FIRST AMENDMENT — MINISTERIAL EXCEPTION — NINTH CIRCUIT AVOIDS CONSTITUTIONAL QUESTION, HOLDING THAT MINISTERS DID NOT STATE A CLAIM THAT CHURCH OF SCIENTOLOGY VIOLATED TRAFFICKING VICTIMS PROTECTION ACT. — *Headley v. Church of Scientology Int'l*, 687 F.3d 1173 (9th Cir. 2012).

Last Term, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[1] the Supreme Court approved the so-called "ministerial exception."[2] This doctrine, rooted in the First Amendment's Religion Clauses, bars the application of certain laws to the employment relationship between a church and its ministers on the ground that those laws abridge a church's freedom "to choose . . . who will guide it on its way."[3] The Court carefully limited its holding, however, stating that it was exempting the ministerial relationship only from employment discrimination suits,[4] despite the fact that many lower federal courts apply the doctrine more broadly and have not established a mechanism to limit the types of laws to which it applies.[5] Recently, in *Headley v. Church of Scientology International*,[6] the Ninth Circuit confronted the question of whether the doctrine should exempt the defendant Church's relationship with its ministers from the constraints of the Trafficking Victims Protection Act[7] (TVPA).[8] Although the district court held that Ninth Circuit precedent required an exemption, the Ninth Circuit concluded that it need not reach the issue, granting the Church summary judgment on the merits.[9] The court was right not to affirm the district court's untenably broad construction of the exception. But despite its refusal to discuss the constitutional issue, the court failed to avoid the constitutional question and to analyze fully the plaintiffs' claims. The court should have instead clarified the boundaries of the exception.

For over a decade, Claire and Marc Headley belonged to Sea Organization, or Sea Org, the Church of Scientology's evangelical wing. The

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[1] 132 S. Ct. 694 (2012).

[2] *Id.* at 706.

[3] *Id.* at 710. In the context of the ministerial exception, courts use the terms "church" and "minister" to mean organizations and spiritual leaders of any religion. For example, courts have interpreted the term "minister" to include a church choir director, *see* Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999), and a kosher supervisor of a Jewish nursing home, *see* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309 (4th Cir. 2004).

[4] *See Hosanna-Tabor*, 132 S. Ct. at 710.

[5] *See, e.g.*, Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1975–77 (2007).

[6] 687 F.3d 1173 (9th Cir. 2012).

[7] Pub. L. No. 106-386, 114 Stat. 1466 (2000) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[8] *Headley*, 687 F.3d at 1179–81.

[9] *Id.*

two had joined as teenagers and married soon thereafter.[10] Like other members, they made a one-billion-year commitment to serve the Church and "learn[ed] that the ministry [would] require them to work long hours without material compensation, . . . to adhere to strict ethical standards, and to be subject to firm discipline."[11] Most of the time, they lived at "Gold Base," a compound surrounded by a perimeter fence patrolled by guards, where they worked over one hundred hours a week and were paid only a fifty-dollar weekly stipend.[12] The Church typically would not let them leave without permission or an escort.[13] At other times, the Headleys lived outside Gold Base and commuted to work; they were then able to travel and run errands. But the Church posted security personnel at their home to monitor them and installed cameras over their house.[14] While working for the Church, the Headleys were assigned disciplinary manual labor. Church officials hit Marc on three different occasions, and both he and Claire testified to witnessing multiple episodes of verbal and physical abuse by Church officials.[15] The couple was not allowed to have children.[16]

Members may leave Sea Org by a specified process.[17] Members who leave without following the process may be pursued by dozens of members to convince them to return, and members who do return are subject to discipline.[18] Those members who do not are declared "suppressive persons" and cut off from friends and family members who still belong to the Church.[19] The Headleys, who left Sea Org without following procedure and failed to return, were declared "suppressive persons."[20]

Following their departure, the Headleys filed separate suits in California state court against the Church, which removed to federal court.[21]

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[10] *Id.* at 1175.

