THE NEW JERSEY SUPREME COURT ALLOWS CONSTITUTIONALLY FORBIDDEN ENTANGLEMENT OF THE STATE IN A CHURCH/MINISTER EMPLOYMENT RELATIONSHIP IN CONTRADICTION TO THE MINISTERIAL EXCEPTION, *MCKELVEY V. PIERCE*, 800 A.2d 840 (N.J. 2002).

By: Leslie K. Harrach*

I. INTRODUCTION

[1] The "ministerial exception" prohibits judicial involvement with the employment relationship between a church and minister.[1] The religion clause principles of the First Amendment of the United States Constitution bar ministers, or those performing religious duties, from challenging employment decisions of religious institutions.[2] It appears the New Jersey Supreme Court went astray of the First Amendment by its decision in *McKelvey v. Pierce* when it held that a priesthood candidate's claim of breach of implied contract against the Diocese of Camden for unwanted homosexual advances by his superiors during his lengthy seminary training could proceed without contradicting the principles of the First Amendment religion clauses.[3] The court concluded that neither the ministerial exception nor the First Amendment would bar McKelvey's claim.[4]

---

* J.D., Rutgers University School of Law – Camden, 2004; B.S., University of Arizona, 2001; Research and Writing Editor of Rutgers Journal of Law and Religion.

[1] McClure v. Salvation Army, 460 F.2d 553, 559-60 (5th Cir. 1972).

[2] *Id.*

[3] 800 A.2d 840, 860 (N.J. 2002). The New Jersey Supreme Court analyzed the claim under both the Free Exercise Clause and the Establishment Clause of the First Amendment to the United States Constitution. *Id.* at 847-60. The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Free Exercise Clause prohibits the state from interfering in religious beliefs or acts. *McKelvey*, 800 A.2d at 848. It also prohibits the state from involving itself in internal church management. *Id.* (citing EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996)); *see also* Kedroff v. St. Nicholas Cathedral of the

[2] The result of the New Jersey Supreme Court's decision is judicial involvement in a case that requires it to imply a contract and contract terms between a church and its ministerial candidate from their words and conduct, and the surrounding circumstances.[5] In doing this, the court must find that the Camden Diocese made implied representations or promises to its

---

Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)(holding that the Free Exercise clause protects right of churches "to decide for themselves, free from state interference, matters of church government."). State regulation that in any way inhibits or advances religion is prohibited by the Establishment Clause. *McKelvey*, 800 A.2d at 848. According to the New Jersey Supreme Court: "[t]he Establishment Clause prohibits states from . . . becoming too entangled in religious affairs, such as by enforcing religious law or resolving religious disputes." *Id.* at 849 (citing County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353 (N.J. 1992)(internal citations omitted)). The Camden Catholic Diocese' motion to dismiss McKelvey's claim relied on the Establishment Clause. *McKelvey*, 800 A.2d. at 849. The Diocese argued that, "[a]lthough the relationship between a student and university is generally a contractual one, a determination of a breach of an alleged 'understanding' in a purported contract between McKelvey and the Diocese would amount to excessive entanglement in violation of the Establishment Clause of the First Amendment." *Id.* at 847.

[4] *Id.*

[5] McKelvey v. Pierce, 776 A.2d 903, 913 (N.J. Super. Ct. App. Div. 2001), *rev'd*, 800 A.2d 840 (N.J. 2002). McKelvey's suit is based on claims of breach of implied contract. *Id.* at 905. His claim is that the Diocese violated "his right to be free of sexual harassment and unwanted sexual advances [that] is a right which can be implied by law into his agreement with the seminary." *Id.* at 912. An implied contract is formed by an interpretation of the parties' words, conduct and the surrounding circumstances. *See* Wanaque Borough Sewage Auth. v. West Milford, 677 A.2d 747, 752 (N.J. 1996)("courts often find and enforce implied promises by interpretation of a promisor's words and conduct in light of the surrounding circumstances.").

ministerial candidates to provide an atmosphere free of sexual discussion and distractions.[6] This entangles the church and state in a way that is prohibited by the First Amendment.[7]

[3] This note analyzes whether the New Jersey Supreme Court's holding is consistent with both the ministerial exception and the First Amendment. This note also compares the New Jersey Supreme Court's holding in *McKelvey* with the various situations in which the ministerial exception has been applied and the analyses of the various circuit courts and other lower federal and state courts in determining whether the exception applies. This note will discuss the New Jersey Supreme Court's overreliance on the Ninth Circuit's opinion in *Bollard v. California Province of the Society of Jesus*.[8] Further, this note considers the "primary duties of plaintiff" test expounded in *Rayburn v. General Conference of Seventh-Day Adventists*[9] to determine whether McKelvey's claim should fall under the exception and be barred. This note will explore

---

[6] *McKelvey*, 776 A.2d at 912. McKelvey would not be able to establish his claim by utilizing evidence of the religiously imposed obligation of celibacy as an implied representation by the Diocese because it would require an "inquiry into the extent and meaning of Church doctrine." *Id.* at 909. Thus, the court must delve into the church and ministerial candidate relationship to ascertain the parties' intentions, agreements and implied representations. *Id.* at 913.

[7] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

[8] 196 F.3d 940 (9th Cir. 1999).

[9] 772 F.2d 1164 (4th Cir. 1985). The Fourth Circuit in *Rayburn* looked to the function of plaintiff's position, rather than whether the plaintiff is an ordained minister. *Id.* at 1169. The court relied on principles of both the Free Exercise and Establishment Clauses of the First Amendment to arrive at its "primary duties of plaintiff" test. *Id.* at 1168-71. The court elicited a balance between church and state interests. *Id.* at 1168. The *Rayburn* court established that if the plaintiff's position was sufficiently spiritual, judicial involvement could not proceed due to the "constitutional concern for the unfettered right of the church to resolve certain questions." *Id.* *Rayburn* did not resolve the dispute as to whether the court or church should determine whether a plaintiff's duties are primarily religious in nature. *See id.*; *see also, e.g.*, Starkman v. Evans, 198 F.3d 173, 175-77 (5th Cir. 1999); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981).

whether, even if McKelvey's claim does not fit the "primary duties of plaintiff" test, it should be barred under a broad analysis for non-ministerial employee plaintiffs.[10] Finally, this note discusses the implications of the New Jersey Supreme Court's ruling for future ministerial candidates who in effect want the court to create and supervise contracts between them and the church.[11]

II. STATEMENT OF THE *MCKELVEY V. PIERCE* CASE

[4] In *McKelvey v. Pierce,* a Roman Catholic priesthood candidate sued the Catholic Diocese of Camden, New Jersey and several of its priests primarily for breach of an implied contract.[12] McKelvey claimed the Diocese subjected him to a hostile education and work environment on the basis that he was continuously subjected to sexual harassment in the form of homosexual

---

[10] *See generally, e.g.*, National Labor Relations Board v. Catholic Bishop of Chi., 440 U.S. 499 (1979)(holding that the National Labor Relations Board (NLRB) did not have jurisdiction to consider unfair labor practice complaints by Catholic high school teachers who provided religious training because of the religious nature of the teachers' duties); *Starkman*, 198 F.3d at 173 (finding a choir director qualified as minister for purposes of the ministerial exception because she participated in religious rituals and had numerous religious duties); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000) (holding that a choir director qualified as minister under the ministerial exception because functions of music are integral to spiritual and pastoral mission); *but see, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999)(ministerial candidate's claim of sexual harassment is not barred by the ministerial exception to Title VII).

[11] *McKelvey*, 776 A.2d at 912.

