BYU Law Review

Volume 2011 | Issue 1 Article 3

3-1-2011

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Brandon S. Boulter

Goldilocks and the Three-Judge Panel: *Spencer v. World Vision, Inc.* and the Religious Organization Exemption of Title VII

I. INTRODUCTION

In *Spencer v. World Vision, Inc.* a three-judge panel for the Ninth Circuit faced the question of whether a self-described "Christian humanitarian organization"[1] qualified for an exemption from Title VII's prohibition of religiously-based employment discrimination. In a split decision, the Ninth Circuit found that World Vision did meet the qualifications for the religious organization exemption, thereby precluding any legal challenges for religiously motivated employment discrimination. Although both judges in the majority agreed with this conclusion, each used a very different test to reach it. Additionally, the lone dissenting judge formulated her own unique test, which, if applied, would greatly limit the scope of Title VII's religious organization exemption. This "Goldilocksian" trio of possible tests, each more restrictive than the last, naturally gives rise to the question of which if any of the three tests is "just right."

This Note argues that although the Ninth Circuit reached the correct conclusion, the test used by the majority is too broad in scope, creating an over-inclusive exemption to the religious discrimination prohibitions of Title VII. The test used in the dissenting opinion, on the other hand, is too narrow. Although it would be too much to say the test used in the concurrence is "just right," it is the most appropriate of the three because it most effectively accommodates existing precedential constraints governing the religious organization exemption and strikes the most appropriate balance between protecting individual rights and the rights of religious entities.

In arguing for this moderate approach to the religious organization exemption of Title VII, this Note proceeds as follows. Part II explains the facts and procedural history of *Spencer*. Part III provides an overview of Title VII's religious organization exemption

1. *Who We Are*, WORLD VISION, http://www.worldvision.org/content.nsf/about/who-we-are (last visited Mar. 12, 2011).

and relevant case law. Part IV summarizes the reasoning of each member of *Spencer*'s three-judge panel. Part V analyzes the three tests against the backdrop of existing precedent and constitutional and statutory requirements. Part VI concludes.

II. FACTS AND PROCEDURAL HISTORY

In 2006, World Vision, Inc., a global humanitarian organization, terminated three of its longtime employees because they "denied the deity of Jesus Christ and disavowed the doctrine of the Trinity."[2] World Vision, whose mission includes "serv[ing] the poor as a demonstration of God's unconditional love for all people,"[3] requires all prospective employees to "agree with World Vision's Statement of Faith and/or the Apostles' Creed," both of which profess, among other things, a belief in the deity of God the Father and Jesus Christ.[4] At the time they were hired, each of the plaintiffs "confirmed that they 'subscribe[d], wholeheartedly to the principles inherent'" in these statements.[5] After several years of employment, however, each of the "[p]laintiffs discontinued their attendance at daily devotions and weekly chapels held during the workday."[6] Upon learning of this apparent lapse in devotion, World Vision representatives interviewed the plaintiffs and determined that each, in fact, "denied the deity of Jesus Christ."[7] Because this denial was clearly contrary to World Vision's Statement of Faith and the Apostles' Creed on which employment at World Vision was conditioned, the plaintiffs were terminated.[8]

Following their termination, plaintiffs filed suit with a U.S. district court, alleging employment discrimination.[9] This complaint was later amended[10] to include the claim that the plaintiffs' termination was based on religious "discrimination in violation of

2. Spencer v. World Vision, Inc. (*Spencer II*), 619 F.3d 1109, 1111 (9th Cir. 2010).

3. *Job Opportunities at World Vision*, WORLD VISION, http://www.worldvision.org/content.nsf/about/hr-home?Open&lpos=lft_txt_Careers (last visited Mar. 12, 2011).

4. *Christian Commitment*, WORLD VISION, http://www.worldvision.org/content.nsf/about/hr-faith (last visited Mar. 12, 2011).

5. Spencer v. World Vision, Inc. (*Spencer I*), 570 F. Supp. 2d 1279, 1282 (W.D. Wash. 2008) (citation omitted).

6. *Id.* (citation omitted).