[11] *Id.* at 1174–75.

[12] *Id.* at 1176–77.

[13] Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *1 (C.D. Cal. Aug. 5, 2010).

[14] *Headley*, 687 F.3d at 1176–77.

[15] *Id.* at 1176.

[16] *Id.* at 1175. Claire nonetheless became pregnant twice. She testified, however, that she terminated both pregnancies against her will after being told that there would be consequences if she refused. *Headley*, 2010 WL 3184389, at *2.

[17] *Headley*, 2010 WL 3184389, at *1.

[18] Headley v. Church of Scientology Int'l, No. CV 09-3986 DSF (MANx), 2010 WL 3157064, at *1 (C.D. Cal. Aug. 5, 2010).

[19] *Headley*, 687 F.3d at 1175.

[20] After Claire left, Sea Org members followed her and pressured her to return by (1) threatening to continue following her, (2) threatening her family's position in the Church, (3) threatening to cut off contact with her family, and (4) threatening that "her co-workers would be in trouble if she did not return." *Headley*, 2010 WL 3184389, at *3. As Marc left, guards approached him and tried to prevent him from leaving. *Headley*, 2010 WL 3157064, at *2.

[21] Removal of Civil Action from the Superior Court of the State of California for the County of Los Angeles to the United States District Court ¶¶ 1, 6, Headley v. Church of Scientology Int'l,

At summary judgment, the Headleys alleged only that the Church had violated the TVPA,[22] which imposes civil and criminal penalties for "knowingly provid[ing] or obtain[ing] the labor or services" of another by "means of force, threats of force, physical restraint, or threats of physical restraint"; "means . . . or threats of serious harm"; or "means of any scheme, plan, or pattern intended to cause the person to believe that . . . that person or another person would suffer serious harm or physical restraint."[23] The Act defines "serious harm" broadly to include psychological harm.[24] The Headleys alleged that the Church had engaged in psychological coercion, pursuing a pattern of behavior that convinced them that they could not leave and that, if they did, they would be subject to physical and emotional abuse and injury.[25]

The district court granted summary judgment on the basis of the Ninth Circuit's ministerial exception jurisprudence.[26] The court stated that to determine whether a statute violates the Free Exercise Clause, the court applies strict scrutiny, balancing the burden imposed by the statute on free exercise, the degree to which the state has a compelling interest justifying the burden, and the extent to which a statutory exemption would impede the statute's objectives.[27] To determine whether a statute violates the Establishment Clause, the court considers "(1) whether [it] has a secular legislative purpose, (2) whether its principal or primary effect advances or inhibits religion, and (3) whether it fosters an excessive government entanglement with religion."[28] The court emphasized the importance of the latter test's entanglement prong, noting that "[e]ntanglement issues arise [when] the Court must evaluate religious doctrine or the 'reasonableness' of . . . religious practices."[29]

No. CV09-3986 MMM (MANx) (C.D. Cal. June 4, 2009). The Headleys alleged state law claims for lost wages and unfair business practices, and state and federal claims for violations of forced-labor laws. *Id.* ¶ 7.

[22] *Headley*, 2010 WL 3184389, at *5; *Headley*, 2010 WL 3157064, at *5. The district court had previously dismissed the Headleys' state law forced-labor claims as time-barred. The Headleys appear to have dropped their other allegations.

[23] 18 U.S.C. § 1589(a)(1), (a)(2), (a)(4), (d) (2006 & Supp. V 2011).

[24] *Id.* § 1589(c)(2) (defining "serious harm" as "any harm, whether . . . psychological, financial, or reputational . . . [,] sufficiently serious . . . to compel a reasonable person of the same background and in the same circumstances to perform . . . labor . . . to avoid . . . that harm").

[25] Appellant's Opening Brief at 53–54, *Headley*, 687 F.3d 1173 (No. 10-56266).

[26] *Headley*, 2010 WL 3184389, at *6; *Headley*, 2010 WL 3157064, at *6. Judge Fischer handled both cases. Although she did not consolidate them, she followed the same legal reasoning in each case. Thus, her analysis is presented here in a consolidated form.

