Unacceptable Exceptions: Why the Ministerial Exception Does Not Encompass Hostile Work Environment Claims

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I. INTRODUCTION

In the current American environment of #MeToo and Black Lives Matter, many would be shocked to learn that an exception exists that permits discrimination without any legal repercussions. The so-called ministerial exception allows religious organizations to hire and fire ministerial employees free from any governmental interference or application of employment antidiscrimination statutes.[1] Courts base this exception on two First Amendment protections, the protection of religious autonomy as guaranteed by the Free Exercise Clause and the protection from excessive governmental involvement as guaranteed by the Establishment Clause.[2] While these protections represent important,

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1. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."); *see also* Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 250 (2019) ("[T]he [ministerial] exception applies to a sweeping range of anti-discrimination norms, and it extends to a broad category of employees whose job includes responsibilities to teach the faith.").

2. *Hosanna-Tabor*, 565 U.S. at 188–89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *see also* Lupu & Tuttle, *supra* note 1, at 256–57 ("[W]e

deeply held values for religious freedom and separation of church and state, the power wielded by the ministerial exception is, nonetheless, daunting.[3] In a recent dissent, Justice Sotomayor characterized the ministerial exception as "extraordinarily potent," giving an employer "free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers.'"[4]

Given its potency, a court should construe the ministerial exception narrowly and expand it only with great caution. Such caution notwithstanding, the recent en banc Seventh Circuit decision in *Demkovich v. St. Andrew the Apostle Parish, Calumet City*[5] takes an already potent ministerial exception and flings wide the doors of applicability. The en banc Seventh Circuit allowed not only hiring and firing decisions, but also any other employment-related interaction between a minister and a religious organization, to enter in.[6] The en banc Seventh Circuit held in July 2021 that the ministerial exception should impose a categorical bar not only on claims involving hiring/firing decisions, consistent with the United States Supreme Court's ministerial exception doctrine, but also on hostile work environment claims brought by ministers against their religious employers.[7] This broadening by the Seventh Circuit expands the ministerial exception beyond the appropriate boundaries set by the United States Supreme Court. This Comment argues that the ministerial exception should not be expanded to categorically bar all hostile work environment claims because it does not comport with the purpose of the ministerial exception and because it dangerously precludes

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argue that the ministerial exception is an application of a broader principle . . . . [that] rests on both the Establishment Clause, which bars the state from exercising ecclesiastical functions, and the Free Exercise Clause, which reserves those functions for private decision makers.").

3. *See* Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U. L. REV. 303, 304 (2015) ("Protecting the internal operations of religious organizations, such as employee selection, from inappropriate governmental intrusion is an important societal value."); Allison R. Ferraris, Comment, *The Expansive Scope of the Ministerial Exception After* Our Lady of Guadalupe School v. Morrissey-Berru, 62 B.C. L. REV. E. SUPP. II.-280, II.-294–95 (2021) ("Employment discrimination on the basis of statutorily protected classes and identities continues to pervade American society. Approximately two million workers in the United States are employees of religious organizations. When the ministerial exception applies, it grants incredible deference to religious employers, and leaves employees with a stark lack of legal recourse.").

4. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting).

5. 3 F.4th 968, 985 (7th Cir. 2021) (en banc).

6. *Id.*

7. *Id.* at 972–73 ("The ministerial exception . . . protects religious organizations from employment discrimination suits brought by their ministers. The question here is whether this constitutional protection applies to hostile work environment claims based on minister-on-minister harassment. We hold that it does.").

victims of harassment from necessary avenues of legal recourse. Rather, this Comment proposes that, when a hostile work environment claim comes before the court, there should be a presumption that the ministerial exception is not implicated.

This Comment first considers the formation and expansion of the ministerial exception from 1972 to 2020. This Background section includes a close reading of the two Supreme Court decisions regarding the exception, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and *Our Lady of Guadalupe School v. Morrissey-Berru*, to glean a full understanding of the purpose of the ministerial exception, as well as to determine its boundaries. The Background section ends with a brief overview of the Seventh Circuit's *Demkovich* case. In the Analysis section, this Comment first proves that the en banc *Demkovich* decision inappropriately expands the ministerial exception beyond the scope of those Supreme Court decisions. It then argues the First Amendment Religion Clauses do not require this expansion, specifically concerning hostile work environment claims. Instead, this Comment proposes a presumption against the application of the ministerial exception to hostile work environment claims raised by ministers against religious organizations. Finally, this Comment concludes by highlighting the dangers inherent in the Seventh Circuit's expansive reading.

