NOTES

OF PRIESTS, PUPILS, AND PROCEDURE: THE MINISTERIAL EXCEPTION AS A CAUSE OF ACTION FOR ON-CAMPUS STUDENT MINISTRIES

In 1972, the Fifth Circuit recognized a First Amendment right for religious ministries to select their own religious ministers and manage the employment relationship free from government regulation. This right was initially framed as an exemption from Title VII of the Civil Rights Act of 1964, which prevents employers from discriminating against employees on the basis of sex, religion, race, and a number of other criteria. This exception came to be recognized as the ministerial exception, and it has since expanded to protect the employment decisions of religious institutions from government interference in more than simply the Title VII context.

Over the next forty years, every federal court of appeals adopted this doctrine (as did many state supreme courts), and in 2012 the U.S. Supreme Court officially recognized the ministerial exception in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC. There, a teacher at a Lutheran school argued that the school had fired her because of her physical disability in violation of the Americans with Disabilities Act. But the Court held that her suit was barred by the ministerial exception, which it unanimously declared to be rooted in both the Free Exercise Clause and the Establishment Clause of the First Amendment. Since the Court’s decision in Hosanna-Tabor, lower courts have continued to grapple with the ministerial exception.

However, as a recent decision in the Southern District of Iowa illustrates, the exception’s protections are neither absolute nor completely developed. In Business Leaders in Christ v. University of Iowa

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1 See McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).
3 Id. § 2000e-2(a); see McClure, 460 F.2d at 555 n.2, 560–61.
6 565 U.S. 171 (2012); see id. at 188 & n.2 (collecting cases from the courts of appeals, which have “uniformly recognized the existence of a ‘ministerial exception,’” id. at 188, to Title VII of the Civil Rights Act of 1964).
7 Id. at 179.
8 Id. at 188–90.
10 360 F. Supp. 3d 885 (S.D. Iowa 2019).
(BLinC), a federal district court considered a challenge to the University of Iowa’s enforcement of its campus antidiscrimination policy against Business Leaders in Christ (BLinC), a student-run on-campus religious ministry. In that case, an openly gay student sought a position as the vice president of BLinC, but his application was denied because he refused to live according to the group’s statement of faith, which included an affirmation of the traditional view of marriage. The University had an antidiscrimination policy that prevented student organizations from discriminating on the basis of sexual orientation, among other things. When the student complained to the University about the denial of his application, the University sought to enforce its policy against BLinC. The University deregistered BLinC as a student organization, and BLinC brought a suit against the University alleging violations of its First Amendment rights. BLinC ultimately prevailed on most of its First Amendment claims. However, the court almost cursorily dismissed BLinC’s ministerial exception argument. The district court’s dismissal was based, at least in part, on the fact that the ministerial exception has been classified as an affirmative defense and not a cause of action.

BLinC is one of the first cases to address the issue of whether the ministerial exception would extend to cover the selection of student leadership for on-campus ministries. The opinion highlights not only the lack of exploration in this area but also one of the main procedural hurdles that has prevented student groups from making ministerial exception arguments in the first place. There is no settled law on the issue, and the district court was understandably reluctant to make new extensions to existing law where it was not necessary to do so. But it will likely become necessary for courts to fully address this question in the coming years. At least two other cases currently pending in federal district courts have presented a similar question, and several other cases either have presented or will present situations where the ministerial exception could play a key role in protecting the rights of on-campus ministries.

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11 Id. at 888–89.
13 See Bus. Leaders in Christ, 360 F. Supp. 3d at 891–93.
14 Id. at 889–90.
15 Id. at 891–92.
16 See id. at 894.
17 See id. at 909.
18 See id. at 904–05.
19 See id.
20 See, e.g., InterVarsity Christian Fellowship v. University of Iowa, BECKET (Apr. 4, 2019), https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-university-iowa [https://perma.cc/8EEG-UQUV]; InterVarsity Christian Fellowship v. Wayne State University, BECKET (Apr. 4,
This Note argues that the ministerial exception should apply to certain student leadership positions in qualifying religious groups. This would preserve the ability of student ministries to choose their ministerial leaders without intervention or objection from the governing university. But in order to provide this level of protection to student ministries, courts will need to adjust the traditional framework slightly. As it stands, the ministerial exception is classified as an affirmative defense by the Supreme Court. This Note proposes that student ministries should be permitted to protect against violations of their right to select their own ministers by asserting a cause of action against universities that restrict this important right. The framework proposed below would preserve the defensive nature of the exception while still allowing student groups to protect their important First Amendment right to choose who will minister to the faithful.

Part I of this Note argues that on-campus student ministries would typically qualify for the protections of the ministerial exception. Part II highlights the procedural challenge posed by the exception’s definition as an affirmative defense and proposes that student groups should be able to assert a violation of the ministerial exception as a cause of action. Under the proposed adjustment to the existing framework, organizations that cannot raise the ministerial exception as an affirmative defense (because they are bringing the action) would still be permitted to assert their right through a kind of affirmative defense to state action. This would be a narrow adjustment, but one which would provide much-needed protection for many student organizations.

Part III clarifies the proposed cause of action’s relationship with extant protections for religious liberty provided by the Free Exercise and Establishment Clauses. It argues that a cause of action rooted in the ministerial exception is beneficial and necessary because the two clauses may not always provide adequate protection for the right of student ministries to select their own ministers.

I. APPLYING HOSANNA-TABOR TO STUDENT ORGANIZATIONS

This Part argues that most on-campus ministries would normally have little trouble qualifying for the ministerial exception under the established framework. Courts have given no real analysis of student ministries under this framework to date, but the argument is relatively
straightforward.23 Despite disagreement over a few fringe issues, most courts seem to agree where the contours of the ministerial exception generally lie. But it is important to note that the exception would normally cover student ministries because it highlights the injustice done by hiding their ability to protect this important right behind an affirmative defense that they can never actually assert.