[27] *Headley*, 2010 WL 3184389, at *4.

[28] *Id.* at *4 (quoting Alcazar v. Corp. of the Catholic Archbishop of Seattle, 598 F.3d 668, 672 (9th Cir. 2010)) (internal quotation marks omitted).

[29] *Headley*, 2010 WL 3157064, at *4 (quoting Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999)) (internal quotation mark omitted). Further, even "civil court inquiry into the clergy-church relationship can be sufficient entanglement" to violate the Establishment Clause. *Id.* (quoting *Alcazar*, 598 F.3d at 672–73) (internal quotation mark omitted).

Together, the court continued, the clauses compel an exemption from all state and federal neutral statutory regimes that interfere with the church-minister relationship because government interference with that relationship "*inherently* burdens religion."[30] The district court recognized that the Ninth Circuit has refused to apply the exception to aspects of the ministerial relationship not required by church doctrine.[31] But, because the Headleys agreed that they qualified as ministers and because they did not dispute that the Church practices they criticized were doctrinally motivated, the ministerial exception applied. *Even* "*inquir[ing] into* [the Headleys'] allegations" — including the means by which the Church persuaded its members to remain — "would entangle the Court in . . . religious doctrine"[32]: in evaluating the Headleys' claims, the court would have to consider the reasonableness of church practices. Thus, the court refused to exclude the TVPA from the coverage of the exception, concluding that to do so would be contrary to circuit precedent.[33]

The Ninth Circuit affirmed. But the court, in a consolidated opinion written by Judge O'Scannlain, refused to reach the question of whether the ministerial exception applied, stating that the text of the TVPA resolved the case.[34] The record "overwhelmingly" indicated that the Headleys had voluntarily joined and worked for Sea Org "because they believed that it was the right thing to do" and "because they enjoyed it."[35] The court emphasized that the Church did not obtain the Headleys' labor by means of restrictive Church practices; rather, it was those practices that caused the Headleys to leave.[36] Further, the Headleys had numerous opportunities to leave the Church, and they — like many others before them — had succeeded in doing so on their first attempt.[37] Of the potentially coercive restrictions the Church had placed on the Headleys, the court discussed only one: that, should they leave, they would be cut off from the Church, family, and friends. The court stated that this result was not a "threat[] or coercion" but rather a "permissible warning[] of adverse but legitimate consequences"; in other words, a church is free to "shun" a member.[38] Thus, the Headleys had not stated a claim under the TVPA.

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[30] *Id.* at *4 (quoting *Alcazar*, 598 F.3d at 673) (internal quotation mark omitted).

[31] *Id.* at *6.

[32] *Headley*, 2010 WL 3184389, at *6 (emphasis added).

[33] *Id.*

[34] *Headley*, 687 F.3d at 1179. Judge O'Scannlain was joined by Judges Nelson and Smith.

[35] *Id.*

[36] *Id.* at 1180.

[37] *Id.* at 1180–81.

[38] *Id.* at 1180 (quoting United States v. Bradley, 390 F.3d 145, 151 (1st Cir. 2004)) (internal quotation mark omitted).

Although the district court faithfully applied the circuit's ministerial exception jurisprudence, the *Headley* court was right not to affirm the lower court's analysis. Under Ninth Circuit precedent, the ministerial exception applies across statutes, exempting doctrinally motivated aspects of the church-minister relationship from scrutiny on the ground that the Religion Clauses bar evaluation of church doctrine. This broad exemption puts the circuit at odds with the Supreme Court's First Amendment jurisprudence and common sense. Instead of merely refusing to affirm the district court's analysis, the *Headley* court should have taken the opportunity to clarify the limits of the circuit's ministerial exception, emphasizing that some entanglement is inevitable in cases involving religious institutions and that minimal entanglement concerns should not preclude adjudication of claims. It could have then stated that, where Establishment Clause concerns are minimal, the circuit will adjudicate ministerial exception cases that fall outside *Hosanna-Tabor*'s ambit under the circuit's free exercise test.