7. *Spencer II*, 619 F.3d at 1111.

8. *Id.*

9. *Spencer I*, 570 F. Supp. 2d at 1280.

10. *Id.* at 1281.

Title VII of the Civil Rights Act."[11] Shortly thereafter, World Vision responded by filing a motion to dismiss, which was later converted into a motion for summary judgment.[12] World Vision argued that "as a religious organization it is exempt from the religious discrimination provisions of Title VII."[13] The plaintiffs disagreed, arguing that World Vision could not qualify as a religious organization and should not, therefore, be exempted from the requirements of Title VII.[14] In the end, the district court agreed with World Vision, granting summary judgment in World Vision's favor and finding that it qualified for the religious organization exemption provided for in Title VII.[15]

III. TITLE VII'S RELIGIOUS ORGANIZATION EXEMPTION

In order to provide an appropriate framework in which to evaluate the Ninth Circuit's decision in *Spencer II*, this section reviews the language and purpose of Title VII's religious organization exemption as well as the Ninth Circuit cases on which the panel relied to guide its decision. The cases include *EEOC v. Townley Engineering & Manufacturing Co.* and *EEOC v. Kamehameha Schools/Bishop Estate*.

A. Title VII of the Civil Rights Act of 1964

In 1964, Congress passed what has been billed as "the most comprehensive civil rights legislation ever enacted" in the United States.[16] In passing the Civil Rights Act of 1964, Congress intended to curb "discrimination on account of race, color, religion, and national origin, in a broad variety of contexts, including . . . discrimination in employment."[17] The provisions governing employment discrimination are found in Title VII of the Act, which "makes it unlawful for an employer 'to discharge any individual, or otherwise to discriminate against an individual with respect to his

11. *Spencer II*, 619 F.3d at 1111.

12. *Id.*

13. *Spencer I*, 570 F. Supp. 2d at 1280.

14. *Id.*

15. *Id.* at 1289; *see also Spencer II*, 619 F.3d at 1126.

16. Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 62 (1964).

17. *Id.*

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"[18] Despite this seemingly clear proscription on employment discrimination, Congress created a fairly broad exemption for certain religious entities in an effort to "prevent excessive government entanglement" with religion and preserve "the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions."[19] The Civil Rights Act provides that "[t]his subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[20] Thus, this exemption left a significant group of entities outside the scope of Title VII's ban on religious-based employment discrimination.

In creating this exemption, however, Congress failed to provide a clear definition of what constitutes a "religious corporation, association, educational institution, or society" within the context of Title VII.[21] As such, it has largely been left to the courts to decide which entities qualify for the so-called "religious organization exemption" and which do not. *Spencer II*, like many cases before it, addressed this issue. Following are two of the most important cases[22] considered by both the district court and the Ninth Circuit in reaching their decisions in the *Spencer* cases.

B. EEOC v. Townley Engineering & Manufacturing Co.

In *EEOC v. Townley*, the Ninth Circuit considered a religious discrimination claim filed by Louis Pelvas, a machinist who had been fired by Townley Engineering & Manufacturing Company

18. *Spencer I*, 570 F. Supp. 2d at 1283 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

19. *Id.* (quoting Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 623 (6th Cir. 2000)) (internal quotation mark omitted).

20. 42 U.S.C. § 2000e-1(a).

21. *Id.*

22. Importantly, the *Spencer II* court also relied heavily on the Third Circuit's reasoning in *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007). In *Leboon* the Third Circuit formulated a factor test to be used to determine whether or not an entity qualifies as a religious organization for the purposes of the Title VII exemption. This test was based largely on the Ninth Circuit cases discussed below, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), and *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).