In applying the ministerial exception, a court must determine (1) whether the organization in question is a religious institution and (2) whether the individual at the heart of the dispute qualifies as a minister.24 The Court in Hosanna-Tabor did not establish rigid tests for either of these assessments,25 but the lower courts have generally come to a consensus regarding both prongs since the exception’s genesis. Because the ministerial exception is a fact-specific inquiry, the ministerial exception will not always apply to student groups. However, looking at a prototypical religious student organization through the Hosanna-Tabor framework indicates that, much like religious schools and hospitals, on-campus ministries will commonly fall under the ministerial exception.

A. On-Campus Ministries Usually Count as Religious Institutions

First, a court will need to determine whether an organization qualifies as a religious institution. While the Court in Hosanna-Tabor did not provide guidelines for making this determination,26 the ministerial exception has never applied exclusively to established churches. The clearest evidence of this was Hosanna-Tabor itself, which applied the exception to a Lutheran school.27 Even before Hosanna-Tabor, lower courts consistently applied the exception to religious organizations that were not churches. A few examples include religious schools,28 retirement homes,29 and hospitals.30 The primary test that courts have come to use was announced in Shaliehsabou v. Hebrew Home of Greater Washington, Inc.,31 where the Fourth Circuit applied the ministerial exception to a Jewish retirement home. There, the court “conclude[d] that a religiously affiliated entity is a ‘religious institution’ for purposes of

24 See Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 833 (6th Cir. 2015).
25 See Hosanna-Tabor, 565 U.S. at 190.
27 See Hosanna-Tabor, 565 U.S. at 177, 190–91. The school did act as an extension of the church, but it was still primarily a school. See id.
31 363 F.3d 299.
the ministerial exception whenever that entity’s mission is marked by clear or obvious religious characteristics.” 32 Several courts after Hosanna-Tabor have looked to this standard to determine the applicability of the ministerial exception to various institutions. 33 Courts tend to apply the exception when an institution has any apparent religious traits or purposes, so long as they are “clearly” religious. 34 The religious characteristics need not be strictly traditional or denominational, 35 and in some cases they can even be latent religious characteristics. In Penn v. New York Methodist Hospital, 36 the Second Circuit applied the ministerial exception to a hospital that used to be associated with the Methodist church, but had since begun to “promote[] its secular nature.” 37 Whereas the hospital’s articles of incorporation had contained references to its “Church related character” and church-affiliation requirements, “[n]ow, [the hospital]’s Articles of Incorporation do not mention religious activity or a religious mission.” 38 Yet, despite the hospital’s efforts to divorce itself from the Methodist church, it did maintain a Department of Pastoral Care, whose mission was still tethered to the hospital’s religious roots. 39 Because this particular department had clear religious characteristics — such as the requirement that pastors hand out Bibles, perform religious rituals, and organize and conduct religious services — the hospital as a whole qualified as a religious institution for ministerial exception purposes. 40

Under the religious characteristics test, most on-campus religious organizations should have little trouble qualifying as religious institutions. Many on-campus ministries are nondenominational, but their purpose is unmistakably religious. 41 Others may be closely affiliated with a specific denomination, 42 further demonstrating their religious foundations.

32 Id. at 310.
33 See, e.g., Grussgott v. Milwaukee Jewish Day Sch., 882 F.3d 655, 658 (7th Cir. 2018) (citing Shaliehsabou, 363 F.3d at 310); Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 834 (6th Cir. 2015) (quoting Shaliehsabou, 363 F.3d at 310).
35 Conlon, 777 F.3d at 834 (“[T]he ministerial exception’s applicability does not turn on its being tied to a specific denominational faith; it applies to multidenominational and nondenominational religious organizations as well.”).
36 884 F.3d 416 (2d Cir. 2018).
37 Id. at 419.
38 Id. at 418.
39 Id. at 420.
40 See id. at 420, 423–24.
42 See id. at 120–23 (discussing the presence and challenges faced by specific denominations on college campuses, including Muslims, Sikhs, Hindus, and some Christian denominations).
For such organizations, the first prong of the ministerial exception standard should apply without much difficulty. The facts of BLinC provide a good illustration of this point. In that case, the student organization conducted weekly scripture study meetings, which included prayer, and stated that one of its main purposes was “to help ‘seekers of Christ’ learn ‘how to continually keep Christ first in the fast-paced business world.’”43 These activities mark the group as religious, and perhaps more clearly so than the New York Methodist Hospital. Because of their evident religious characteristics, BLinC and other campus ministries with similarly religious qualities should be considered religious institutions under the ministerial exception.

But there will doubtless be other organizations that do not qualify or that are more difficult to classify. Consider an organization that acts more like an association of like-minded religious individuals than as a center for on-campus worship. Members and leaders generally belong to the same religion, and they get together for social outings and activities with other members of their religion, but the group organizes no specific prayer or scripture study groups for its members. Is their association with a particular religion sufficient to classify the group as a religious institution despite their lack of religious activities? Can the desire to associate with like-minded religious individuals count as a religious purpose? There may be some organizations whose specific circumstances do not justify classification as a religious institution. But on the whole, the typical student ministry will likely qualify.

B. Some Student Leaders Will Qualify as Ministers

Once a court has established that an organization counts as a religious institution, it will need to determine the ministerial status of the individual at issue.44 This is the crux of most ministerial exception cases. The ministerial exception applies only to ministers; it does not apply to mere employees.45 Determining the difference can be difficult. The Supreme Court has declined “to adopt a rigid formula for deciding when an employee qualifies as a minister.”46 Instead, the Court has looked to four factors: “the formal title given . . . by the Church, the substance reflected in that title, her own use of that title, and the

43 Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 891 (S.D. Iowa 2019) (quoting Defendants’ Responses to Plaintiff’s Statement of Material Fact at 34, Bus. Leaders in Christ, 360 F. Supp. 3d 885 (No. 17-CV-00080)).
44 See, e.g., Grussgott v. Milwaukee Jewish Day Sch., 882 F.3d 655, 658 (7th Cir. 2018).
45 See, e.g., Biel v. St. James Sch., 911 F.3d 603, 608-09 (9th Cir. 2018) (declining to apply the ministerial exception where the employee in question bore few of the ministerial characteristics analyzed in Hosanna-Tabor).
46 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).
important religious functions she performed for the Church.\textsuperscript{47} Lower courts have struggled to determine how much weight to give each factor and how to proceed when faced with a case where some, but not all, of the factors are present.