Although the lower federal courts have held for over forty years that the First Amendment requires a ministerial exception,[39] the Supreme Court first approved the doctrine last Term in *Hosanna-Tabor*.[40] In that case, the Court concluded that allowing a former minister to proceed with a lawsuit alleging retaliation under the Americans with Disabilities Act might require the Church to rehire a minister or be punished for failing to do so.[41] Such a requirement would run afoul of the First Amendment: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[42] The Court limited its holding, however, exempting the ministerial relationship only from employment discrimination suits and "express[ing] no view on whether the exception bars other types of suits," including contract or tort claims.[43]

In approving the ministerial exception, the Court did not apply any of its established First Amendment tests. In particular, it did not apply the Establishment Clause test it developed in *Lemon v. Kurtzman*,[44] which asks whether a statute has a secular purpose, whether it primarily advances or inhibits religion, and whether it creates excessive entanglement with religion — and which the Ninth Cir-

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[39] *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 555, 558–59 (5th Cir. 1972).
[40] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).
[41] *Id.* at 706.
[42] *Id.* at 703.
[43] *Id.* at 710.
[44] 403 U.S. 602 (1971).

cuit has applied in its ministerial exception cases.[45] Nor did it apply its free exercise test, set forth in *Employment Division v. Smith*,[46] which held that the First Amendment does not require the government to grant religious exemptions from generally applicable laws.[47] The Court instead analyzed the degree to which government interference with church control over *hiring and firing* its ministers burdens a church's First Amendment rights, relying on both clauses equally.[48]

In restricting its holding to employment discrimination cases, *Hosanna-Tabor* also did not address the full range of laws to which the lower federal courts apply the doctrine.[49] Many circuits apply the exception to laws regulating a minister's working conditions as well.[50] Indeed, the district court in *Headley* concluded that the ministerial exception exempts religious institutions from *all* claims burdening doctrinally motivated aspects of the church-minister relationship.[51]

The district court's conclusion was a reasonable interpretation of Ninth Circuit precedent. Although the district court stated that a balancing of state and church interests is required to determine whether a given statute runs afoul of the Free Exercise Clause, the court relied on the Ninth Circuit's ministerial exception case *Alcazar v. Corp. of the Catholic Archbishop of Seattle*[52] for the proposition that, under the Establishment Clause, "the very process of . . . court inquiry into the

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[45] *See* Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *4 (C.D. Cal. Aug. 5, 2010). The circuit recognizes that the Court has not lately relied on *Lemon*, but continues to apply it "because the Court has not yet reached consensus on [its] successor." Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 n.2 (9th Cir. 1999).

[46] 494 U.S. 872 (1990).

[47] *See id.* at 890. *Smith* acknowledged that previous decisions had granted certain individuals exemptions from generally applicable laws on the basis of an application of strict scrutiny, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406–09 (1963), but held that those decisions did not apply to First Amendment challenges to "across-the-board criminal prohibition[s]." *Smith*, 494 U.S. at 884. It was during this period before *Smith* that courts began developing the ministerial exception. *See generally* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). Thus, after the Court decided *Smith*, some scholars argued that the case *precluded* a ministerial exception, as employment laws generally apply to all organizations. *See, e.g.*, Corbin, *supra* note 5, at 1982–85.

[48] *See Hosanna-Tabor*, 132 S. Ct. at 706–07. *Hosanna-Tabor* distinguished *Smith* in two sentences, stating that the latter applied only to regulation of "outward physical acts," whereas the former dealt with regulations interfering with "internal church decision[s]." *Id.* at 707.

[49] *See* Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 114, 115 (2012).

[50] Courts have exempted the church-minister relationship from wage and hour claims, *see* Alcazar v. Corp. of the Catholic Archbishop of Seattle, 598 F.3d 668, 676 (9th Cir. 2010), and state human rights statutes, *see* Stately v. Indian Cmty. Sch., 351 F. Supp. 2d 858, 871 (E.D. Wis. 2004).