II. BACKGROUND

A. The Formation and Expansion of the Ministerial Exception

The ministerial exception is "a judicially created principle that bars federal and state statutory employment discrimination suits by ministers against the religious organizations that employ them."[8] The exception constitutes a "subcategory of the ecclesiastical abstention or church autonomy doctrine"[9] that precludes "any cause of action that requires a court to examine claims implicating religious doctrine."[10] The First Amendment's Free Exercise and Establishment Clauses undergird the exception.[11]

The Free Exercise Clause provides that "Congress shall make no

8. Gonzalez, *supra* note 3, at 307.

9. Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After* Hosanna-Tabor, 11 STAN. J. C.R. & C.L. 89, 92 (2015).

10. *Id.*

11. Gonzalez, *supra* note 3, at 308.

law . . . prohibiting the free exercise [of religion]."[12] A religious institution, therefore, must have autonomy in matters of church governance to practice its religion freely. This autonomy includes control over the selection of ministers "so that the group may chart its own course and develop its faith."[13] Indeed, the Supreme Court held almost 70 years ago that religious organizations must have the "power to decide for themselves . . . matters of church government as well as those of faith and doctrine."[14] The ministerial exception functions to ensure that religious organizations are "free to choose those who will guide [them] on [their] way."[15]

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[16] The Establishment Clause thereby prohibits "government involvement in such ecclesiastical decisions."[17] While the Free Exercise Clause creates the space for a religious organization to chart its own course, the Establishment Clause constrains the government from invading that protected space. Until recently, the Court analyzed alleged Establishment Clause violations, in part, by considering "excessive government entanglement,"[18] which constituted the third prong of the now-abrogated *Lemon* test. Though the Court abandoned the *Lemon* test in *Kennedy v. Bremerton School District* in favor of "reference to historical practices and understandings,"[19] the concept of entanglement (if not the language) arguably endures. The prohibition on excessive government entanglement encapsulates the prohibition on "state interference," a prohibition which predates the

12. U.S. CONST. amend. I.

13. Gonzalez, *supra* note 3, at 304.

14. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

15. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

16. U.S. CONST. amend. I.

17. *Hosanna-Tabor*, 565 U.S. at 188–89.

18. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

19. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)). Though it is hard to anticipate at this early point how courts will apply the "historical practices and understandings" analysis to Establishment Clause claims, I postulate that this shift in Establishment Clause jurisprudence will not have a major impact on the ministerial exception. There is much in the way of historical practice to suggest that the government should not invade the space of ecclesiastical decision-making. As such, even if the discourse shifts away from entanglement language (which I have chosen to retain in this Comment for the sake of continuity with previous scholarship), the prohibition on interference or involvement by the state which justifies the ministerial exception will remain. As such, the ministerial exception will likely stand unaltered by the *Kennedy* decision.

Lemon test.[20] As such, this Comment will continue to utilize the language of entanglement to indicate the prohibition on governmental involvement required by the Establishment Clause. Indeed, it is this very prohibition that undergirds the ministerial exception. That is, the ministerial exception seeks to prevent excessive government entanglement (or interference) with religion by precluding litigation of particular types of claims against religious organizations.[21] The Establishment Clause, thereby, informs the ministerial exception's "underlying principle of entanglement avoidance."[22]

Given this foundation in the First Amendment Religion Clauses, "no court in the United States ever disputed the basic constitutional idea behind . . . the 'ministerial exception' to employment laws."[23] Far from disputing it, courts have afforded the ministerial exception wave after wave of expansion since its inception by the Fifth Circuit in 1972.[24] The exception was originally framed as an exemption from Title VII of the Civil Rights Act of 1964.[25] It has since expanded beyond the Title VII context to protect the employment decisions of religious institutions from government interference via other anti-discrimination employment statutes as well.[26] Courts have applied the exception "to every form of job discrimination forbidden by federal or state law, including that based on race, sex, national origin, age, disability, and sexual orientation, along with related employee protections such as wage and hour laws."[27] Not only has it expanded in context, but the exception is broad in other ways as well, including what constitutes a religious organization. The exception does not merely apply to churches or other places of worship, but also to religious schools, retirement homes, and hospitals.[28]

When the Supreme Court first embraced the ministerial exception in *Hosanna-Tabor*, it did so as a unanimous court.[29] Although the Court was

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20. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.").