Most courts have turned both to the history of the exception and Justice Alito’s concurrence (which was joined by Justice Kagan) in \textit{Hosanna-Tabor} to answer this question.\textsuperscript{48} As Justice Alito noted, prior to 2012 the lower courts had a “functional consensus” that the primary consideration was not titular, but functional in nature.\textsuperscript{49} Courts tended to look to the role that a particular individual played within the organization, rather than at the employee’s title, training, or ordination status.\textsuperscript{50} Because many religious institutions employ distinct titles for their clergy, and some have no titles or ordination ceremonies at all, such outward demonstrations, while helpful, can be misleading.\textsuperscript{51}

After \textit{Hosanna-Tabor}, most courts have continued to take a more functional approach. No court has required that all four \textit{Hosanna-Tabor} factors be present for the exception to apply. Instead, the Sixth\textsuperscript{52} and Seventh\textsuperscript{53} Circuits applied the exception where only two of the \textit{Hosanna-Tabor} factors were present, and in both cases, the present factors included the religious role that the plaintiffs played within their respective organizations.

In \textit{Cannata v. Catholic Diocese of Austin},\textsuperscript{54} the Fifth Circuit applied the ministerial exception where the only consideration present was the employee’s religious function.\textsuperscript{55} There, the court assessed whether the music director of a church qualified as a minister. While the first three \textit{Hosanna-Tabor} factors were not necessarily present, the court stated:

\begin{quote}
Application of the exception . . . does not depend on a finding that Cannata satisfies the same considerations that motivated the Court in \textit{Hosanna-}
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\textsuperscript{47} Id. at 192. \\
\textsuperscript{49} \textit{Hosanna-Tabor}, 565 U.S. at 203 (Alito, J., concurring). \\
\textsuperscript{50} See id. at 203–04 (collecting cases). \\
\textsuperscript{51} See id. at 200 (“Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of ‘employees’ whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.”). \\
\textsuperscript{52} Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 834–35 (6th Cir. 2015) (noting that only the employee’s title and religious function tended toward applying the ministerial exception). \\
\textsuperscript{53} Grussgott v. Milwaukee Jewish Day Sch., 882 F.3d 655, 658–60 (7th Cir. 2018) (noting that only the substance reflected in Grussgott’s title and religious function at the school tended toward applying the ministerial exception). \\
\textsuperscript{54} 700 F.3d 169 (5th Cir. 2012). \\
\textsuperscript{55} See id. at 177.
Tabor] to find that Perich was a minister within the meaning of the exception. Rather, it is enough to note 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.\footnote{Id. (citing \textit{Hosanna-Tabor}, 565 U.S. at 200 (Alito, J., concurring)).}

The court also noted that Cannata had significant secular responsibilities for the church, but “the performance of secular duties, the Supreme Court has said, may not be overemphasized in the context of the ministerial exception.”\footnote{Id. (citing \textit{Hosanna-Tabor}, 565 U.S. at 193 (majority opinion)).} Cannata’s important role in selecting and providing music for worship services qualified him as a minister for the exception’s purposes, despite the fact that his title reflected no such status and he had neither received religious training nor apparently held himself out as a minister to the community.\footnote{See id.}

The Supreme Judicial Court of Massachusetts took a similar approach in \textit{Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination}.\footnote{975 N.E.2d 433 (Mass. 2012).} There, despite the fact that the plaintiff “was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi,” the court applied the ministerial exception because “she taught religious subjects at a school that functioned solely as a religious school.”\footnote{Id. at 443.} Because the teacher’s role was religious in nature and contributed to the overall religious mission of the school, that was sufficient for the court to apply the exception. Most courts, both before and since \textit{Hosanna-Tabor}, have focused on the function or role that an individual plays within an organization, rendering the other factors less salient.\footnote{But cf. Biel v. St. James Sch., 911 F.3d 603, 628–29 (9th Cir. 2018) (holding that religious function alone was insufficient to apply the ministerial exception). The Ninth Circuit is a bit of an outlier in this area, however. \textit{See} Sterlinski v. Catholic Bishop, 934 F.3d 568, 569–71 (7th Cir. 2019).}

Again, BLinC provides a useful example. There, the complaining student was denied the opportunity to become the vice president of the group.\footnote{Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 891 (2019).} Looking at that position through the analysis given by the lower courts, we can see that it is a ministerial position. Though the vice presidential title is not obviously religious, the vice president’s role within the organization weighs in favor of applying the ministerial exception. As described, “BLinC’s officers [including the vice president] are responsible for leading its members in prayer, Bible discussion, and spiritual teaching; for implementing and protecting the religious mission of the group; and for modeling BLinC’s faith to the group and to the public.”\footnote{Id. (citing \textit{Hosanna-Tabor}, 565 U.S. at 193 (majority opinion)).} These functions are all core religious functions, and the vice president, alongside the other members of BLinC’s board, shoulders

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\item \textit{Id.} (citing \textit{Hosanna-Tabor}, 565 U.S. at 200 (Alito, J., concurring)).
\item \textit{Id.} (citing \textit{Hosanna-Tabor}, 565 U.S. at 193 (majority opinion)).
\item See \textit{id.}
\item 975 N.E.2d 433 (Mass. 2012).
\item Id. at 443.
\item But cf. Biel v. St. James Sch., 911 F.3d 603, 628–29 (9th Cir. 2018) (holding that religious function alone was insufficient to apply the ministerial exception). The Ninth Circuit is a bit of an outlier in this area, however. \textit{See} Sterlinski v. Catholic Bishop, 934 F.3d 568, 569–71 (7th Cir. 2019).
\item Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 891 (2019).
\item Id.
\end{thebibliography}
these responsibilities. This weighs strongly in favor of considering the student who serves as BLinC’s vice president to be a minister.