[51] Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *5 (C.D. Cal. Aug. 5, 2010); *see also Alcazar*, 598 F.3d at 674 ("The ministerial exception encompasses all 'tangible employment actions' . . . .").

[52] 598 F.3d 668 (9th Cir. 2010).

clergy-church relationship can [create] sufficient entanglement" to violate the First Amendment,[53] and on *Bollard v. California Province of the Society of Jesus*[54] for the proposition that "[e]ntanglement issues arise whenever the Court must evaluate religious doctrine or the 'reasonableness' of . . . religious practices."[55] Because evaluating a claim by a minister against a church on the basis of doctrinally motivated behavior necessitates inquiry into the clergy-church relationship and an evaluation of church doctrine, such an entanglement analysis automatically precludes any such claim — and makes irrelevant the balancing otherwise required by the circuit's free exercise test. Indeed, in *Alcazar*, although the Ninth Circuit articulated the church and state interests at issue, the court never balanced them, finding instead that entanglement concerns required the exception "as a matter of law across statutes" that interfere with the church-minister relationship.[56]

Such an interpretation is practically and doctrinally untenable.[57] Taken at face value, this analysis would exempt the church-minister relationship from even criminal laws.[58] And extended to its logical conclusion, it would prevent courts from adjudicating any claim that required evaluation of church doctrine, a position the Supreme Court has rejected.[59] Indeed, the Ninth Circuit formulated its test to prohibit only *excessive* entanglement, as the adjudication of most First Amendment claims necessitates some entanglement.[60] In precluding examination of the church-minister relationship, the *Alcazar* court's interpretation threatens to read *excessive* out of the Ninth Circuit's test. A comparison with *Hosanna-Tabor* is illustrative: In that case, the Su-

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[53] *Headley*, 2010 WL 3184389, at *4 (quoting *Alcazar*, 598 F.3d at 672–73) (internal quotation mark omitted).

[54] 196 F.3d 940 (9th Cir. 1999).

[55] Headley v. Church of Scientology Int'l, No. CV 09-3986 DSF (MANx), 2010 WL 3157064, at *4 (C.D. Cal. Aug. 5, 2010) (quoting *Bollard*, 196 F.3d at 950) (internal quotation mark omitted).

[56] *Alcazar*, 598 F.3d at 673.

[57] *Cf.* Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (emphasizing that allowing individuals to disobey laws that do not coincide with their religious beliefs "contradicts both constitutional tradition and common sense").

[58] *Cf.* Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990) ("[The plaintiff] argues that taken to its logical conclusion [the ministerial exception] would create a first amendment prohibition against even the most egregious human rights violations[;] . . . for example, . . . courts would be prevented from enforcing homicide statutes against churches that selected their pastors by making them play russian roulette.").

[59] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (foundational case refusing to exempt children of Jehovah's Witnesses from child labor laws despite doctrinal motivation); Reynolds v. United States, 98 U.S. 145, 166–67 (1879) (foundational case refusing to exempt defendant from federal bigamy laws despite doctrinal motivation).

[60] *See* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in denial of rehearing en banc) (arguing that "[t]he very invocation of the ministerial exception requires [the court] to engage in entanglement with a vengeance," as it requires the court to determine whether the plaintiff qualifies as a minister for the defendant church).

preme Court considered whether the Americans with Disabilities Act requires a church either to reappoint a minister it otherwise would have fired or to incur punishment for failure to do so, a requirement that intuitively presents establishment concerns. But the Ninth Circuit was not faced with an internal doctrinal dispute or a requirement that a church accept a certain leader. It rather considered whether certain acts by Sea Org violated the TVPA, a criminal statute which allows a court to impose fines, imprisonment, or both.[61] There is a strong argument that evaluating these claims would not have created excessive entanglement.