[12] McKelvey v. Pierce, 800 A.2d 840, 844 (N.J. 2002). McKelvey was a candidate for priesthood who had been educated and trained through the Diocese from 1989 to 1993. *Id.* at 845. He complained that despite reporting the homosexual harassment to all levels of superiors, he was "regularly and persistently subjected to unwanted homosexual advances during his lengthy seminary training." *Id.* at 844. McKelvey sought monetary damages for his lost time and "out-of-pocket costs". *McKelvey*, 776 A.2d at 905. The money damages were sought in the form of "[reimbursement] for his tuition costs and student loans, emotional suffering, loss of employment and loss of employability as a Roman Catholic priest." *McKelvey*, 800 A.2d at 846.

advances and discussions during his years in seminary training with the Diocese.[13] McKelvey's suit was grounded in implied contract rather than sexual harassment.[14]

[5] McKelvey became a priesthood candidate with the Catholic Diocese of Camden in April 1985 and continued his education and religious seminary training through November 1993.[15] In November 1993, McKelvey was granted a leave of absence during his priesthood internship due to the alleged sexual harassment.[16] In August 1995, when McKelvey had not returned from his leave of absence, the Diocese terminated its sponsorship of him for priesthood candidacy.[17] McKelvey filed suit in 1999, claiming breach of an implied contract based on the Catholic

---

[13] *McKelvey*, 800 A.2d at 844.

[14] *Id.* at 845-46. McKelvey claimed there were implied representations by the Diocese that his education and work atmosphere would be free from sexual conduct and harassment. *Id.* McKelvey's suit alleged breach of implied contract, breach of fiduciary duty and implied covenant of good faith and fair dealing, intentional infliction of emotional distress, fraud, and deceit. *Id.* at 846. McKelvey sought "reimbursement for his tuition costs and student loans, as well as damages for his emotional suffering, loss of employment, and loss of employability as a Roman Catholic priest." *Id.* at 846. The Diocese had assured McKelvey that they would cover his tuition and room and board when he was initially accepted as a priesthood candidate in 1985. *Id.* at 845. Yet, after he was terminated in 1995, the Diocese demanded reimbursement in the amount of $69,002.57. *Id.* at 846. McKelvey did not repay the loan and sought these costs as part of his monetary damages. *Id.*

[15] *McKelvey*, 776 A.2d at 907.

[16] *Id.* McKelvey took a voluntary leave of absence (apparently due to the alleged sexual harassment) during his final year of seminary training. *Id.* McKelvey had just completed his formal education through the Diocese of Camden, including obtaining an A.B. degree from the University of Scranton and graduate level education in theology and divinity, that same year. *Id.* McKelvey had begun his final year, which is an internship that is considered an important year of transition from seminary training and education into priesthood. *Id.*

[17] *Id.* After being terminated by the Camden Diocese, in November 1995 (two years after his leave of absence) McKelvey applied for admission to the priesthood ordination program at the Trenton Diocese and was rejected. *Id.* The reason for the rejection was not enunciated by either court's opinion.

Diocese's failure to remedy the alleged sexual harassment after being notified of the alleged harassment.[18]

[6] The New Jersey Superior Court Law Division, in dismissing McKelvey's complaint, reasoned that the court's involvement would violate the First Amendment by involving the court

[18] *Id.* at 905. This case stems from McKelvey's allegations contained in his second amended complaint. *Id.* McKelvey initially filed his complaint on March 12, 1999. *Id.* The complaint was dismissed for lack of subject matter jurisdiction, as was his amended complaint. *Id.* The Superior Court Law Division reasoned that the complaints presented claims of treatment contrary to church doctrine, which would require the court to interpret that church doctrine. *Id.* at 909. The court allowed McKelvey to reassert his claims in a non-religious context. *Id.* His second amended complaint alleged the breach of implied contract, among other contract causes of action. *Id.* at 905-06. On April 27, 2000, the Diocese' first motion to dismiss was denied. *Id.* at 906. McKelvey was ordered to present the Diocese with a new statement of claims and basis for the claims, and the parties were ordered to produce any documentation implying a contract between them. *Id.* at 906. On June 29, 2000, the Judge dismissed the McKelvey's second amended complaint, again for lack of subject matter jurisdiction. *Id.*

in church affairs.[19] The New Jersey Superior Court Appellate Division affirmed the Law Division's ruling for substantially the same reasons.[20]

[7] On appeal, the New Jersey Supreme Court reversed the decision of the Appellate Division, unanimously holding that the suit did not overly involve the court in religious matters, and therefore did not offend the First Amendment.[21] The New Jersey Supreme Court, however, did not decide whether McKelvey's claim would be successful.[22] Instead, the Court declared, "we express

---

[19] *Id.* at 905. The Law Division determined that in order to decide the case it would be required to involve itself in the church's administration thereby excessively entangling church and state in violation of the First Amendment religion clauses. *Id.* The Law Division found that, in proceeding with the case, it would require interpretation of "essentially religious documents," which "could only lead to violations of the First Amendment." *Id.* at 909.

[20] *Id.* at 912. The Appellate Division held that the plaintiff's claim would require it to imply a contract, thus, requiring the court to inquire into the internal workings of the church and excessively entangle the court with church administration. *Id.* at 912. The court stated: "[w]e are most reluctant to entertain plaintiff's implied contract claim here for fear of encroachment on church administration and polity in a sensitive matter of considerable contemporary concern." *Id.* at 914. The Appellate Division reasoned that if the court were to entertain McKelvey's claim against the Diocese it:

> would require the judicial branch to delve into religious matters outside our province, such as the conditions of the plaintiff's association with the Diocese; its disciplinary and supervisory decisions; whether plaintiff would have otherwise been ordained into the priesthood; and the extent to which he could be made whole from loss of a life of spiritual service, and the proper measure of compensation for the emotional pain he suffers from this deprivation.

Id. (citing Bollard v. Cal. Province of Soc'y of Jesus, 211 F.3d 1331, 1332 (9th Cir. 2000)).

[21] McKelvey v. Pierce, 800 A.2d 840, 860 (N.J. 2002).

[22] *Id.* at 860. The New Jersey Supreme Court did note that its decision "merely underscore[s] the theoretical potential for some of McKelvey's claims to pass muster and our conviction that the lower courts' wholesale rejection of McKelvey's complaint cannot withstand scrutiny" and

no opinion about the merits of McKelvey's claim that he was sexually harassed and, if he can prove it, whether he suffered any recoverable damages as a result."[23]

[8] Nonetheless, is this a subject with which the court should be involved to any extent? The First Amendment religion clauses prohibit secular court jurisdiction over internal church matters, such as McKelvey's claim.[24] To decide McKelvey's claim, the court would be required to interpret the intent of the church and its ministerial candidates and find that there was an implied contract that rendered an obligation on the church to act according to the contract's terms as claimed by McKelvey.[25]

III. THE MINISTERIAL EXCEPTION

[9] The "ministerial exception" to Title VII[26] is constitutionally based on the First Amendment religion clauses, and was created to protect religious organizations from judicial

---

that "[u]pon remand, McKelvey should be given an opportunity to demonstrate how each of his claims can be litigated without offending First Amendment principles." *Id.*

[23] *Id*.

[24] *See* U.S. CONST. amend. I.

[25] McKelvey, 776 A.2d at 913 ("[i]f we entertain plaintiff's suit here, our courts would have to imply the contractual terms relating to sexual advances by other seminarians and supervising priests because no such terms are explicit in the parties' undertaking"). The Appellate Division recognized the danger and inappropriateness of judicial involvement in this case because the court must "find a contractual obligation on the Diocese's part to provide a seminary and internship atmosphere, over the nine-year program, free from the distractions and undesirable conduct described by the plaintiff. Plaintiff, in effect, asks the court to establish and supervise a contractual relationship between a priest-in-training and the Diocese." *Id.* at 912.