But this framework is necessarily fact-specific. It is admittedly difficult to make generalized statements about the exception’s applicability to religious student groups at a variety of universities with a variety of structures and religious functions for their leadership. Accordingly, when analyzing whether an individual counts as a minister, courts should continue to look to the facts that establish an individual’s role and status within that organization. Not all student leaders will qualify as ministers, and certainly most members will not. Thus, universities will still be able to enforce antidiscrimination policies with respect to most individuals in most organizations. However, many student leaders will qualify as ministers under the Hosanna-Tabor framework, particularly if courts continue to focus on the role that student leaders play within their ministries.

C. The Unique Properties of Student Ministries Do Not Detract from the Applicability of the Exception

There are admittedly a few distinctions between traditional and student ministries that initially complicate matters. But, as a brief review of these differences demonstrates, they are not fatal to the applicability of the exception to student ministries.

First, although the exception’s reach has expanded beyond Title VII claims to wage and hour claims, breach of contract disputes, some sexual harassment claims, and some tort claims, the exception’s reach has largely been limited to employment decisions. Student organizations do not employ their ministers, and they are not even seeking an exemption from employment laws, so the exception’s applicability seems limited at first. But the ministerial exception should be applied according to its underlying principle of entanglement avoidance. A volunteer student organization would be just as negatively impacted by state intervention into its ministerial selection process as would be an organization that employs its ministers.

64 See Tafoya, supra note 23, at 188–92 (arguing that the president of a Christian student ministry should qualify as a minister under Hosanna-Tabor).

65 Cf. Ira C. Lupu & Robert W. Tuttle, #MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 249, 268–98 (2019) (explaining the contours of which sexual harassment claims have and have not been covered by the ministerial exception under lower court rulings).

66 See Grisham & Blomberg, supra note 9, at 87 n.96.

Admittedly, there is little case law regarding the ministerial exception’s applicability to organizations with volunteer and lay ministries. But that may be because those organizations tend not to end up in court regarding their ministerial relationships in the first place.\textsuperscript{68} Who would bring them there? There is no employment relationship with their ministers, so there can be no issue regarding a nonexistent contract. Nor can such a church violate minimum wage laws because volunteers are unpaid. But volunteer-based religious organizations are clearly still protected from government interference. There is no doubt that if a congregation of the Church of Jesus Christ of Latter-day Saints (whose local ministry is entirely run by volunteers\textsuperscript{69}) removed a local bishop from his office, that action would be protected from state intervention. The same should be true of an organization whose ministry is based on student volunteers. Their rights are no less viable simply because they are students, and the government has no competency to tell them who should minister to their faithful or how they ought to run their ministries.

Second, some also note that the ministerial exception may not be properly applicable to student ministries because the enforcement of a university antidiscrimination policy is not like the enforcement of Title VII.\textsuperscript{70} When the government enforces Title VII against a church, its full force is poured into a punitive action that attempts to force compliance. For the church, this means either forced inclusion or an imposed penalty. But when a university enforces its policy, it merely withdraws a proffered benefit for compliance with its policies. Thus, the choice between forced inclusion or dissolution now includes the possibility to continue on without the added benefits of recognition.\textsuperscript{71} The withholding of benefits for noncompliance could be considered constitutional where penalization for the same behavior might not be.\textsuperscript{72}

But this distinction relies on the mistaken premise that withdrawing benefits is not punitive in nature. Just as an order of forced inclusion or the imposition of monetary damages would,\textsuperscript{73} the withholding of university recognition deprives the student ministry of benefits and

\textsuperscript{68} See Lund, supra note 67, at 1200.
\textsuperscript{69} Doug Andersen, The Church’s Unpaid Clergy, CHURCH JESUS CHRIST LATTER-DAY SAINTS: NEWSROOM BLOG (Sept. 3, 2009), https://newsroom.churchofjesuschrist.org/blog/the-church-s-unpaid-clergy [https://perma.cc/D5ES-BD6Q].
\textsuperscript{70} See Melanie Crouch, Comment, The Public University’s Right to Prohibit Discrimination, 53 HOUS. L. REV. 1369, 1389 (2016).
\textsuperscript{71} See id.
\textsuperscript{73} See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194 (2012) (noting that the award of front pay, back pay, money damages, and attorney’s fees “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”).
privileges to which it would otherwise be entitled. Expulsion from any other physical territory would be just as punitive as a fine would be, so it makes little sense to argue that expulsion from a university campus — the eventual sanction for continued noncompliance — is not punitive enough to be prohibited by the First Amendment when either a fine or forced inclusion are.

While not every student leader in every on-campus ministry will be able to meet the Hosanna-Tabor standard, the analysis above demonstrates that some (indeed, many) will. As such, student-run organizations can qualify for the ministerial exception. Many will qualify under the traditional analysis, which is why it’s important not to dismiss their arguments out of hand. If student-run organizations faced the same kinds of challenges that traditional ministries do, there would be little question that they would qualify for the ministerial exception.

II. A PROPOSAL FOR ADJUSTING THE AFFIRMATIVE DEFENSE FRAMEWORK TO ACCOMMODATE STUDENT MINISTRIES

But the unique position that student groups occupy poses some equally unique hurdles to their ability to claim these protections. The main trouble is the procedural posture in which these kinds of cases will come before the court. Because the ministerial exception is an affirmative defense, student groups may never be able to claim the benefits of the exception in court. This Part proposes that we ought to adjust the affirmative defense framework in order to accommodate the needs of these student groups who would otherwise qualify for the exception’s protections. Rather than insisting that student groups abandon their right to select their own ministers, courts should allow them to assert the ministerial exception in an initial complaint as a kind of affirmative defense to state action.