("Townley").[23] Townley, a Florida-based company, manufactured equipment used in the mining industry.[24] At the time they founded the company, the owners, who were born-again Christians, "made a covenant with God that their business would be a Christian, faith-operated business."[25] This covenant was evident in the company's business practices of including gospel messages in outgoing mail and on official company documents, as well as providing financial aid to churches and missionaries.[26] Additionally, the company held "a devotional service once a week during work hours."[27]

When Pelvas was hired in 1979, no weekly devotional service was being held at the Eloy, Arizona plant where he was employed.[28] However, in 1982 an employee handbook was distributed, which stated, "All employees are required to attend the non-denominational devotional services each Tuesday. Employees are paid for their time while attending these services."[29] Although Pelvas initially agreed to abide by this condition of employment—going so far as to sign a statement confirming his willingness to attend such services—he soon made a request to be exempted from these services on the basis that he was an atheist.[30] Following a denial of his request, Pelvas filed a religious discrimination complaint with the EEOC, which led to the EEOC filing an action in federal court against Townley.[31] The district court reviewed this action and granted summary judgment against Townley, finding that the company had violated Title VII "by requiring its employees to attend devotional services"[32] and "by failing to accommodate Pelvas' objection to attending the services."[33] The district court also "issued a permanent injunction prohibiting Townley from continuing the mandatory devotional services."[34]

23. 859 F.2d at 612.
24. *Id*. at 611.
25. *Id*. at 611–12 (internal quotation marks omitted).
26. *Id*. at 612.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.

The Ninth Circuit affirmed the lower court's decision, finding that Townley's employment practices did, in fact, violate Title VII.[35] This decision hinged on the court's determination that, contrary to Townley's assertions, the company did not qualify for the religious organization exemption provided for in Title VII.[36] In making this determination, the court noted that case law interpreting the scope of the religious organization exemption was "not very helpful."[37] As such, the court was left largely to its own devices to make the determination regarding Townley's status. Rather than create a clear test to perform this analysis, the Ninth Circuit simply stated that "each case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious."[38] Under this fairly flexible standard, the court concluded that Townley's "primarily secular" nature disqualified it from the religious organization exemption of Title VII.[39] As such, the Ninth Circuit affirmed the lower court's grant of summary judgment against Townley.

C. EEOC v. Kamehameha Schools/Bishop Estate

In 1993, the Ninth Circuit once again considered the parameters of Title VII's religious organization exemption in *EEOC v. Kamehameha Schools/Bishop Estate*.[40] In contrast to *Townley*, which involved a corporation, *Kamehameha* involved a review of the religious nature of two schools whose employment policy required all teachers to be of the Protestant religion.[41] The dispute in *Kamehameha* arose when Carole Edgerton, a non-Protestant, applied for a position with the schools but was denied employment based on the Protestant-only policy.[42] Edgerton subsequently filed a complaint with the EEOC, which in turn filed suit in federal court against the schools.[43] On appeal, however, a three-judge panel for

35. *Id.* at 613.
36. *Id.* at 613, 617–19.
37. *Id.* at 618.
38. *Id.*
39. *Id.* at 619.
40. 990 F.2d 458 (9th Cir. 1993).
41. *Id.* at 459.
42. *Id.*
43. *Id.*

the Ninth Circuit unanimously reversed the district court's decision, finding that "the Schools failed to establish their entitlement to" the Title VII exemptions.[44] The Ninth Circuit arrived at this conclusion by considering six factors it believed were relevant to distinguishing a religious entity from a secular one.[45] These factors included: "(1) ownership and affiliation, (2) purpose, (3) faculty, (4) student body, (5) student activities, and (6) curriculum."[46] After considering each of these in turn, the court determined that the schools could not qualify as religious organizations under the Title VII exemption.

IV. *SPENCER V. WORLD VISION, INC.*

A. Judge O'Scannlain's Majority Opinion

In a split decision, a panel of the United States Court of Appeals for the Ninth Circuit upheld a grant of summary judgment by the district court, holding that World Vision qualified for the religious organization exemption under Title VII and could not, therefore, be liable for religiously-based employment discrimination. Writing for the majority, Judge O'Scannlain began his opinion by noting that "[t]ypically, the question of whether an organization is religious for purposes of section 2000e-1 warrants little analysis."[47] *Spencer II*, however, provided a rare instance in which the answer to that question was not so obvious. According to Judge O'Scannlain, the Ninth Circuit had previously reviewed only two cases in which the answer to this question was not readily apparent—*Townley* and *Kamehameha*.[48] Because neither of these cases had established a clear test to govern determinations such as this, the *Spencer II* court was left to fill the gaps, leading each member of the three-judge panel to formulate his or her own governing test.