[26] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2003). Title VII prohibits employers from making employment decisions on the basis of "race, color, religion, sex, or national origin." *Id.* The language of Title VII provides support that it is not intended to reach religious decisions: "[t]his title 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 . . . ." 42 U.S.C. § 2000e-1 (2003).

scrutiny in their employment decisions.[27] Because Title VII's language purported to include regulation of religious entities' employment decisions, the judiciary created the ministerial exception to bring Title VII in line with the First Amendment of the Constitution.[28]

[10] The ministerial exception was first articulated in 1972 by the Fifth Circuit in *McClure v. Salvation Army*.[29] In *McClure*, the plaintiff was a female ordained minister of The Salvation Army.[30] McClure claimed that she was discriminated against as a female minister in violation of Title VII.[31] The *McClure* court held that its involvement in the claim between a religious organization and its minister would require the court to review church practices and decisions, thereby "caus[ing] the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."[32] According to the Fifth Circuit, such involvement by the judiciary or legislature "could only produce by its coercive effect the very opposite of that separation of church and

---

[27] McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972). The ministerial exception initially was created to apply to sex discrimination cases under Title VII, but eventually expanded and became more about the plaintiff's position than the legal nature of the claim.

[28] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999).

[29] *McClure*, 460 F.2d at 560-61. The Fifth Circuit stated that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister." *Id.* at 561. The court reasoned that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-59.

[30] *Id.* at 554. The Salvation Army is considered a church. *Id.*

[31] *Id.* at 555. McClure alleged she received less pay and benefits compared to her male counterparts, and that she was discharged due to her complaints to superiors about these practices. *Id.*

[32] *Id.* at 560.

State contemplated by the First Amendment."[33] The *McClure* court held that Congress did not intend Title VII to regulate the relationship between church and minister.[34]

[11] Several courts have applied the ministerial exception since its inception in 1972.[35] Among the circuits and lower courts, it is vague and imprecise as to how the three-decade-old ministerial exception applies and when it is appropriate to utilize the exception. The United States Supreme Court has not specifically considered the ministerial exception, but it has recognized that the First Amendment prevents government regulation of religious organizations' operations if it creates a significant risk of interference with internal governance.[36]

[12] The state and circuit courts that have considered whether to apply the ministerial exception have employed different tests to determine which employees constitute a "minister"

---

[33] *Id.*

[34] *See id.*; *see also, generally*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a) at § 702.

[35] *See generally, e.g.*, Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Combs v. Cen. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Bell v. Presbyterian Church, 126 F.3d 328, 331 (4th Cir. 1997); E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Hosp., 21 F.3d 184 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Church, 929 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir.1981); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002); E.E.O.C. v. Roman Catholic Diocese, 48 F.Supp 2d. 505 (E.D.N.C. 1999).

[36] *See generally* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985). *See also* McClure, 460 F.2d at 560 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952))(the ministerial exception stems from the United States Supreme Court's statement that there is "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.").

under the exception.[37] The most widely used test is the "primary duties of plaintiff" test.[38] Under this test, the court focuses on the function of the plaintiff's current or desired position.[39] When the duties are primarily "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," the position falls under the ministerial exception, and the court should not adjudicate the claim.[40]

[13] Other courts have applied the ministerial exception to cases where the plaintiff was a lay employee and not a "minister."[41] For example, various courts have barred claims alleged under the ministerial exception for plaintiffs who were teachers in religious schools,[42]

---

[37] *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979); *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 795; *Young*, 21 F.3d at 184; DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993); *Catholic Univ. of Am.,* 83 F.3d at 455; *Rayburn*, 772 F.2d at 1169; E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1370 (9th Cir. 1986); *Southwestern Baptist Theological Seminary*, 651 F.2d at 283-84; E.E.O.C. v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980); *McClure*, 460 F.2d at 553; Powell v. Stafford, 859 F.Supp. 1343 (D.Colo. 1994); Maguire v. Marquette Univ., 627 F.Supp. 1499, 1504-05 (E.D. Wis. 1986); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988).

[38] *Rayburn*, 772 F.2d at 1169-69.

[39] *Id.*

[40] *Id.* at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979).

[41] *See, e.g.*, *Catholic Bishop of Chi.*, 440 U.S. at 490; *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 795; *Starkman*, 198 F.3d at 173; *Young*, 21 F.3d at 184; *DeMarco*, 4 F.3d at 172; *Rayburn*, 772 F.2d at 1169; *Fremont Christian Sch.*, 781 F.2d at 1370; *Southwestern Baptist Seminary*, 651 F.2d at 283; *McClure*, 460 F.2d at 553; *Catholic Univ. of Am.,* 83 F.3d at 455; *Powell*, 859 F.Supp. at 1343; *Southwestern Baptist Theological Seminary*, 651 F.2d at 283-84; *Assemany*, 434 N.W.2d at 238; *Macguire*, 627 F.Supp. at 1504-05; *Miss. College*, 626 F.2d at 485.

[42] *See, e.g.*, *Catholic Bishop of Chi.*, 440 U.S. at 490 (finding that the National Labor Relations Board could not exercise jurisdiction over lay faculty members of church-operated schools because it would violate the Religion Clauses of the First Amendment); *Powell*, 859 F.Supp. at 1346-48 (opining that the ministerial exception applied to theology teacher at Catholic high

choir directors or musicians,[43] Nuns,[44] and probationary ministers.[45] It has long been recognized by the judiciary that ordination is not a prerequisite for the ministerial exception to apply.[46] Instead, application of the ministerial exception hinges on the function of the plaintiff's position

---

school); *Southwestern Baptist*, 651 F.2d at 283-84 (classifying seminary faculty as ministers under the ministerial exception); *Macguire*, 627 F.Supp. at 1504-05 (holding that theology professor's claim would be barred under the ministerial exception); *but see Holy Cross High Sch*., 4 F.3d at 172 (determining that a claim by a teacher in private religious school was not barred by ministerial exception); *Miss. College*, 626 F.2d at 485 (holding that the ministerial exception did not bar application of Title VII to relationship between religious university and its faculty); *Fremont Christian Sch*., 781 F.2d at 1370 ("duties of the teachers . . . do not fulfill the function of a minister.").

[43] *Starkman*, 198 F.3d at 177 (including a choir director in the ministerial exception because she "participated in religious rituals and had numerous religious duties" *Id.* at 177.); *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 797 (holding that a claim of sex discrimination by a music director of Catholic elementary school was barred by the ministerial exception because her duties played an integral role in the Catholic church's spiritual life); *Assemany*, 434 N.W.2d at 238 (finding that a church organist met requirements for "minister" under the ministerial exception because he "was intimately involved in the propagation of Catholic doctrine and the conduct of Catholic liturgy.")

[44] *Catholic Univ. of Am.,* 83 F.3d at 455. The D.C. Circuit Court of Appeals held a Catholic nun's sex discrimination claim was exempted by the ministerial exception. *Id.* at 462-64.

[45] *Young*, 21 F.3d at 184. The Seventh Circuit Court of Appeals held that the First Amendment barred a probationary minister's claims of sex and race discrimination. *Id.*

[46] *Rayburn*, 772 F.2d at 1168-69. *See also* McClure v. Salvation Army, 460 F.2d 553, 559-60 (5th Cir. 1972); *Southwestern Baptist Seminary*, 651 F.2d at 283; Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)(stating that in order to determine whether plaintiff's position falls under the ministerial exception, the court must look at whether "duties [would] consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship"). *But see* Weissman v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994)(finding an office administrator of a synagogue was not a "minister" under the ministerial exception); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993)(holding that a lay teacher in elementary parochial school did not fall under ministerial exception); *Holy Cross High Sch*., 4 F.3d at 172 (interpreting the ministerial exception as not applying to a lay math teacher at Catholic high school); *Miss. College*, 626 F.2d at 485 (finding that college faculty members did not fall under the ministerial exception because "[t]hey neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine.").

with the church or religious organization.[47] Several courts have applied the ministerial exception to cases like *McKelvey* that do not involve ordained ministers. In these cases, the courts considered the plaintiff's duties and functions of their positions rather than simply whether or not they were ordained.[48]

[14] In accord with these decisions, although McKelvey was not yet ordained, he had completed eight of the nine required years of seminary training with the Catholic Diocese and was in his final year of training before ordination.[49] The Appellate Division found that McKelvey's claim fell under the ministerial exception because "[h]is 'future in the priesthood is at the heart of his claim. This directly implicates the minister-church relationship, an undisputed matter of core ecclesiastical concern.'"[50] The Appellate Division therefore believed that its inquiry into such a relationship would overly entangle it with internal workings of the church which could present a constitutional violation of First Amendment principles.[51] The court

---

[47] *See Rayburn*, 772 F.2d at 1168-69.