The Ninth Circuit was therefore right not to affirm the district court's application of its ministerial exception test. Its stated reason for doing so, however, was not the overly broad implications of that analysis, but rather the doctrine of constitutional avoidance, under which a court should avoid construing a statute in a manner that would raise constitutional questions[62]: because it could affirm summary judgment on the merits, it did not have to reach the constitutional question of whether the ministerial exception applied.[63]

Where it applies, the ministerial exception precludes consideration of the merits of a minister's allegation that a church has violated laws related to the church-minister relationship.[64] Under the Ninth Circuit's interpretation, this restriction accords with the exception's purpose: because both the assessment of the "reasonableness" of church doctrine and "the very process of civil court inquiry into the clergy-church relationship"[65] create entanglement issues, courts should avoid evaluation of church doctrine. In *Headley*, however, the Ninth Circuit reached the merits, arguing that its merits determination precluded the need to discuss the ministerial exception. In so doing, the Ninth Circuit failed to avoid the constitutional question by engaging in entanglement, as defined by its own precedent: reaching the merits necessitated at least some government inquiry into Church doctrine, as the court addressed the question of whether one Church practice — threatening to cut members off from friends and family — could support a forced-labor claim. The court determined that it could not, on the basis that "shunning" is a "legitimate consequence" of leaving a

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61 18 U.S.C. § 1589(d) (2006 & Supp. V 2011).

62 *See, e.g.*, Gonzalez v. United States, 553 U.S. 242, 251 (2008) (affirming courts' duty to avoid construing statutes in ways that raise "grave and doubtful constitutional questions" (quoting Harris v. United States, 536 U.S. 545, 555 (2002))).

63 *See Headley*, 687 F.3d at 1181.

64 *See generally, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2011); Alcazar v. Corp. of the Catholic Archbishop of Seattle, 598 F.3d 668 (9th Cir. 2010).

65 Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *4 (C.D. Cal. Aug. 5, 2010) (quoting *Alcazar*, 598 F.3d at 672–73).

church.[66] In reaching this conclusion, the court interpreted and defined Church doctrine, and reserved for itself the power to declare Church doctrine legitimate. While engaging in this determination might not constitute *excessive* entanglement properly construed, it contravened the Establishment Clause under Ninth Circuit precedent.

Reaching the merits without addressing the concerns of the ministerial exception may have prevented the court from fully evaluating the Headleys' claims. The court conspicuously failed to address the Headleys' psychological coercion argument, avoiding a discussion of the majority of the Church practices that the Headleys alleged contributed to their forced labor.[67] If the court avoided this discussion to minimize entanglement concerns, constitutional avoidance may have prevented a clearly reasoned opinion that addressed all claims, and may have established unduly restrictive precedent for future applications of the TVPA. When an application of the doctrine creates such results, the court should instead reach the constitutional issue.[68]

Instead of giving short shrift to the Headleys' claims, the Ninth Circuit should have clarified the boundaries of its ministerial exception whether or not it reached the constitutional question of whether the court was required to grant the church an exception to the TVPA. Most importantly, it should have revisited its overbroad entanglement analysis and emphasized that the Establishment Clause prohibits only *excessive* entanglement. Taking this step would help set the boundaries of its doctrine in the future because, in cases in which the court does not find excessive entanglement, it applies strict scrutiny to the statute at issue to address free exercise concerns.[69] As applied to the church-minister employment relationship, strict scrutiny maintains strong deference to doctrinally motivated church policies. Unlike the test in *Smith*, this test also allows courts to grant exemptions from generally applicable laws.

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[66] *Headley*, 687 F.3d at 1180.