Judge O'Scannlain's opinion was framed in large part by the relatively vague parameters of both *Townley* and *Kamehameha*. On the one hand, the *Townley* decision established a fairly broad scope of analysis, holding that "'each case must turn on its own facts . . .

44. *Id*. at 460.

45. *Id*. at 461–63; *see also* Spencer v. World Vision, Inc. (*Spencer I*), 570 F. Supp. 2d 1279, 1284 (W.D. Wash. 2008) (utilizing the six factors set forth in *Kamehameha*), *aff'd*, 619 F.3d 1109 (9th Cir. 2010).

46. *Spencer I*, 570 F. Supp. 2d at 1284.

47. Spencer v. World Vision Inc. (*Spencer II*), 619 F.3d 1109, 1112 (9th Cir. 2010).

48. *See id.*

[with a court weighing] [a]ll significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious.'"[49] On the other hand, as conceded by Judge O'Scannlain, "there is no denying that [the *Kamehameha* court] held that section 2000e-1 should be construed 'narrowly.'"[50] Taking these together, Judge O'Scannlain believed that the court was simply required "to analyze, on a case-by-case basis, whether the 'general picture' of an organization is 'primarily religious,' taking into account '[a]ll significant religious and secular characteristics.'"[51] Judge O'Scannlain rejected the calls by both parties in this case to apply a strict "factor test" like those found in *Kamehameha* or *Leboon v. Lancaster Jewish Community Center Ass'n*,[52] as he believed such a test could run afoul of the clear requirements of the First Amendment's religion clauses.[53]

"[T]he Free Exercise Clause," noted Judge O'Scannlain, "'clearly' protects 'organizations less pervasively religious than churches.'"[54] Accordingly, Judge O'Scannlain refused to establish a factor test that would narrowly construe the category of religious organizations described in Title VII's exemption.[55] Additionally, the Establishment Clause demands "neutrality among religious groups,"[56] meaning that "[t]he very act of [determining what activities do or do not have religious meaning] runs counter to the 'core of the [Establishment Clause].'"[57] Judge O'Scannlain found support for this principle in Justice Brennan's concurrence from *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, which argued that "'determining whether an activity is religious or secular requires a searching case-by-case analysis . . . [, which] results in considerable ongoing government entanglement in religious affairs . . . [and] raises [the] concern that

49. *Id.* (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

50. *Id.* at 1114.

51. *Id.* (quoting *Townley*, 859 F.2d at 618; EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993) (alteration in original)).

52. *See supra* note 22.

53. *Spencer II*, 619 F.3d at 1115–19.

54. *Id.* (quoting *Townley*, 859 F.2d at 620 n.15).

55. *Id.* at 1113.

56. *Id.* at 1114.

57. *Id.* at 1116 (quoting New York v. Cathedral Acad., 434 U.S. 125, 133 (1977)).

a religious organization may be chilled in its free exercise activity.'"[58] Based on this reasoning, Judge O'Scannlain elected to form his own test, which he claimed "minimizes any untoward differentiation among religious organizations and any unseemly judicial inquiry into whether an activity is religious or secular in nature."[59] Under Judge O'Scannlain's test:

> [A] nonprofit entity qualifies for the section 2000e-1 exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.[60]

Applying this test, which "permits an institution to acknowledge its own religiosity" by "evaluat[ing] the purpose provided by the organization against the organization's practice,"[61] Judge O'Scannlain found that World Vision did qualify as a religious organization under Title VII and upheld summary judgment in its favor.[62]

B. Judge Kleinfeld's Concurring Opinion

Although Judge Kleinfeld agreed with Judge O'Scannlain's ultimate finding, he disagreed with the test Judge O'Scannlain applied, believing it to be "too inclusive."[63] From Judge Kleinfeld's perspective, "Judge O'Scannlain's test is too broad because it would allow nonprofit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment."[64] Judge Kleinfeld feared reliance on this test would force "courts to look into the hearts of [executives] and make a judgment about their real purposes."[65] To avoid the need for such an

58. *Id.* (quoting Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 343–44 (1987) (Brennan, J., concurring)) (internal quotation mark omitted).