[48] *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499 (1979)(holding that the National Labor Relations Board did not have jurisdiction to consider unfair labor practice complaints by Catholic high school teachers who provided religious training because of the religious nature of the teachers' duties); *Starkman*, 198 F.3d at 177 (finding that a choir director qualified as minister for purposes of the ministerial exception because she "participated in religious rituals and had numerous religious duties"); *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 797 (opining that a choir director qualified as minister under the ministerial exception because function of music is "integral to spiritual and pastoral mission"). *But see* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999)(allowing Jesuit candidate's claim for sexual harassment to proceed under the ministerial exception).

[49] McKelvey v. Pierce, 776 A.2d 903, 907 (N.J. Super. Ct. App. Div. 2001). McKelvey was close to ordination since he took his leave of absence during his final year of internship.

[50] *Id.* at 914 (quoting *Bollard*, 211 F.3d at 1331).

[51] *McKelvey*, 776 A.2d at 914. The Appellate Court found that adjudicating the claim would require the court to find the Catholic Church had an implied contractual obligation to provide religious training "free from the distractions and undesirable conduct described by the plaintiff".

reasoned that because the plaintiff's claim was based in contract, and there was no express contract, it would necessarily have to find the Diocese had a contractual obligation to provide a specific environment to McKelvey, which would require the court to inquire into the Diocese's intentions.[52]

[15] On the contrary, although the New Jersey Supreme Court acknowledged the ministerial exception, it found that McKelvey was not a minister and therefore did not fit within the

---

Id. at 912. The Appellate Court held that this inquiry into the church's seminary training program would overly entangle the court in church affairs contrary to the First Amendment. *Id.* The Appellate Court analyzed the judiciary's potential entanglement under the Establishment Clause, relying on a test expounded by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *McKelvey*, 776 A.2d at 910-11. Of the three prongs of the "*Lemon* test" only the entanglement prong applied to McKelvey's claim. *Id.* at 910. The entanglement prong forbids government from enforcing religious doctrine, as well as from resolving religious disputes. *Id.* The Appellate Court also analyzed the case under the Free Exercise Clause, utilizing the *Sherbert-Yoder* test established by the United States Supreme Court in 1972. *Id.* at 911 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963)). Under the *Sherbert-Yoder* test, "any incidental burden on the free exercise of religion may be justified only by a compelling state interest in the regulation of the subject within the State's power to regulate." *McKelvey*, 776 A.2d at 911 (citing *Sherbert*, 374 U.S. at 406; South Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch., 696 A.2d 709 (N.J. 1997); Gallo v. Salesian Soc'y, Inc. 676 A.2d 580 (N.J. App. Div. 1996)). The *Sherbert-Yoder* test requires a balancing of religious freedoms and compelling state interests. *McKelvey*, 776 A.2d at 911. According to the Appellate Court: "[a] judge should ask whether the claims are religious in nature, whether state action burdens exercise of the religion, and whether there is a state interest sufficiently compelling to override the right of free exercise." *Id.* (citing *St. Teresa*, 696 A.2d at 719).

[52] *McKelvey*, 776 A.2d at 912. The Appellate Court recognized that the legal basis for McKelvey's claim in a religious context was unprecedented and difficult to determine. *Id.*

exception.[53] Thus, the New Jersey Supreme Court remanded the case for the lower court to delve into affairs of church management and determine whether an implied contract exists between the Diocese and McKelvey.[54]

IV. THE NEW JERSEY SUPREME COURT'S REASONING

[16] The New Jersey Supreme Court held that the Superior Court Law Division and Appellate Division erred in dismissing McKelvey's complaint.[55] The New Jersey Supreme Court recognized that a state could not constitutionally encroach upon internal church management and

---

[53] McKelvey v. Pierce, 800 A.2d 840, 857-58 (N.J. 2002). While McKelvey's claim was not brought under Title VII, the New Jersey Supreme Court made a comparison of the two and found that while "[t]his case differs from a Title VII action in form[,] . . . the underlying wrongful conduct is alleged to be the same." *Id.* According to the New Jersey Supreme Court, "[t]he ministerial exception developed to protect churches from government action that interferes with a church's internal affairs management, such as the core right to choose and regulate members of its own clergy." *Id.* at 851 (citing Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301 (11th Cir. 2000)). The court recognized that "where a minister seeks redress for termination[,] . . . or other similar decision[s] involving, at their heart, a church's core right to decide who (and in what manner he or she) may propagate its religious beliefs, the Establishment Clause clearly prevents review by a civil court." *McKelvey*, 800 A.2d at 849 (citing *Bollard*, 196 F.3d at 946). The New Jersey Supreme Court acknowledged that the application of the ministerial exception to sexual harassment claims brought by clergy members against churches furthered the well-being of the church through internal church governance, including the essential right to supervise ministers. *McKelvey*, 800 A.2d at 851 (citing Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002)).

[54] *McKelvey*, 800 A.2d at 847, 860.

[55] *Id.* at 857-58. The New Jersey Supreme Court held that the lower courts erred on two grounds. *Id.* First, religion clause protections are "highly nuanced and not monolithic." *Id.* Secondly, the lower courts did not analyze "each and every claim contained in McKelvey's complaint to determine whether adjudication would require a determination of competing religious visions or interfere with church administration or choice." *Id.* at 857.

governance.[56] The court relied on other jurisdictions that had applied First Amendment principles in cases that were factually similar to McKelvey's case to conclude that deciding McKelvey's claim would not encroach on the Diocese' management and internal affairs.

[17] The New Jersey Supreme Court relied heavily on the Ninth Circuit's decision in *Bollard v. California Province of the Society of Jesus*.[57] The *Bollard* and *McKelvey* cases are similar in that both claims stem from alleged sexual harassment claims by ministerial candidates against the church.[58] The legal basis for the claims, however, are vastly different since McKelvey's claim is grounded in implied contract, as opposed to sexual harassment which was the basis in *Bollard*.[59] While Bollard filed a timely sexual harassment claim, McKelvey was beyond the statute of limitations for such a claim and, therefore, filed a claim for breach of implied contract.[60] McKelvey asked the court to imply a contract in law or in fact between himself and

---

[56] *Id.* at 848-49. "The Free Exercise Clause . . . provides institutional protection by forbidding governmental action from 'encroaching on the ability of a church to manage its internal affairs.'" *Id.* (quoting E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996)). The New Jersey Supreme Court also analyzed both the substantive and procedural entanglements under the Establishment Clause. *McKelvey*, 800 A.2d at 849-51. Substantive entanglement occurs when the state impinges on the church's freedom to choose, such as choosing its clergy. *Id.* at 850. Procedural entanglement concerns "protracted legal process pitting church and state as adversaries." *Id.* (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)). The New Jersey Supreme Court also cites to *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), for its proposition that "[i]t is not only the conclusions that may be reached by the [court] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *McKelvey*, 800 A.2d at 850 (internal citations omitted).