Student ministries exist in a distinct procedural space that does not lend itself well to traditional ministerial exception proceedings. In a prototypical ministerial exception case, a minister is discharged from her post. Suspecting that her dismissal was the result of unlawful discrimination or animus, she files a claim with the local office of the Equal Employment Opportunity Commission (EEOC). Either the EEOC becomes directly involved, or it issues her a “right-to-sue” letter, and she brings a lawsuit against the church. Only at this point can the church raise the ministerial exception before the court and argue that her claim

74 See Tafoya, supra note 23, at 185, 196-97; see also Sherbert v. Verner, 374 U.S. 398, 404 (1963) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”).
75 See Hosanna-Tabor, 565 U.S. at 195 n.4.
77 See id.
against it cannot proceed lest the constitutional rights of the church be violated by the court’s interference. The case is then dismissed, and the parties go their separate ways.

But student groups will virtually never be in that kind of procedural position. When a student group refuses to appoint a ministerial leader, the university does not sue the group. Nor does the slighted student who wanted the ministerial position. Instead, the university initiates internal enforcement proceedings that result in either submission by the student ministry or revocation of privileges that can cripple or destroy the group entirely.78 None of this is ever brought to a courtroom, and the constitutional right of the student ministry to choose its own ministers can never be raised as a proper defense to the enforcement proceedings. The only way for a student group to see the inside of a courtroom would be to take the university there in the first instance. Thus, student groups will likely be able to assert the ministerial exception only as a cause of action rather than an affirmative defense.79 In BLinC, this procedural oddity proved insurmountable.80

Because the right is currently defined solely as an affirmative defense, the definition would need to shift slightly to accommodate the unique position of these student groups. To protect the important First Amendment concerns that undergird the existence of the ministerial exception, courts should treat the affirmative defense in light of the Free Exercise and Establishment Clause concerns underpinning the Supreme Court’s decision in Hosanna-Tabor.81 The Court’s main concern in that case was “[a]cording the state the power to determine which individuals will minister to the faithful.”82 When the state becomes the arbiter of a religious group’s faith, mission, practices, or doctrine, it necessarily violates that group’s Free Exercise and Establishment Clause rights.83 But this violation is not exclusive to direct intervention by the courts. Intervention by state governments, or even state-sponsored universities, would also violate such rights. A student group whose rights have been violated by an enforcement action outside of a court should not lose its ability to seek redress for that wrong simply because it walked into court first. As Professors Peter Smith and Robert Tuttle put it, “it does not follow from Hosanna-Tabor’s footnote four that courts should treat the ministerial exception the same way that they treat other, conventional

78 See Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 891–94 (S.D. Iowa 2019) (describing the University of Iowa’s process for deregistering BLinC).
79 Cf. id. at 904 (“[T]he ministerial exception has traditionally been used as a defense to claims asserted against a religious organization, not as its own cause of action.”).
80 See id. at 904–05.
81 See id.
82 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012).
83 See id.
affirmative defenses.” To protect the important right to select its own ministers, a student group should be able to raise what we might call an affirmative defense to state action, rather than simply an affirmative defense to a complaint, such that it can defend itself against governmental overreach regardless of its procedural posture.

Under this conception of the right, student ministries could rely on 42 U.S.C. § 1983 to bring a ministerial exception claim against the university, just as they might bring other First Amendment claims under other circumstances. The impact of this expansion would be rather limited. Most cases would not require the ability to assert the ministerial exception as a cause of action because most enforcement proceedings include an adjudicatory setting where a traditional affirmative defense can be laid out. In truth, student groups may be some of the only ones to receive a benefit from this reframing. But this small extension is significant because it allows student-run groups to receive the same First Amendment protections as other groups despite their procedurally disadvantaged position as students.

Some commentators have expressed concerns with the breadth of protection that the ministerial exception provides, arguing that the exception could be used to engage in discriminatory conduct. This is a serious concern, and any proposal for expanding the recognition of the ministerial exception should be sensitive to it. However, the right to select its own minister is an organization’s constitutional right. The ministerial exception protects only those actions of the church (or, in this case, the student ministry) that it needs to in order to preserve that right. Expanding our understanding of this right, as proposed in this Note, would not permit student organizations to ask for blanket exceptions to valid nondiscrimination policies. Student groups would only be able to seek exemptions for their ministerial positions. They could still be required to comply with nondiscrimination policies regarding nonministerial leadership and membership. Thus, the university’s valid objectives for creating and maintaining a welcoming and inclusive environment on campus would not be undermined. Permitting student groups to bring a ministerial

84 Smith & Tuttle, supra note 76, at 1867.
85 For examples of what a complaint under § 1983 could look like in this context, see Complaint, supra note 12, at 23–24; Complaint at 21–22, InterVarsity Christian Fellowship v. Univ. of Iowa, No. 18-cv-00080 (S.D. Iowa Aug. 6, 2018); and Complaint at 24–25, InterVarsity Christian Fellowship v. Wayne State Univ., No. 18-cv-00231 (W.D. Mich. Mar. 6, 2018). Each of these cases was brought around the same time, and each plaintiff group asserted its ministerial exception rights under § 1983. Only BLinC has received a court order on the issue, however.
86 See Smith & Tuttle, supra note 76, at 1848–50.
exception claim when their constitutional rights have been violated does not prohibit the university from otherwise protecting the diversity and equality that it seeks to achieve. Rather, it enables student groups to protect their constitutional rights and prevents universities from continuing to trample on the important relationship between an organization and its ministers in the future.

III. THE MINISTERIAL EXCEPTION’S ADDED VALUE AS A CAUSE OF ACTION

One might reasonably ask: Why exactly do we need another First Amendment cause of action? It seems odd to think that a student group needs to be able to raise a ministerial exception claim when there are already other avenues for redressing the wrongs that a university may impose upon them. The First Amendment already permits student groups to sue a public university if they are being targeted for their religious beliefs.88 And the Religious Freedom Restoration Act of 1993 (RFRA) provides additional safeguards for plaintiffs whose religious freedom is being threatened by government action.89 With these causes of action in place, aren’t on-campus student groups already able to vindicate their right to select their own ministers?