59. *Id.* at 1119.

60. *Id.* (citing Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1343 (D.C. Cir. 2002)).

61. *Id.*

62. *Id.* at 1126.

63. *Id.* at 1127 (Kleinfeld, J., concurring).

64. *Id.* at 1130.

65. *Id.* at 1132.

"impractical" approach, Judge Kleinfeld proposed a test based on "one big objectively ascertainable difference: how [the organizations] charge."[66] Thus, under Judge Kleinfeld's formulation:

> To determine whether an entitity is a "religious corporation, association, or society," [a court must] determine whether it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[67]

In Judge Kleinfeld's opinion, centering analysis on this final characteristic would allow a court to distinguish organizations "designed to exchange goods or services for money, from those designed to give them away except perhaps for nominal charges in order to serve a religious objective."[68] Even under this formulation, concluded Judge Kleinfeld, World Vision would qualify as a religious corporation.[69]

C. Judge Berzon's Dissenting Opinion

In her dissent, Judge Berzon rejected both tests proposed by her colleagues as too expansive, fearing both "would transform what has always been a narrow exemption from the general prohibition on religious discrimination into an exceedingly broad one, with no obvious stopping point."[70] Based on her narrow reading of Title VII's religious organization exemption, Judge Berzon would apply the exemption only to those organizations whose "primary activity . . . consists of voluntary gathering for prayer and religious learning."[71]

66. *Id*. (explaining that, while a "hospital gets money by exchanging valuable services for their market value in cash," "[t]he Salvation Army gives its homeless shelter and soup kitchen services away, or charges nominal fees, perhaps eight dollars a night for a bed worth fifty dollars a night").

67. *Id*. at 1133.

68. *Id*. at 1132.

69. *Id*. at 1133.

70. *Id*. at 1134 (Berzon, J., dissenting).

71. *Id*. at 1148.

V. ANALYSIS

Given the various legal constraints facing the Ninth Circuit panel—including the parameters of prior precedent and the competing interests of freedom of religion and individual employment rights—it is not surprising that the formation of a new test governing the scope of Title VII's religious organization exemption was no easy task. As a result of this difficulty, the court failed to reach a consensus on the appropriate test for such a determination, leaving each member of the panel to cling to his or her own unique formulation. Although the ultimate outcome of *Spencer II* was correct, the test used in the majority opinion was not the most appropriate of the three. Of the three tests proposed in *Spencer II*, Judge Kleinfeld's formulation most effectively balances the competing interests of the religion clauses of the First Amendment and the individual employment rights mandated under Title VII, while still accounting for the demands of prior precedent. Accordingly, the Ninth Circuit should adopt Judge Kleinfeld's test, or some slight variation thereof, to govern future decisions regarding the application of Title VII's religious organization exemption.

A. Accommodating Ninth Circuit Precedent

Townley and *Kamehameha* established the precedential parameters for cases involving the religious organization exemption of Title VII in the Ninth Circuit. Together these cases stand for the principles that "[a]ll significant religious and secular characteristics must be weighed to determine whether the [organization's] purpose and character are primarily religious,"[72] and "that section 2000e-1 [sh]ould be construed 'narrowly.'"[73] Using these principles as the governing standard, of the three possible tests found in *Spencer II*, Judge Kleinfeld's formulation represents the most appropriate accommodation of the precedential demands of both *Townley* and *Kamehameha*. Whereas Judge O'Scannlain's test is too over-inclusive in actual effect to meet the narrowness requirement of *Kamehameha*, Judge Berzon's test is too narrow to allow for the weighing of "[a]ll

72. *Id.* at 1112 (majority opinion) (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

73. *Id.* at 1112 (quoting EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993)).

significant religious characteristics" required by *Townley*.[74] As such, Judge Kleinfeld's middle-of-the-road approach, though far from perfect, is truest to the demands of Ninth Circuit precedent.