[57] *Id.* at 853-54; Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

[58] *Bollard*, 196 F.3d at 944; *McKelvey*, 800 A.2d at 844-45.

[59] *McKelvey*, 800 A.2d at 845-46; *Bollard*, 196 F.3d at 944.

[60] *Bollard*, 196 F.3d at 944; *McKelvey*, 800 A.2d at 844.

the Catholic Diocese.[61] Thus, the *Bollard* case is not parallel to McKelvey's claim, as the New Jersey Supreme Court suggested in its decision.

[18] The plaintiff in *Bollard* was a candidate for ordination as a Jesuit priest.[62] His complaint alleged sexual harassment by his superiors during his priesthood training from 1990-1996, which was severe enough for him to leave the order in 1996.[63] Bollard claimed the Society of Jesuits violated Title VII by allowing the sexual harassment to occur.[64] The Ninth Circuit, in deciding *Bollard*, realized that the religion clauses of the First Amendment required narrow interpretation Title VII in order to avoid state interference in the church-minister relationship.[65] The Ninth Circuit held that extending the ministerial exception to protect disciplinary inaction in Bollard's sexual harassment claim was too far removed from the constitutional protection intended by the Free Exercise Clause, even though ministers were involved as both the target of inaction and as the harasser.[66]

---

[61] *McKelvey*, 776 A.2d at 912.

[62] *Bollard*, 196 F.3d at 944. Bollard became a candidate in the order of the Society of Jesus, training for Roman Catholic priesthood as Jesuits. *Id.* He was a novice of the order in San Francisco, California where he and other men trained and studied to be ordained as a Jesuit. *Id.*

[63] *Id.* Bollard alleged the sexual harassment involved unwelcome sexual advances, discussions and materials. *Id.* He reported the conduct but no action was taken to correct the conduct. *Id.*

[64] Bollard v.Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (3d Cir. 1999). Bollard, unlike McKelvey, asserted a federal cause of action under Title VII. *See id.* Bollard also asserted "state law claims for failure to investigate, for constructive wrongful discharge, and for breach of contract." *Id.*

[65] *Id.* at 945.

[66] *Id.* at 947.

[19] The *Bollard* court also analyzed the implications of the Establishment Clause on the claim.[67] The Ninth Circuit found that the "potential for protracted government surveillance of church activities poses the gravest concern under the Establishment Clause." [68] Still, the Ninth Circuit held that Bollard's sexual harassment claim did not cause a "sufficiently significant" entanglement of church and state that would violate the Establishment Clause.[69]

[20] The Ninth Circuit in *Bollard* held that allowing Bollard's federal cause of action to proceed did not mean the state law claims could also proceed.[70] The court recognized, but did not address, that there is also a ministerial exception to state law actions that might interfere with the church's right to regulate and choose its ministers.[71] The court left the question of whether the ministerial exception applied to Bollard's state law claims to the district court on remand.[72]

[21] In contrast to the plaintiff's sexual harassment based claim in *Bollard*, McKelvey's suit was based on the theory of implied contract.[73] Thus, in McKelvey's case, the court is required to interpret religious dealings to imply a contract - an involvement that was not required by the Ninth Circuit in *Bollard*. According to the New Jersey Supreme Court, if McKelvey would have filed a timely sexual harassment claim under Title VII, it would not have been prohibited

---

[67] *Id*. at 948-50.

[68] *Id.* at 949 (citing Aguilar v. Felton, 473 U.S. 403, 413 (1985)).

[69] *Bollard*, 196 F.3d at 949.

[70] *Id.* at 950. Bollard's state law claims included a breach of express contract claim. *Id.* at 944. Unlike McKelvey's claim, which was based solely in state law, Bollard's breach of contract claim did not require a contract to be implied. *See id.*

[71] *Id.* at 950. The court went on to state: "[w]hether the exception applies in a particular instance will depend on the nature of the state law claim and its associated remedy . . . ." *Id.*

[72] *Id.*

[73] McKelvey v. Pierce, 800 A.2d 840, 844 (N.J. 2002).

on First Amendment principles.[74] The New Jersey Supreme Court held that the relationship between McKelvey and the church did not automatically bar the claim because it was "an otherwise secular dispute."[75] The court reasoned that the claim did not offend the First Amendment because it would not require the court to "[interpret] dogma or interfere with church administration."[76]

[22] The New Jersey Supreme Court found that while the ministerial exception barred McKelvey's claims for "ordination or employment" as a priest, it was possible for McKelvey to seek money damages for the benefit that the Diocese garnered from his free labor.[77] Thus, while

---

[74] *Id*. at 858.

[75] *Id*. at 857.

[76] *Id*. at 858. The court limited the evidence that could be used by the plaintiff:

> McKelvey may not rely on evidence regarding the vow of celibacy or other church teachings on sexual behavior to establish that his contract bore with it an implied promise that he would be free from sexual harassment. Such an inquiry would require a court to interpret the celibacy vow and related doctrine in contravention of the First Amendment's guarantees. But McKelvey may argue that, like all similar secular contracts, his agreement with the Diocese carried with it a covenant of good faith and fair dealing that defendants' conduct violated.

Id. at 859.

[77] *Id*. The New Jersey Supreme Court stated:

> Clearly, the ministerial exception interdicts any claims for ordination or employment as a priest and, to that extent, the motion to dismiss was properly granted. However, McKelvey might, without offending First Amendment principles, seek money damages for the benefit defendants received from his free or reduced cost labor as an intern in various diocesan churches and . . . seek an order prohibiting defendants from attempting to recoup . . . tuition, book and fee costs.

Id.

McKelvey could not ask the court to compel the church to employ or ordain him without violating the First Amendment, the New Jersey Supreme Court stated that he could seek monetary reimbursement for his years of unpaid labor without offending the constitution.[78] The New Jersey Supreme Court further believed that testimony could establish a fiduciary duty on the part of McKelvey's superiors, based on the relationship between the two, without entangling the court with religion.[79] Therefore, the New Jersey Supreme Court allowed McKelvey's claim to proceed and remanded it to the Superior Court.[80]

---

[78] *Id.* During his seminary training, McKelvey provided free labor in the Catholic Diocese' churches through his position as an intern. *Id.*

[79] *Id.* at 859-60. The New Jersey Supreme Court believed:

> Presumably testimony could establish, as a fact, the hierarchical structure in seminary education; that the mentors and spiritual director defendants were, in that hierarchy, in dominant positions over McKelvey; that they were persons to whom a seminarian was expected to turn for counseling and guidance; and that they violated the duty of trust implicit in the relationship. Such evidence would not be admitted for an assessment of its truth or validity or the extent of its divine approval or authority, but only to establish the character of defendants' relationship with McKelvey. If established, those claims, and others lurking in the margins of McKelvey's complaint, could give rise to monetary damages, the imposition of which would not excessively entangle church and state.

Id. at 860 (internal citations omitted). The New Jersey Supreme Court reasoned that by establishing a fiduciary duty whereby the church, as fiduciary, would be liable for breach of duty of loyalty and care resultant from failure to protect from sexual harassment, McKelvey could proceed against the Diocese without requiring the court's involvement in religious doctrine. *Id*.

[80] *Id.*

V. ANALYSIS OF THE NEW JERSEY SUPREME COURT'S REASONING AND HOLDING, AND ITS IMPLICATIONS

[23] The reasoning and analysis by the New Jersey Supreme Court is inconsistent with the ministerial exception established under the church autonomy doctrine.[81] The New Jersey Supreme Court's decision will require the court to delve into matters of pure church polity and administration in order to imply the contractual obligation on which McKelvey's claim is based.[82] The court will be required not only to interpret the church's beliefs and intentions towards its seminary members, but also how that relationship should and will proceed.[83]

---

[81] *Id.* at 851. The ministerial exception stems from the church autonomy doctrine. *Id.* The church autonomy doctrine is rooted in both First Amendment religion clauses. *Id.* The church autonomy doctrine "protect[s] a church's freedom to regulate its own internal affairs by prohibit[ing] civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." *Id*. (citing Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) (second alteration in original). "The church autonomy doctrine is also based on a long line of Supreme Court cases that affirm[s] the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well a those of faith and doctrine.'" *McKelvey*, 800 A.2d at 851 (quoting Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)) (alteration in original).