21. *Employment Litigation*, 33 BUS. TORTS REP. 8, 11 (2020).

22. *Note, Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599, 607 (2019) [hereinafter *Student Ministries*].

23. Lupu & Tuttle, *supra* note 1, at 254.

24. *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).

25. 42 U.S.C. § 2000e-1(a); *Student Ministries*, *supra* note 22, at 599.

26. *Student Ministries*, *supra* note 22, at 599.

27. Lupu & Tuttle, *supra* note 1, at 254.

28. *Student Ministries*, *supra* note 22, at 602.

29. Jeremy Weese, Comment, *The (Un)holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1326 (2020).

unanimous in embracing the exception, scholars were not. Some expressed concern about the breadth of the exception's scope.[30] Such concerns deepened in 2020 with the Supreme Court's second ministerial exception decision. In *Our Lady of Guadalupe*, the Court widened the definition of a "minister" to include anyone who plays "a vital part in carrying out the mission of the church."[31] A commentator, Allison R. Ferraris, referred to this decision as having "problematically expanded the scope of the ministerial exception" and having "eroded [the ministerial exception's] limitations."[32] Ferraris urged future courts to "construe the ministerial exception narrowly to protect the interests of as many employees of religious institutions as possible."[33] Dissenting justices were so troubled by how the *Our Lady of Guadalupe* Court "reframe[d] the ministerial exception as broadly as it can" that the dissenters characterized the decision as "judicial abdication."[34]

Thus, even before the 2021 *Demkovich* decision, many were concerned about the scope of the ministerial exception. The seemingly ever-widening trajectory of the exception's boundaries presented a cause for alarm. A close reading of the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* should, however, quell such alarm. As outlined below, there rests within these Supreme Court decisions a careful consideration of the exception's purpose and a narrow tailoring of the exception's scope. Provided that lower courts align their decisions with the Supreme Court's guidance, *Hosanna-Tabor* and *Our Lady of Guadalupe* contain the burgeoning exception within its proper boundaries.

1. The First Supreme Court Case: *Hosanna-Tabor*

In the four decades between the ministerial exception's genesis in 1972 and *Hosanna-Tabor* in 2012, federal appellate courts widely

30. *See id.* at 1327–28. Weese argues the ministerial exception embraced by the *Hosanna-Tabor* Court is too broad because it "has allowed actions to be protected under the ministerial exception that were not based on religious belief . . . ." *Id.* at 1327. Weese, thus, proposes that a narrowing of the *Hosanna-Tabor* ministerial exception using his Bona Fide Religious Decision defense would." *Id.* at 1328. One wonders what Weese would say in response to the further broadening in *Our Lady of Guadalupe*.

31. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

32. Ferraris, *supra* note 3, at II.-282, II.-294, II.-297.

33. *Id.* at II.-302.

34. *Our Lady of Guadalupe*, 140 S. Ct. at 2076 (Sotomayor, J., dissenting) ("[T]he Court . . . all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication.").

recognized the ministerial exception.[35] Indeed, "every circuit ha[d] confirmed the existence of a ministerial exception," suggesting a "clear concurrence," when the Supreme Court finally embraced the exception in 2012.[36]

In *Hosanna-Tabor*, Cheryl Perich, a teacher at a Lutheran elementary school, had taken disability leave due to an illness eventually diagnosed as narcolepsy.[37] When Perich sought to return to work, she was not permitted to do so.[38] In response, she threatened legal action and was terminated soon thereafter for "insubordination and disruptive behavior" and the damage done to her "working relationship" with the school.[39] Perich later filed a claim, alleging the school had violated the Americans with Disabilities Act (ADA) by firing her.[40] The Church invoked the ministerial exception, claiming the First Amendment barred the suit because it involved employment claims "between a religious [organization] and one of its ministers."[41] Perich was considered to be a "minister" for the purpose of the exception because she was a "called" teacher who had taken "eight courses of theological study [at a Lutheran college], obtain[ed] the endorsement of [the] local Synod district, and pass[ed] an oral examination by a faculty committee."[42] The Supreme Court unanimously held that the ministerial exception barred Perich's claim.[43]

In this first endorsement of the ministerial exception, the Supreme Court outlined the exception's purpose, context, and rationale. The *Hosanna-Tabor* Court stated: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[44]

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35. The ministerial exception was first conceived in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). *See also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) ("Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other employment discrimination laws, the Courts of Appeals have *uniformly recognized* the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." (emphasis added)).