Although Judge O'Scannlain's desire to allow "institution[s] to acknowledge [their] own religiosity"[75] is a worthy theoretical goal to allow for greater religious freedom, in actual application this test may prove to be much too over-inclusive to fit within the precedential parameters of *Kamehameha*. As noted in both the concurrence and the dissent,[76] by relying on so-called "neutral factors" for determining whether or not an organization is "religious," Judge O'Scannlain's test runs the risk of placing too much power in the hands of those organizations. This may allow secular entities to redefine themselves as "religious" and thereby receive undeserved exemption from certain requirements of Title VII, a problem which *Kamehameha*'s narrowness requirement undoubtedly seeks to avoid.

Judge Kleinfeld's test, though similar to Judge O'Scannlain's in many regards, places important limits on the power of organizations to redefine themselves as religious by allowing the court to objectively review whether an organization "engage[s] primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[77] This addition tempers Judge O'Scannlain's formulation of the test, bringing it more in line with the "narrowness" requirement of *Kamehameha*. Additionally, Judge Kleinfeld's shift away from Judge O'Scannlain's focus on nonprofit status allows the court to more fully review "[a]ll significant religious characteristics" of organizations that may in fact be religious but lack the "corporate papers and nonprofit status" Judge O'Scannlain's test demands.[78]

Judge Kleinfeld's test also avoids the narrowness problems of Judge Berzon's formulation. Judge Berzon argues for a very limited reading of the phrase "religious organization," effectively excluding from that classification all entities whose primary purpose is not limited to "voluntary gathering for prayer and religious learning."[79] Such a narrow reading would force the court to ignore many other

74. *See supra* notes 49–50 and accompanying text.

75. *Id*. at 1119.

76. *See id*. at 1130 (Kleinfeld, J., concurring); *id*. at 1133–34 (Berzon, J., dissenting).

77. *Id*. at 1133 (Kleinfeld, J., concurring) (alteration in original).

78. *Id*. at 1130.

79. *Id*. at 1148 (Berzon, J., dissenting).

obviously religious characteristics of an organization, thereby running contrary to the requirements of *Townley*. Judge Berzon's test could also run the risk of withholding the exemption from "'clearly' religious" organizations simply because such organizations engage in activities that are not limited to prayer and religious learning.[80] For instance, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the Court reviewed a Title VII claim involving a church's decision to terminate an employee from a church owned gym.[81] The Court upheld application of Title VII's exemption to the seemingly secular activities of this clearly religious organization, noting that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[82] Judge Berzon's test would fail to provide adequate deference to a large category of religious organizations whose functions include, in addition to voluntary prayer and religious learning, activities that might be viewed by a court as secular or nonreligious. Judge Kleinfeld's test, however, avoids such problems by allowing the court to review "[a]ll significant religious characteristics" of an organization, which, as in the case of World Vision or The Church of Jesus Christ of Latter-day Saints, will often include much more than prayer and study.

B. Balancing the Interests of Freedom of Religion and Individual Employment Rights

Apart from effectively accommodating the established Ninth Circuit precedents, Judge Kleinfeld's test also more effectively balances the competing interests of the First Amendment's religion clauses and the protection of individual employment rights provided for in Title VII.[83] History has demonstrated that "whenever religious

80. *Id*. at 1112 (majority opinion).

81. 483 U.S. 327 (1987).

82. *Id*. at 337.

83. For a discussion on why these interests come into conflict, see Duane E. Okamoto, Comment, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1379 (1987) ("On the one hand, allowing a religious group to practice religious discrimination in employment matters advances first amendment [sic] goals by allowing religious groups to keep their beliefs intact. On the other hand, however, allowing a religious group to discriminate may seriously infringe upon the individual employee's right to be free from discrimination, including discrimination based on religion.).

groups act as employers, the possibility exists that the groups' religious rights will conflict with individual employees' liberty rights."[84] Such conflicts raise significant challenges for reviewing courts given the fact that they must find a way to balance constitutional rights against rights guaranteed by what has been called "the most important civil rights legislation in American history."[85] Because any increase in one of those rights often comes at the expense of the other, any test formulated by the courts will often sacrifice one right for the other in attempting to create a workable standard.