[82] McKelvey v. Pierce, 776 A.2d 903, 913 (N.J. Super. Ct. App. Div. 2001).

[83] *Id.* In order for a court to decide the *McKelvey* matter, it would at least be required to delve into church affairs to preliminarily determine that there was an implied contract, because such contracts "are born by interpretation of the words and conduct" of the parties involved. *See* Woolley v. Hoffmann-LaRoche, 491 A.2d 1257, 1278 (N.J. 1985)(noting that an implied contract depends on the parties' intent garnered from the language used and all attending circumstances). The New Jersey Superior Court, Appellate Division realized in *McKelvey* that it would be required to interpret the intent of the Catholic Diocese and its ministerial candidate:

> If we entertain plaintiff's suit here, our courts would have to imply the contractual terms relating to sexual advances by other seminarians and supervising priests because no such terms are explicit in the parties' undertaking. Implied contracts are products of the interpretation of words and conduct by judges or questions of law to be decided by a court. They are legal creations.

Because there is no express contract, the court would be required to establish a contract and the terms of that contract based on the conduct and words of the Diocese and McKelvey, and the surrounding circumstances of their relationship.[84]

[24] Unlike the cases that New Jersey Supreme Court relied on to allow McKelvey's claim to proceed, McKelvey's claim is based in implied contract.[85] Consequently, the New Jersey courts must interpret the "mind" of the Camden Catholic Diocese to find that the implied representations alleged by McKelvey exist in order for the claim to proceed.[86] This is because the intent of the parties must be determined in order to imply a contract and its terms, which McKelvey asks the court to do.[87]

[25] An implied contract is a legal creation that establishes a contractual obligation that does not expressly exist.[88] A contract can be implied from the parties' words and conduct, the surrounding circumstances, or the attendant circumstances of the employment.[89] Since there is no written contract and McKelvey relies on the Diocese's "implied representations" the court

---

McKelvey, 776 A.2d at 913 (citing Wanaque Borough Sewage Authority v. West Milford, 677 A.2d 747 (N.J. 1996)).

[84] *McKelvey*, 776 A.2d at 913.

[85] *McKelvey*, 800 A.2d at 860.

[86] *Id.* According to the D.C. Circuit: "entanglements might result from a protracted legal procedure which might involve subpoenas, discovery, and other tools designed to probe the *mind of the church*." Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (citing *Rayburn*, 772 F.2d at 1170-71) (emphasis added).

[87] *McKelvey*, 800 A.2d at 860.

[88] *McKelvey*, 776 A.2d at 913.

[89] White v. Atlantic City Press, 313 A.2d 197, 203 (1973); 27 AM. JUR. 2D *Employment Relationship* § 13 (1996).

must determine the scope of the religious employment and educational relationship, and the intentions of both parties with regard to that relationship.[90]

[26] In order for McKelvey to establish a claim for breach of implied contract, the court will necessarily be required to "probe the mind" of the Camden Catholic Diocese, to imply both that a contract exists and to imply the terms of the contract.[91] In order to determine that the terms are as McKelvey alleges, the court must delve into the Diocese's intentions to determine if it represented that it would provide a specific atmosphere devoid of distractions and discussions concerning sexuality.[92] Even if an implied contract and terms are established, and are as McKelvey claims them to be, the court would be required to weigh the truth and severity of the claim in a religious context.[93] This analysis will be required to determine whether there was a "substantial breach of contract in the seminary training, college and parish-internship context."[94] The court's involvement both in implying a contract and its terms, and analyzing the truth and gravity of McKelvey's claims against the Diocese entangles the state in internal church matters that contradict the First Amendment.

---

[90] *McKelvey*, 776 A.2d at 908. It is a question of fact to be determined "whether the parties acted in a manner sufficient to create implied contractual terms." *See* Reynolds v. Palnut Co., 748 A.2d 1216, 1220-21 (N.J. Super. Ct. App. Div. 2000). In New Jersey, when implying contract terms the fact finder must determine "[t]he legitimacy of the representations and reasonableness of the employees' reliance . . . ." *See*, *e.g.*, Labus v. Navistar Int'l Transp. Corp., 740 F.Supp. 1053, 1063 (D.N.J. 1990).

[91] *McKelvey*, 776 A.2d at 908.

[92] *Id.* at 912.

[93] *Id.* at 913.

[94] *Id.*

A. Analysis of the Soundness of the New Jersey Supreme Court's Reasoning and Holding

[27] The New Jersey Supreme Court reasoned that the lower courts were incorrect when they stated that, "any dispute between a ministerial-type plaintiff and his or her church" is beyond the jurisdiction of secular courts.[95] The New Jersey Supreme Court determined that to fall under the ministerial exception, there must be a "*decision* of core ecclesiastical concern, a decision, in other words, where the *dispute* truly is *religious*."[96] The Supreme Court held that McKelvey's breach of contract claim did not involve an ordination or employment decision by the Diocese and, therefore, did not fall under the ministerial exception.[97] However, the opposite conclusion is at least arguable. McKelvey had completed his formal education and was performing internship duties when he took his leave of absence.[98] The Camden Diocese terminated McKelvey's candidacy for ordination into the priesthood, which certainly is an ordination or

---

[95] McKelvey v. Pierce, 800 A.2d 840, 857 (N.J. 2002). The New Jersey Superior Court Appellate Division expressed its concern that the court would become too entangled with church affairs if it "were to impose implied contract terms on the conditions of seminary training for priesthood candidates, absent clear legislative command." *McKelvey*, 776 A.2d at 913.

[96] *McKelvey*, 800 A.2d at 857-58 (emphasis in original).

[97] *Id.* at 858. The New Jersey Supreme Court stated:

> To be sure, where an ecclesiastically-based action clearly is present, such as the propriety of a church's *choice* concerning the hiring, termination, relocation, benefits, or tenure of a person whose function at the church concerns the propagation of its faith, the First Amendment shields the religious organization from suit. That is not the case here. No choice regarding McKelvey's ordination or employment was exercised by the Diocese.

Id. (emphasis in original).

[98] *McKelvey*, 776 A.2d at 907.

employment decision.[99] The policy behind the ministerial exception of protecting church freedom to regulate its internal affairs supports the conclusion that McKelvey's claim falls under the exception.[100]

[28] The New Jersey Supreme Court's decision inherently chastised the lower courts' refusal to undertake a review of McKelvey's claim due to fear of offending the First Amendment religion clauses.[101] However, the lower courts did not simply refuse to entertain McKelvey's claim without an analysis.[102] The Superior Court Law Division dismissed McKelvey's original complaint because it alleged a violation of his "rights to be treated according to the doctrines of the Catholic Church," the adjudication of which would require the court's analysis of church doctrine.[103] McKelvey then filed an amended complaint.[104] The Law Division also dismissed this complaint which relied on the Diocese's mission statement,[105] because the mission statement did not state a promise to McKelvey that he would be free from sexual advances.[106] Thus, the

---

99 *Id.*

100 *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002).

101 *McKelvey*, 800 A.2d at 858. The New Jersey Supreme Court stated: "both the trial court and the Appellate Division declined to decide whether McKelvey had an implied contract with the Diocese." *Id*. at 847. This statement is not wholly accurate; rather the lower courts realized after analysis that the courts could not constitutionally establish a contract and its terms between the Diocese and McKelvey. *See infra* text accompanying notes 109-113.