36. Weese, *supra* note 29, at 1326.

37. *Hosanna-Tabor*, 565 U.S. at 178.

38. *Id.* at 179.

39. *Id.*

40. *Id.* at 179–80.

41. *Id.* at 180.

42. *Id.* at 177, 192.

43. *Id.* at 196.

44. *Id.* at 194–95.

The Court thus clearly articulated the purpose of the ministerial exception: to protect the church's autonomy to "select and control who will minister."[45] The *Hosanna-Tabor* Court then outlined the context and rationale of the exception. If the state requires a religious organization "to accept or retain an unwanted minister . . . the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[46] The Court thus emphasized that the acceptance or retention of a minister is the distinct context in which the ministerial exception applies. Similarly, the Court identified that a "group's right to shape its own faith and mission" is the rationale behind the ministerial exception.[47]

Two of the ministerial exception's most important boundaries thus emerge in this opinion. First, the Court conceived of the exception as functioning within the context of employee selection and termination, actions referred to in the employment law context as "tangible employment actions." Second, the Court identified a religious organization's faith and mission as the rationale behind the exception. Each of these boundaries limit the scope of the ministerial exception in critical ways.

First, the ministerial exception functions within the context of "tangible employment actions." The Supreme Court defined "tangible employment actions" in a foundational case on hostile work environment claims, *Burlington Industries, Inc. v. Ellerth*, stating, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[48] The *Ellerth* Court thus enumerated a discrete set of actions that qualify as "tangible." The *Hosanna-Tabor* Court situated the church's authority to "select and control who will minister" and to choose not "to accept or retain an unwanted minister" within this discrete set of tangible

45. *Id.* at 195.

46. *Id.* at 188.

47. *Id.*

48. 524 U.S. 742, 761 (1998). *See also* Megan E. Mowrey & Virginia Ward Vaughn, *Employer Liability for Sexual Harassment Culminating in Constructive Discharge: Resolving the Tangible Employment Action Question*, 14 S. CAL. REV. L. & WOMEN'S STUD. 25, 37 (2004) ("Some courts classify what might be considered relatively less minor employment actions . . . as tangible employment actions, such as the Seventh Circuit's acknowledgement that the denial of training could be a tangible employment action. Other circuit courts have also found the definition of tangible employment action to include the denial of overtime and other discretionary pay or the reduction of overtime." (footnotes omitted)).

employment actions.[49] The Court narrowly focused its holding on termination:

> The case before us is an employment discrimination suit brought on behalf of a minister, *challenging her church's decision to fire her*. Today we hold *only* that the ministerial exception bars such a suit. *We express no view* on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.[50]

In holding so, the *Hosanna-Tabor* Court belabored the narrow tailoring, specifically stating that it "express[ed] no view" regarding how the ministerial exception might impact other types of suits and holding "only" in reference to ministerial termination.[51] The absence of other types of employment actions, i.e. intangible employment actions, in the Court's understanding of the ministerial exception is notable.

Second, the ministerial exception prevents governmental obstacles to a religious organization's furtherance of its core mission. The Court emphasized that a religious organization may select "those who will personify its beliefs" and may "shape its own faith and mission through its appointments."[52] As such, the exception's applicability is effectively limited to situations that implicate the faith or mission of a religious organization.

The *Hosanna-Tabor* Court identified the purpose of the ministerial exception, both in terms of its context and its rationale. The context of the exception is a religious organization's control over the selection of its ministers. The rationale of the exception is to allow a religious organization to further its core mission.[53] The *Hosanna-Tabor* Court narrowly tailored its holding in alignment with both the context and the

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49. *Hosanna-Tabor*, 565 U.S. at 188, 195. *But see* Koenke v. Saint Joseph's Univ., 2:19-CV-19-4731, 2021 WL 75778, at *3 (E.D. Pa. Jan. 8, 2021) ("The Supreme Court has not cabined the ministerial exception to tangible or intangible employment actions, and it is not for this Court to create such an exception to binding precedent."), *appeal dismissed per stipulation*, No. 21-1057, 2021 WL 6495772 (3d Cir. 2021).