[67] The court did affirm the district court's striking of the plaintiffs' expert witness testimony on psychological coercion, *id.* at 1181 n.1, but it did not discuss their allegations that the Church disciplines members considering leaving Sea Org, that the Church surveils and restrains members, or that Sea Org officers create an atmosphere of physical and emotional abuse. Instead, the court focused on the physical ability of the plaintiffs to leave Gold Base. *See id.* at 1180–81. It could be argued that an interpretation of the TVPA — which was meant to impose liability on employers engaging in psychological as well as physical coercion — that focuses on physical ability to extricate oneself from employment does not fully carry out Congress's purposes in enacting the statute. *See* 18 U.S.C. § 1589(c)(2) (2006 & Supp. V 2011). Further, it is questionable that an *objective* ability to leave satisfies the requirements of the TVPA's *subjective* test, which demands consideration of the view of a "reasonable person of the same background and in the same circumstances." *Id.*

[68] *See generally* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71.

[69] *Headley*, 2010 WL 3184389, at *4; *see also, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (holding that government's interest in protecting employees from sexual harassment outweighed church's autonomy interests in case in which ministers alleged harassment by priests and the court found the conduct not doctrinally motivated).

And it provides that the church's interest in these policies must sometimes give way to particularly strong government interests, such as the government's interests in the enforcement of its criminal statutes or the viability of certain tort suits.[70] Although *Hosanna-Tabor* did not apply strict scrutiny,[71] the case applies only to employment discrimination suits, and strict scrutiny may arguably still be applied to other statutes burdening the church-minister relationship.

In *Headley*, addressing the district court's overbroad entanglement analysis could have avoided setting TVPA precedent on the basis of curtailed analysis and would have established the Ninth Circuit's own test as the mechanism by which it could limit the exception's scope. In the face of concerns that lower federal courts have not yet established how they will limit the laws to which the exception applies, the test would also serve as an example[72] of how courts can determine whether governmental interests override church interests, while maintaining the exception's concern with deference to church doctrinal choices.

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[70] Some commentators have suggested applying strict scrutiny in cases like *Headley*. *See, e.g.*, Transcript of Oral Argument at 6, Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) ("If the government's interest is in protecting ministers from discrimination, we are [in] the heart of the ministerial exception. If the government's interest is something quite different . . . , like protecting the children, then you can [apply strict scrutiny]."); Laycock, *supra* note 47, at 1402; Benton C. Martin, Comment, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297, 1302 (2010). Some circuits have also applied strict scrutiny. *See, e.g.*, Brock v. Wendell's Woodwork, Inc., 867 F.2d 196, 198–99 (4th Cir. 1989) (balancing interests to hold First Amendment did not preclude enforcement of labor laws against church claiming doctrinally required child labor).

Other scholars have argued that, under *Smith*, there should be no ministerial exception, as the laws to which it applies are neutral laws of general applicability. *See, e.g.*, Corbin, *supra* note 5, at 1982–85. Although *Hosanna-Tabor* rejected this argument, the Court limited its holding to employment discrimination cases, and it could be argued that *Smith* still applies outside of that narrow category. Still, the vast majority of courts have refused to apply *Smith* to any case covered by the ministerial exception. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (stating that *Smith* was a free exercise case and that ministerial exception cases implicate both Religion Clauses); Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 230 (E.D.N.Y. 2007) ("[M]ost, if not all . . . courts have found that the ministerial exception survives *Smith* because the ministerial exception addresses the rights of the *church* while *Smith* addressed the rights of *individuals*."). The Ninth Circuit has not addressed the issue, but the existence of an exception implies that it has accepted other circuits' rationales. *See* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 801–02 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc) (noting that other circuits have distinguished *Smith*).

[71] *Hosanna-Tabor*, 132 S. Ct. at 710 ("[T]he First Amendment has struck the balance for us.").

[72] Alternatively, to limit its exception, the Ninth Circuit could make more significant changes to its doctrine. For example, it is possible that the Sea Org acts in question here would qualify as the "outward physical acts" the Court in *Hosanna-Tabor* stated should be subject to *Smith* and not the ministerial exception, and thus that the Ninth Circuit could hold that the exception does not govern in cases like these. *See supra* note 48. Or it could determine that the ministerial exception should not apply to this category of cases. *Cf., e.g.*, Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau, 49 A.3d 812, 817 (D.C. 2012) (applying "neutral principles of law" to a contract dispute between a church and its former minister).