102 *See McKelvey*, 776 A.2d at 909, 912-914.

103 *Id.* at 909. The Superior Court Law Division dismissed the original complaint but left McKelvey with the "opportunity to amend his complaint to assert claims in a non-religious context." *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

court held that further inquiry of the claim would violate the First Amendment.[107] McKelvey then filed his second amended complaint alleging breach of implied contract.[108]

[29] In deciding the Diocese's motion to dismiss McKelvey's second amended complaint, the Law Division ordered the parties to produce documents before it would consider the matter.[109] After review of these documents, the Law Division found that McKelvey had not established an enforceable contract.[110] The court then went on to determine that any further review of the religious documents would require the court to engage in an interpretation of wholly religious documents.[111] The Superior Court Appellate Division similarly found that the evidence on the record revealed no express contract and that in order to imply a contract, the court would have to delve into the church's seminary training and internship program and perform a "legal monitoring of religious aspirants' and their peers' and supervisors' sexual proclivities."[112] The Appellate Division also held that the inquiry by the court necessary to establish an implied contract would excessively entangle the court in church administration and polity.[113]

---

[107] *Id.*

[108] *Id.* The second amended complaint is the subject of the New Jersey Supreme Court's decision. McKelvey v. Pierce, 800 A.2d 840, 844 (N.J. 2002).

[109] *McKelvey*, 776 A.2d at 909.

[110] *Id.*

[111] *Id.* In addition, the Law Division was satisfied that the additional documents sought by McKelvey were not "reasonably calculated to lead to discovery of evidence that a contract between plaintiff and defendants existed." *Id.* at 909-10.

[112] *Id.* at 912.

[113] *Id.* at 913-14. The Appellate Division relied on the New Jersey Supreme Court's opinion in *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218 (N.J. 1992), to hold that McKelvey's claim "does not entangle the court with the doctrines of the Roman Catholic Church

[30] The New Jersey Supreme Court stretched both law and facts in order to determine and suggest possibilities and presumptions, no matter how thin the possibility, to allow McKelvey to bring and prove a claim that the court should have no role in deciding.[114] Regardless of which of the court's suggested possibilities McKelvey was to employ, it is difficult, if not impossible, to understand how the court could find for the plaintiff without delving into church administration to determine if there is an implied contract, implied covenant of good faith and fair dealing, or fiduciary duty.[115]

---

but certainly does entangle us with respect to the polity and administration of the Church." *McKelvey,* 776 A.2d at 914. The New Jersey Supreme Court previously recognized in *Alicea* that,

> [i]n assessing the extent to which the dispute implicates issues of doctrine or polity, factors such as the function of the employee under the relationship sought to be enforced, the clarity of contractual provisions relating to the employee's function, and the defendant's plausible justifications for its actions should influence the resolution of that threshold question.

608 A.2d at 223. In McKelvey's case there are no clear contractual provisions. *McKelvey*, 776 A.2d at 912. Because no express contract terms exist, the court must interpret all interactions between and intentions of the Catholic Diocese and McKelvey to establish the existence of a contract and its terms. *Id.*

[114] McKelvey v. Pierce, 800 A.2d 840, 859 (N.J. 2002). The New Jersey Supreme Court pointed to several possible ways that McKelvey could set forth and prove a claim for damages against the Camden Diocese and its priests. *Id.* For example, the supreme court suggested McKelvey could establish an implied covenant of good faith and fair dealing, which the Diocese violated by not providing an environment free of sexual harassment. *Id.* The court went on to suggest that McKelvey "might . . . seek money damages for . . . free or reduced cost labor" that he provided during his internships with the Diocese. *Id.* In addition, the court suggested that testimony of church officials could show a fiduciary duty existed and was breached by the Diocese and its priests. *Id.* at 859-60.

[115] *McKelvey*, 776 A.2d at 908. McKelvey's other claims include intentional infliction of emotional distress, fraud, deceit, breach of fiduciary duty, and breach of implied covenant of good faith and fair dealing. *Id.*

[31] McKelvey's only available claim at the time he filed suit was breach of implied contract.[116] McKelvey did not file suit until 1999, nearly four years after his termination by the Diocese.[117] Other than an implied contract claim, McKelvey had no other recourse available.[118] The other alternative causes of action McKelvey may have established would not require court involvement that would offend the First Amendment.[119] However, the other legal bases for his claim were foreclosed by the statute of limitations.[120] The fact that McKelvey sat on his claim for nearly four years thereby limiting the available causes of action to contract claims, which can only be proved through the court's interpretation of church intentions to imply a contractual obligation, should not be reason for the court to allow the claim to proceed in contradiction to the First Amendment.

[32] The New Jersey Supreme Court relied on the Ninth Circuit's holding in *Bollard*, to arrive at its conclusion that McKelvey's claim was not barred by the First Amendment religion

---

[116] *Id.* at 906.

[117] *Id.* at 905.

[118] *Id.* at 905, 912. The statute of limitations for filing a sexual harassment suit is two years. *Id.* at 912 (citing Montells v. Haynes, 627 A.2d 654 (N.J. 1993)).

[119] *McKelvey*, 776 A.2d at 912. McKelvey could have filed a sexual harassment claim under New Jersey state law, which would not have required the court to delve into church affairs to imply a contract. *Id.* (citing N.J. STAT. ANN. § 10:5-1 to -49 (West 2000)); *but see* Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions,* 54 VAND. L. REV. 481, 526 n.211 (March 2001)("[h]ostile environment sexual harassment liability may be interpreted as an ex post facto statement to the church that it should have discharged or removed the offending minister from his position").

[120] *McKelvey*, 776 A.2d at 912.

clauses.[121] However, the issue in *Bollard* was solely whether the plaintiff "was subjected to sex-based harassment by his supervisors that was sufficiently severe or pervasive as to be actionable under Title VII."[122] The Ninth Circuit recognized that Bollard's claim entailed only "a restricted inquiry."[123] There was no need for the *Bollard* court to delve into church matters to imply a contract, since Bollard's claim was couched in sexual harassment rather than breach of an implied contract.

[33] The New Jersey Superior Court, Appellate Division was wise in its determination that McKelvey's claim concerns "a contract dispute between a church and clergyman approaching ordination, arising out of pre-ordination training. *This is not standard fare for civil courts*."[124] No matter how much the New Jersey Supreme Court stretches the possibilities of what could be for McKelvey, the court cannot constitutionally involve itself in McKelvey's claim against the Catholic Diocese.[125]

---

[121] McKelvey v. Pierce, 800 A.2d 840, 853-54 (N.J. 2002). *Bollard* involved similar facts to the *McKelvey* case. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944-45 (9th Cir. 1999). Bollard was a candidate for Jesuit priesthood, who claimed he was forced to leave the Jesuit order before ordination due to sexual harassment by his superiors. *Id.* at 944.

[122] *Id.* at 949. Bollard brought his claim in the year following his leaving the Jesuit order. *Id.* at 944. While Bollard set forth, primarily, a federal claim for sexual harassment, he also made secondary state law claims. *Id.* The *Bollard* court was not required to imply a contract as part of the state law claims. *Id.*

[123] *Id.* at 950 (determining whether Bollard was sexually harassed would not require interpretation of religious doctrine or the "reasonableness" of Jesuit religious practices).

[124] *McKelvey*, 776 A.2d at 913 (emphasis added). The Appellate Court recognized that courts do not need to refuse any claim that touches religion stating: "[o]nly when the underlying dispute turns on religious doctrine or polity, will courts refuse to enforce secular rights." *Id.* at 911 (citing F.G. v. MacDonell, 696 A.2d 697, 706 (N.J. 1997)).