50. *Hosanna-Tabor*, 565 U.S. at 196 (emphasis added).

51. *Id.*

52. *Id.* at 188.

53. *But see* Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J. LAW & SOC. CHANGE 11, 29–31 (2021) (arguing that the two purposes of the ministerial exception are "Selection and Control" and "Church-Minister Relationship"). Casper proceeds to assert the inaccuracy of the Church-Minister Relationship view and argue for a singular purpose of Selection and Control, stating, "[i]f absolute protection of the church-minister relationship were the purpose of the exception, several categories of claims brought by non-ministers—claims that do not violate the church autonomy doctrine—would likely, and problematically, fall within the exception." *Id.*

rationale of the ministerial exception's purpose.

2. The Second Supreme Court Case: *Our Lady of Guadalupe*

In 2020, the Supreme Court revisited the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[54] This decision addressed two consolidated cases brought by Catholic school teachers against their employers.[55] In both cases, the religious schools sought to invoke the ministerial exception, but the plaintiffs argued the exception was inapplicable because they were not formally "ministers" or "called" teachers, as Perich had been in *Hosanna-Tabor*.[56] In the opinion, the Court developed a test to define who constituted a minister for the purposes of the ministerial exception.

The first case involved Agnes Morrissey-Berru, who taught fifth and sixth grade at Our Lady of Guadalupe, a Roman Catholic primary school in Los Angeles.[57] The school first moved Morrissey-Berru to a part-time position in 2014 and then, in 2015, failed to renew her contract.[58] Morrissey-Berru filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), claiming that the school's desire to replace her with a younger teacher fueled its demotion decision and its failure to renew her contract.[59]

The second case involved Kristen Biel, also a teacher at a primary Catholic school in Los Angeles.[60] When Biel's school, St. James, declined to renew her contract, she brought a suit alleging that her request for a leave of absence to receive breast cancer treatments caused her discharge.[61] As with Morrissey-Berru, Biel's employment agreement also did not hold her out as a "minister."[62] However, again like Morrissey-Berru, the employment agreement did require teachers to serve under a religious mission.[63] The agreement imposed religious commitments regarding worship, religious instruction, and modeling faith in their personal lives.[64]

54. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).
55. *Id.* at 2060.
56. *Id.* at 2055.
57. *Id.* at 2056.
58. *Id.* at 2057–58.
59. *Id.* at 2058.
60. *Id.*
61. *Id.* at 2059.
62. *Id.* at 2056–59.
63. *Id.* at 2058.
64. *Id.*

In its decision, the *Our Lady of Guadalupe* Court affirmed the ministerial exception's purpose, context, and rationale as outlined in *Hosanna-Tabor*. The Court asserted that "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities."[65] The *Our Lady of Guadalupe* Court thus reinforced the limited context of the ministerial exception. The exception arises only with regard to a religious organization's selection and control of its ministers. The Court did, however, add the word "supervise" between the words "select" and "remove."[66] As discussed more later, the addition of supervise raises the question of whether the ministerial exception encompasses both tangible employment actions (selection and removal) *and* intangible employment actions (supervision).

The *Our Lady of Guadalupe* decision also affirmed the rationale behind the ministerial exception: to allow a religious organization to further its core mission. The Court here battled with the question of precisely who qualified as a minister, i.e., to whom does the ministerial exception apply.[67] The Court repeatedly invoked the teachers' roles in furthering the organization's core mission.[68] The extent to which the teachers furthered the mission was the determinative characteristic of a "minister" in the Court's assessment.[69] The Court held that "[e]ducating and forming students in the Catholic faith *lay at the core of the mission* of the schools," that "[the teachers] were expected to help the schools *carry out this mission*," and that "both their schools expressly saw [the teachers] as playing a vital part *in carrying out the mission* of the church."[70] As such, the Court's application of the ministerial exception in *Our Lady of Guadalupe* closely mirrored the exception's application in *Hosanna-Tabor*. The Court likewise narrowly tailored its decision, explicitly stating: "Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us."[71] The Court, thus, consistently circumscribes the boundaries of ministerial exception in alignment with the exception's purpose,

65. *Id.* at 2060.

66. *Id.*

67. *Id.* at 2063 ("In determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important.").