The simple answer is that Free Exercise and Establishment Clause claims are not always available to student groups. And in many circumstances, RFRA will provide no shelter to student groups because RFRA protects against only federal infringement of religious observance.90 Because almost all public universities are state universities, any actions that they take against their student organizations would fall outside the scope of the federal RFRA law.91 As these other potential

90 RFRA prohibits the federal government from burdening the free exercise of religion unless it can demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Id. § 2000bb-1.
91 See City of Boerne, 521 U.S. at 532–36 (invalidating RFRA as applied to state governments).
92 Although the federal RFRA may not be available, some states have also enacted their own religious freedom protection laws in response to the Supreme Court’s decision in City of Boerne v. Flores, 521 U.S. 507. See Violet S. Rush, Note, Religious Freedom and Self-Induced Abortion, 54 TULSA L. REV. 491, 498 (2019). But fewer than half of the states actually have RFRA laws. State Religious Freedom Restoration Acts, NAT’L CONF. ST. LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/4F93-MG7J] (noting that only twenty-one states have enacted RFRA laws). And many of the states with the largest numbers of public universities, such as California and New York, are noticeably
recourses are frequently unavailable to student groups, a ministerial exception cause of action could prove vital.

A. The Free Exercise Clause

Consider first why the Free Exercise Clause may be unavailable to student-run ministries. Under the right circumstances, it is definitely a valuable tool for protecting religious groups’ rights to the free exercise of their religion. But these circumstances are essentially limited to cases where the government entity has targeted the beliefs or practices of a particular group. To be sure, this happens more frequently than one might hope. Such was the case in *BLinC*, where the district court held for the plaintiffs on their Free Exercise claims because it was clear that the University had not applied its rules neutrally or generally. And under such circumstances, student ministries are well within their rights to seek the protection of the courts.

But in many cases, a university will actually have a neutral and generally applicable rule that is not used to target a religious group. Yet despite its neutrality, the rule may infringe on a student group’s right to select its own ministers. Take the case of *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, which was decided by the Supreme Court just two years before *Hosanna-Tabor*. There, the University of California school system (and the Hastings College of the Law specifically) had a nondiscrimination policy (the all-comers policy) that required registered student organizations to permit all comers to seek membership and leadership positions. The law school’s chapter of the Christian Legal

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absent from that list. See id.; Vic Lang’at Junior, *Which State Has the Most Colleges?*, WORLDATLAS (July 11, 2019), https://www.worldatlas.com/articles/which-state-has-the-most-colleges.html [https://perma.cc/DX49-X2J9] (stating that the four states with the most public universities are Texas, California, New York, and Pennsylvania — two of which have RFRA laws and two of which do not). This means that students who happen to attend school in a state with a RFRA statute will have an additional tool to protect their religious rights that remains wholly unavailable to the students in the other half of the country.

93 Compare Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1731 (2018) (“[T]he government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”), with Emp’t Div. v. Smith, 494 U.S. 872, 885 (1990) (holding that strict scrutiny did not apply to laws that were neutral and generally applicable). See also Douglas Laycock, Essay, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 888 (1994) (“Once the Court decides the law is neutral and generally applicable, there is simply no issue left. That was *Smith*.”).

94 See Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 902 (S.D. Iowa 2019).

95 561 U.S. 661 (2010).

96 See id. at 670. The actual language of the all-comers policy at issue in *Martinez* was similar to that at issue in *BLinC*. Compare id. (quoting the law school’s policy that student groups “shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability,
Society (CLS) sought an exemption so that it could require members and leaders to sign a statement of faith that affirmed a traditional view of marriage and sexuality. Its request was denied, and it subsequently sued the University under several First Amendment claims — free speech, free association, and free exercise of religion.

The Court ultimately ruled in favor of the law school on the first two claims because the all-comers policy was “reasonable and viewpoint neutral.” Regarding the free exercise claim, the Court briefly dismissed CLS’s arguments because “[its] decision in Employment Division v. Smith forecloses that argument. . . . [T]he Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct.” Because the Court had already found that the law school’s regulation was neutral and generally applicable, failing to provide an exemption did not violate the Free Exercise Clause.

Under Martinez, then, student groups faced with all-comers policies are precluded from bringing free exercise claims as long as Smith continues to stand. But the ministerial exception faces no opposition from Smith in this regard. While many have noted that the ministerial exception stands in some tension with Smith, the Supreme Court unanimously declared that no such tension exists. Not only was

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97 Martinez, 561 U.S. at 672.
98 Id. at 673.
99 Id. at 697.
101 Martinez, 561 U.S. at 697 n.27 (citation omitted).
102 See id.
103 Smith is an admittedly unpopular opinion in certain circles, and at the time of writing, at least one case is pending certiorari that has asked the Court to reconsider the Smith decision. See Petition for a Writ of Certiorari at i, Ricks v. State of Idaho Contractors Bd., No. 19-66 (July 16, 2019), https://www.supremecourt.gov/DocketPDF/19/19-66/107759/20190710194325684_FINAL%20CERT%20PETITION.pdf [https://perma.cc/YAT7-FLAQ].
104 See, e.g., Griffin, supra note 87, at 992 (“Opponents of the ministerial exception, including this author, have argued that if religious individuals must obey neutral laws of general applicability, so too must religious institutions.”).
105 See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189–90 (2012). The Court’s reasoning, although odd to some, was partly based on the widespread acceptance in the lower courts that Smith posed no problem for the continuation of the ministerial exception. See, e.g., Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir.)
Smith concerned with individual behavior rather than internal autonomy, but it also dealt exclusively with the Free Exercise Clause. But, as Professor Christopher Lund has noted, “the ministerial exception is grounded just as much in disestablishment concerns as in free exercise.” The ministerial exception stands apart from the Court’s decisions in Smith and Martinez to protect an organization’s right to select its own ministers even from neutral and generally applicable laws because that decision involves more than a single individual’s exercise of religion. Thus, even in cases where Martinez and Smith might prevent a free exercise claim, a ministerial exception claim could still provide valuable protection for an organization’s religious rights.