Such was the case in *Spencer II*. Judge O'Scannlain's test, in an effort to avoid infringing on religious liberty—certainly a very worthy goal—created a test that could allow largely secular entities to infringe upon individual employment rights by escaping Title VII's prohibition on discrimination in the workplace. On the other end of the spectrum, Judge Berzon's test would greatly hamper the rights of religious organizations in favor of giving greater protection for employees. Both results would represent an unfortunate imbalance in the natural conflict between these competing rights. Judge Kleinfeld's test, although imperfect in other regards, provides a middle-of-the-road approach that would likely create a more workable balance between these interests. By allowing religious organizations to demonstrate their truly religious nature through largely objective standards, Judge Kleinfeld's test significantly protects religious freedom. However, by requiring a review of the extent and nature of an organization's money making operations, Judge Kleinfeld's test also provides protection for employees by making it less likely that a predominantly secular organization can take advantage of Title VII's religious organization exemption.

C. Potential Shortcomings of Judge Kleinfeld's Test

Importantly, although Judge Kleinfeld's test is the most effective of the three tests created in *Spencer II*, it does raise its own concerns. Because it involves a review of an organization's "exchange of goods or services,"[86] Judge Kleinfeld's test runs the risk of bumping up against the strict restraints of the Establishment Clause and entering

84. *Id*. at 1379.

85. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 1 (3d ed. 2010).

86. Spencer v. World Vision, Inc. (*Spencer II*), 619 F.3d 1109, 1133 (9th Cir. 2010).

what Judge O'Scannlain called a "constitutional minefield."[87] Because "the prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment,"[88] the courts have long been reluctant to penetrate the traditional "wall of separation"[89] between church and state. In *Lemon v. Kurtzman*, the Supreme Court established the primary test for determining when the government has violated the Establishment Clause. Under one of the prongs of the *Lemon* test, the Establishment Clause is violated "if there is excessive government entanglement with religion," which may exist where the government requires a "comprehensive, discriminating, and continuing state surveillance."[90] Fear of such entanglement has led the government to take a largely hands-off approach in many situations involving churches and religious organizations in order to avoid the appearance of a "continuing state surveillance."[91] In its most basic application, Judge Kleinfeld's test may not require such continuing surveillance, but reviewing courts would be wise to avoid such a searching inquiry that would begin to implicate establishment issues. Through such avoidance, courts can continue to protect the ever-important religious rights guaranteed by the First Amendment.

VI. CONCLUSION

The Ninth Circuit faced an unenviable challenge in *Spencer v. World Vision, Inc.* It is no easy task to formulate a workable test that remains faithful to existing precedent while appropriately balancing the religious freedoms guaranteed by the First Amendment and the individual employment rights protected under Title VII. Although the final holding in *Spencer II* was correct, two of the three tests formulated by the court failed to effectively deal with the competing

87. *Id.* at 1115.

88. New York v. Cathedral Acad., 434 U.S. 125, 132–33 (1977).

89. *See* Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) *in* THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1984); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

90. Lemon v. Kurtzman, 403 U.S. 602, 613, 619 (1971).

91. See NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, TAX EXEMPT ORGANIZATIONS: CASES AND MATERIALS (2d ed. 2008) for a discussion of the government's treatment of tax-exempt religious organizations.

interests and precedential constraints associated with the religious organization exemption of Title VII. Although it would be a stretch to say Judge Kleinfeld's test is "just right," of the three possible tests, his formulation strikes the most appropriate balance of the important competing rights at issue and should therefore guide the Ninth Circuit in future determinations regarding Title VII's religious organization exemption.

Brandon S. Boulter[*]

* J.D. Candidate, April 2011, J. Reuben Clark Law School, Brigham Young University.