[125] *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284-86 (5th Cir. 1981). According to the Fifth Circuit, even if a church is not successful in persuading the court that the plaintiff's position is "sufficiently religious" for the ministerial exception to apply,

[34] The *McKelvey* case does not involve claims of parishioners, or those outside the church against the church and its ministers, which may warrant secular court involvement. Rather, this case concerns solely internal church players including a church, its priests and its priest candidate.[126] Thus, while the former type of claim would not necessarily, in all cases, entail a review of purely internal church government, the latter (McKelvey's claim) most certainly would involve review and interpretation of purely church decisions and conduct.

[35] The underlying motivation of McKelvey's claim is suspicious. The Catholic Diocese of Camden paid for McKelvey's graduate level training and living expenses.[127] Upon termination of McKelvey's priesthood candidacy, he became responsible for repayment of tuition and costs in the amount of approximately $69,000.[128] According to the court, McKelvey was unaware that he would be responsible for reimbursement of the entire amount of the tuition and other costs.[129]

---

the church can still argue that adjudication of the case would excessively entangle church and state if the church/state relationship is substantial, in contradiction to the principles of the First Amendment. *Id.*

[126] *McKelvey*, 776 A.2d at 905. McKelvey's claim is solely one of breach of implied contract as a ministerial candidate against the Catholic Diocese and several of its ministers. *Id.*

[127] *Id.* at 907.

[128] *Id.* at 907-08. The indebtedness included a student loan of nearly $38,000, which was in default. *Id.* at 908. Prior to McKelvey beginning his priesthood candidacy, no mention was made of his obligation to repay tuition and costs in the event that he withdrew or was terminated from the seminary. *Id.* McKelvey was advised of his indebtedness to the Diocese and student loan supplier after his candidacy was terminated in 1995. *Id.* As of the date of the New Jersey Supreme Court's decision, McKelvey has yet to make any repayment of the debt, and the Camden Diocese had no intention to sue for repayment at the time the case was heard. *Id.*

[129] *Id.* at 907. The Camden Diocese' policy at the time McKelvey was accepted into the seminary in 1986 was that students were responsible for $8,000 of the $28,000 tuition (presumably the yearly tuition at the University of Scranton). *Id.* McKelvey was informed at that time that "all tuition, room and board costs at the graduate level are paid for by the Diocese of Camden." *Id.* McKelvey was not provided any information that there would be a repayment obligation in the event of his termination or withdrawal from candidacy. *Id.*

McKelvey allegedly endured sexual harassment by his superiors at the Diocese for nearly nine years.[130] During this nine-year period he obtained a degree from a university, other educational training and full room and board, all economically provided for by the Catholic Diocese.[131] McKelvey's formal education ended in 1993, and shortly thereafter in the same year, he began his voluntary leave of absence.[132]

[36] Is McKelvey's claim really a smoke screen that enables him to get something for nothing? That is, obtaining an education and living expenses amounting to more than $70,000 provided by the Camden Diocese without fulfilling his part of the arrangement to enter the priesthood and serve the Diocese. Perhaps the Camden Diocese should more appropriately bring forth a breach of contract claim against McKelvey. In fact, the Diocese provided all of the education and training they had agreed to, while McKelvey left the church before completing his end of the agreement to join the priesthood.[133] Of course, the timing of McKelvey's departure from the Diocese just after he had completed his expensive education may simply be a coincidence. In any event, the facts of McKelvey's case are not those that should support an extremely narrow reading of the ministerial exception and the First Amendment religion clauses.

---

[130] *Id.* at 908-09.

[131] *Id.* at 907. McKelvey began training through the Diocese of Camden in 1986. *Id.* He was able to obtain an A.B. degree in 1989 from the University of Scranton through the Diocese. *Id.* He then went on to "theology seminary and divinity school" through the Diocese, from which he graduated in 1993. *Id.*

[132] *Id.* McKelvey graduated from his final graduate studies through the Diocese in 1993. *Id.* He then interned for the church for a short time until he took his leave of absence in November 1993. *Id.*

[133] *Id.*

B. Implications of the New Jersey Supreme Court's Decision

[37] The New Jersey Supreme Court's holding allows the court to regulate matters it is constitutionally prohibited from doing, a proposition recognized by the circuit courts for decades.[134] Determining an implied contract, a necessary step for McKelvey to establish a prima facie case of breach of implied contract, will create involvement in the purely religious internal government of the Camden Diocese.[135] As the Camden Catholic Diocese contends, if the court adjudicates McKelvey's case, it would amount to a "prohibited union of civil and ecclesiastical control."[136] Even if an implied contract were found, the court would still be called upon to "evaluate the truth and gravity of plaintiff's claims and the Diocese's defenses and decide whether or not the established facts constitute a substantial breach of contract in the seminary

---

[134] *See generally, e.g.*, Combs v. Central Tex. Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Bell v. Presbyterian Church, 126 F.3d 328, 331 (4th Cir. 1997); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Rayburn, 772 F.2d 1164; Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Church, 126 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002); E.E.O.C. v. Roman Catholic Diocese, 48 F.Supp 2d. 505 (E.D.N.C. 1999).

[135] *McKelvey*, 776 A.2d at 913.

[136] *McKelvey*, 800 A.2d at 847. The Camden Catholic Diocese argued that a court's determination that there was a contract between McKelvey and the church would excessively entangle the court with the church, and thereby offend the Establishment Clause of the First Amendment. *Id.* The Camden Diocese argued that:

> judicial determination that the relationship between a seminarian in the priesthood formation program and his sponsoring diocese is a contractual one would set the stage for an unconstitutional imbroglio, resulting in the ability of either party thereto to enlist the courts in the enforcement of terms and conditions of a religious denomination's ministerial training program.

Id.

training, college and parish-internship context."[137] The court cannot determine whether the Diocese' employment decisions regarding McKelvey were a breach of contract, without heavily involving itself in church management.[138]

[38] The effect of the New Jersey Supreme Court's ruling is the unfortunate and unconstitutional result that the Appellate Division feared: "an undertaking [that] is simply too entangling, involving inquiry into the seminary's training program and legal monitoring" of church actions.[139] The New Jersey Supreme Court's ruling may send the message that the ministerial exception has been narrowed to an extent that results in a flood of litigation asking the New Jersey courts to imply representations of unlimited subjects on the part of churches and religious organizations. The result will be the over involvement of the state in church affairs.

VI. CONCLUSION

[39] The New Jersey Supreme Court erred in allowing McKelvey's claim against the Camden Diocese to proceed. The result of the New Jersey Supreme Court's holding is the involvement of the judiciary in purely religious internal government, in which it has no place. If McKelvey had brought a timely claim for sexual harassment, similar to the claim in *Bollard*, on which the New Jersey Supreme Court relies, the cases might be parallel and warrant the same holding. However, given that McKelvey's claim is for breach of an implied contract with the Catholic Diocese, the analyses between the two cases are quite different.

---

[137] *McKelvey*, 776 A.2d at 913.

[138] *See, e.g., Combs*, 173 F.3d at 350 ("We cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.").

[139] *McKelvey*, 776 A.2d at 912.

[40] Implied contracts are interpretations of the parties' words and conduct taken with the surrounding circumstances. Thus, the court would necessarily be required to delve into the internal workings of the church to find that the Diocese made the implied representations by its words and conduct, on which McKelvey's claim is based. Namely, the court must find that the Diocese impliedly agreed to provide McKelvey with a specific atmosphere that cannot be based on the church's requirement of celibacy, which is a religious doctrine.

[41] The New Jersey Supreme Court's ruling does not only ask the courts to establish a contract, along with the contract terms between a religious entity and its ministerial employee/student, but also places the court in the position to supervise that contractual relationship. This entangles the court with purely internal church governance and management, and thus offends the religion clauses of the First Amendment of the Constitution.