B. The Establishment Clause

But the ministerial exception’s reliance on Establishment Clause principles raises a second question: Why couldn’t the student group just argue that the Establishment Clause on its own prevents a university from imposing antidiscrimination rules on its student groups? While there is certainly an argument that the Establishment Clause alone could protect against interference with this valuable right, its protections will vary according to circumstances.

As with the Free Exercise Clause claims, Establishment Clause claims are at their strongest when one religious group is being advantaged over another: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” If a student group finds itself in a situation where its host university explicitly prefers one group or one set of beliefs to another, the Establishment Clause may provide firmer protection.

The ministerial exception, while still applicable under circumstances of targeting or preferential treatment, adds the most value where the university did not target or act preferentially with respect to a particular group. Where a university employs a neutral and secular policy, the Establishment Clause provides somewhat uncertain footing for a claim. Imagine that a state university has a stringent all-comers policy like the policy in Martinez, and a religious student group on that campus requires its leaders to sign a statement of faith that affirms traditional beliefs about gender and sexuality. The university gets wind of it,
though nobody has been rejected from leadership yet, and deregisters
the student group for violating the all-comers policy. Does the univer-
sity’s enforcement of its policy violate the Establishment Clause?

Under *Lemon v. Kurtzman*, the university’s policy would be in line
with the Establishment Clause if it (1) has a secular purpose, (2) neither
advances nor inhibits religion as its principal or primary effect, and (3)
does not foster excessive entanglement with religion. Nondiscrimina-
tion and all-comers policies will almost always satisfy the first two
prongs, as they embody valuable goals of inclusion and equality and
their primary effect is to establish, or at least encourage, equal treatment
across the university community. The third prong — avoiding exces-
sive entanglement — is more likely to be where a contestable issue lies.

Entanglement concerns can be grouped into two types: procedural
and substantive. According to a procedural entanglement theory, any
extensive interactions between the government and a church would be
constitutionally suspect. But the Supreme Court has largely
abandoned this theory of entanglement. Under the Supreme Court’s
precedent regarding procedural entanglement, it is doubtful that an all-
comers policy like the one at issue in *Martinez* would be problematic.
While enforcing the policy would require some interaction (even, per-
haps, procedural entanglement) with the student ministries, that may
not be enough to violate the groups’ constitutional rights. The Court
has stated that “interaction between church and state is inevitable, and
we have always tolerated some level of involvement between the
two. Entanglement must be ‘excessive’ before it runs afoul of the
Establishment Clause.”

A theory of substantive entanglement (i.e., a concern that the
government would become involved in doctrinal or theological matters)
would be more likely to protect a group from enforcement of an all-
comers policy. The Supreme Court has established that courts ought

111 403 U.S. 602 (1971). As discussed below, the Lemon test may no longer be the best way to
analyze an Establishment Clause claim. But, as a court may still use the test, it is important to
understand how it might analyze such a claim and why the test is unhelpful for student ministries.
112 Id. at 612–13 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970)).
113 See Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Kane,
115 See id. at 1979–80.
116 See id. at 2006.
117 See id. at 2006–08 (arguing that the ministerial exception cannot be justified under the Court’s
procedural entanglement cases).
not to meddle with areas of internal doctrine or governance. While the Court’s line of church autonomy cases formed the backbone of the ministerial exception’s Establishment Clause roots, these cases do not fully protect a group’s right to select its own minister without the addition of Hosanna-Tabor—a decision that reaches beyond the Establishment Clause to encompass many free exercise concerns. Without Hosanna-Tabor, the church autonomy cases stand only for the proposition that a court cannot directly tell a church what doctrines to teach or how to teach them. But they say nothing about the revocation of benefits based on church policies, such as when a university deregisters a student group based solely on its requirement that leaders sign a statement of faith. In that situation, does it really entangle the government in church autonomy to refuse to grant benefits to a group that doesn’t meet the specified criteria?

Return again to the case of CLS for an example of what an Establishment Clause analysis could look like without Hosanna-Tabor to seal the deal. CLS actually alleged a violation of the Establishment Clause in its initial complaint, which was promptly dismissed by the district court. The district court reasoned that, under Lemon, the law school’s policy did not run afoul of the Establishment Clause. This decision has no precedential power, but the district court’s ruling highlights a strain of logic that leads to the conclusion that merely enforcing a neutral regulation would not cause a university to become excessively entangled in a student ministry’s affairs.

When analyzing whether the all-comers policy brought about excessive entanglement, the district court looked to the Supreme Court’s opinion in Bob Jones University v. United States and determined that enforcement of a neutral nondiscrimination policy would not offend the Establishment Clause’s entanglement concerns. In Bob Jones University, a religious school challenged an Internal Revenue Service (IRS) action that revoked its status as a tax-exempt religious institution. The revocation occurred because of the IRS policy that an institution that discriminates on the basis of race cannot be considered

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121 See Marci A. Hamilton, Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 BYU L. REV. 1099, 1112–14 (arguing that there is no such thing as a church autonomy doctrine and summarizing the Court’s holdings in this area).
123 Id. at *16–20.
126 See Bob Jones Univ., 461 U.S. at 579.
a “charitable” institution meriting tax exemption. The University challenged this rule because of its religious tenets that forbade interracial relationships. Although the case focused mainly on the statutory interpretation aspects, the University also challenged the denial of its tax-exempt status as a violation of the Establishment Clause. The Court stated that “[t]he IRS policy at issue here is founded on a ‘neutral, secular basis’ and does not violate the Establishment Clause.” The Court went on to explain that, in the words of the Fourth Circuit, “the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief.” For the district court assessing CLS’s Establishment Clause claim, this meant that a neutrally crafted and generally applicable all-comers policy would not lead to excessive entanglement in the student group’s internal affairs, even if that same law might still inhibit that group’s ability to practice and organize its religion as it chose.

Under that logic, a student group’s claims under the Establishment Clause could run into a very similar problem as its claims under the Free Exercise Clause. If a university has a nondiscrimination policy that it applies selectively or in a targeted manner, then it certainly violates the First Amendment. But if the policy is neutral and the university enforces it against everybody who violates the policy, regardless of their religion, then there is likely no entanglement concern, and therefore no violation of the Establishment Clause. The entanglement concern could arise if the university were required by its policy to assess the basis for a student group’s decision about whom to appoint as its minister. But a blanket prohibition on discrimination for any reason could actually prevent the university from getting entangled in the affairs of the student organization. Rather than requiring the university to get involved in disputes about whether someone was selected for or removed from a leadership position based on religious reasons, an all-comers policy merely states that an organization cannot have a policy that discriminates against certain groups of people. Enforcing that policy does not require the university to get directly involved with a student group’s activities. Instead, at least under the scenario imagined above, the university can enforce its policy by refusing to grant certain

127 See id. at 578.
128 See id. at 580–81.
129 See id. at 604 n.30.
130 Id. (citation omitted) (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).
131 Id. (quoting Bob Jones Univ. v. United States, 639 F.2d 147, 155 (4th Cir. 1980)).
benefits solely because of the existence of a group’s allegedly discriminatory policy. No fussing about individual cases is necessary. If a discriminatory policy exists, the group gets deregistered, and the university doesn’t need to get mixed up in any of the actually religious aspects of the policy. Thus, although there is still an interaction between church and state to some degree, there is no substantive entanglement, and therefore no violation of the Establishment Clause.

One might wonder whether Lemon is the proper Establishment Clause framework to apply in this situation. Lemon has never been applied with especial regularity, and its scope continues to dwindle as time goes on. But because the Court has never actually discarded Lemon (and because nobody seems to agree about what to do once Lemon disappears), the threat of the Lemon test looms large over many Establishment Clause cases. While this confusion means that courts may not always apply the Lemon test, it also means that student groups cannot bring a claim under the Establishment Clause with any sense of confidence about what they will find once they enter the courtroom. It could be Lemon, or something else entirely. The standard for assessing their claim would be inconsistent at best, and this inconsistency makes the Establishment Clause an unreliable source of protection.

And it is in this space of uncertainty that the ministerial exception could do the most work. In the kind of situation just highlighted, a university could theoretically avoid liability under both the Free Exercise and Establishment Clauses because it has maintained neutrality regarding its religious student groups. But that neutrality belies the fact that the school’s policies could still infringe on a group’s right to select its own ministers. The ministerial exception is, at its core, an explicit exemption from otherwise neutral antidiscrimination laws. It provides the breathing room for organizations to conduct their internal

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135 See Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2080–82 (2019) (plurality opinion) (“In many cases, this Court has either expressly declined to apply the [Lemon] test or has simply ignored it.” Id. at 2080.).
136 See id. (rejecting the relevance of Lemon to a religious symbol case but declining to expressly overrule it); see also Mark Movsesian, Interpreting the Bladensburg Cross Case, FIRST THINGS (June 24, 2019), https://www.firstthings.com/web-exclusives/2019/06/interpreting-the-bladensburg-cross-case[https://perma.cc/CJW8-Q88R] (“The lopsided vote conceals serious disagreement on the Court. Along with the majority opinion . . . the members of the Court issued a bewildering seven additional opinions — inviting confusion in the lower courts.”).
137 See Strasser, supra note 134, at 209–10 (“While the Court has used a variety of tests when performing its Establishment Clause analysis, the requirement of neutrality has been quite influential. However, because there are many interpretations of what neutrality is or requires, differing justices using the neutrality standard reach very different conclusions about the constitutionality of a particular practice.” (footnotes omitted)).
138 See Crunk, supra note 4, at 1097–102.
affairs even when the government burdens their religious practices only as an incidental side effect of an otherwise desirable law. Where the Free Exercise and Establishment Clauses have their limitations (i.e., where government actions are neutral, generally applicable, and secular in nature) is precisely where the exception has existed since it was first recognized in the lower courts.

The ministerial exception, then, protects a specific right that is not fully protected by other First Amendment causes of action. But, until now, it has only been available to defendants when somebody else (be they a disgruntled minister or the government) has tried to interfere with that right in court. Because of the unique posturing of student groups, they have not been able to use the ministerial exception doctrine to obtain the kind of exception to antidiscrimination policies that the doctrine normally provides. In terms of protecting their right to choose who will minister to the faithful, it is necessary to provide them with some avenue for obtaining the exception that they would otherwise be due.

CONCLUSION

Despite the procedural and organizational challenges that student-run, on-campus ministries face, these organizations should be able to claim protections under the ministerial exception. If they were able to raise the exception as an affirmative defense, the Hosanna-Tabor framework would apply to them as readily as it applies to any other religious entity. But because of their unique procedural and organizational positions, student organizations have not yet been able to claim the rights that they would otherwise have. To protect those rights, we may need to adjust the framework slightly and allow these organizations to assert their ministerial exception rights in a complaint under certain circumstances.

When viewed in light of the important First Amendment concerns highlighted above, applying the ministerial exception to student-led religious organizations is not much of a substantive extension at all. Rather, it constitutes a recognition that religious organizations come in many shapes and sizes, but all have the same right to select and manage their own religious missions and ministries. Student organizations are no different, and it is time to afford them the protection that they deserve, regardless of their structure or their procedural status in court.

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139 See Robinson, supra note 26, at 182 (“Prior to Hosanna-Tabor, all litigants could pursue one or both of two claims under the Religion Clauses: that the government had burdened their religious liberty in violation of the Free Exercise Clause; and/or that the government had violated the Establishment Clause. What Hosanna-Tabor has added is an additional doctrinal path for litigants to follow.” (footnote omitted)).

140 Cf. Lund, supra note 67, at 1192 (characterizing Hosanna-Tabor as a “change in [the] baseline” First Amendment inquiry that refocuses on a church’s right to choose its leaders).