68. *Id.* at 2066.

69. *Id.* at 2064 ("What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

70. *Id.* at 2066 (emphasis added).

71. *Id.* at 2069.

context, and rationale.

3. The Seventh Circuit Case: *Demkovich*

In *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, the Seventh Circuit, in a July 2021 rehearing en banc, considered the applicability of the ministerial exception to hostile work environment claims.[72] Starting in 2012, Sandor Demkovich was the music director, choir director, and organist at St. Andrew the Apostle Parish in Calumet City, Illinois, a Roman Catholic church in the Archdiocese of Chicago.[73] The church's priest, Reverend Jacek Dada, supervised Demkovich over the two years of Demkovich's employ by the church until Dada terminated Demkovich in September 2014.[74] Demkovich is a gay man who was married during his tenure at the church and who has various health conditions, including "diabetes, metabolic syndrome, and weight issues."[75] According to Demkovich, during those two years, Dada "repeatedly subjected him to derogatory comments and demeaning epithets showing a discriminatory animus toward his sexual orientation."[76] Moreover, Dada "allegedly made belittling and humiliating comments based on [Demkovich's health] conditions as well."[77]

Demkovich originally brought an action under Title VII, claiming the church violated the 1964 Civil Rights Act in firing him based on sex, sexual orientation, marital status, and disability.[78] The church moved to dismiss, raising the ministerial exception as an affirmative defense, and the district court dismissed the complaint in full.[79] In this initial decision, the church benefitted from the ministerial exception as it was envisaged by *Hosanna-Tabor* and *Our Lady of Guadalupe*.

Demkovich then amended his complaint to allege hostile work environment claims on the same bases.[80] The church again moved to dismiss, invoking the ministerial exception, and the district court granted the motion in part (with respect to those claims based on sex, sexual orientation, and marital status) but denied the motion with respect to the

72. 3 F.4th 968, 973 (7th Cir. 2021) (en banc).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

disability-based claims.[81] The district court cited the distinction between tangible and intangible employment claims when justifying its decision to allow the disability-based claims to go forward. As explained by the Seventh Circuit: "Protection under the ministerial exception instead turned on whether the plaintiff challenged a tangible or intangible employment action. Claims based on tangible employment actions, such as termination, were categorically barred; claims based on intangible employment actions, such as discriminatory remarks and insults, were not."[82] With respect to why the claims based on sex, sexual orientation, and marital status could not proceed, the court explained: "[C]oncerns over excessive church-state entanglement—as when a religious organization proffers a religious justification for alleged conduct—could trigger the ministerial exception's protection against intangible employment action claims . . . . [T]he church offered a religious justification for Reverend Dada's allegedly discriminatory remarks."[83]

Sitting for a rehearing en banc, the Seventh Circuit reversed the district court's decision regarding the disability-based claim, holding that "the ministerial exception precludes Demkovich's hostile work environment claims against the church."[84] The en banc court stated that "[a]djudicating a minister's hostile work environment claims based on interaction between ministers would undermine [a] constitutionally protected [employment] relationship,"[85] and that "[t]he contours of the ministerial relationship are best left to a religious organization, not a court."[86]

In applying the ministerial exception to Demkovich's claim, the en banc *Demkovich* court repeatedly invoked *Hosanna-Tabor* and *Our Lady of Guadalupe*, asserting, for instance, that "[j]udicial involvement in this dispute would depart from *Hosanna-Tabor* and *Our Lady of Guadalupe*"[87] and that "*Hosanna-Tabor* and *Our Lady of Guadalupe* recognize that a minister's religious significance makes this employment relationship different than others, and deservedly so."[88]

The en banc *Demkovich* court explicitly applied the ministerial exception to a context other than hiring and firing. And it justified this

81. *Id.*

82. *Id.* at 974 (internal citations omitted) (citing Demkovich v. St. Andrew the Apostle Par., 343 F. Supp. 3d 772, 778–83 (N.D. Ill. 2018), *aff'd in part*, *rev'd in part en banc*, 3 F.4th 968 (7th Cir. 2021)).

83. *Id.* (internal citations omitted) (citing *Demkovich*, 343 F. Supp. 3d at 784–86).

84. *Id.* at 985.

85. *Id.*

86. *Id.* at 979.

87. *Id.* at 978.

88. *Id.*

expansion by invoking these two Supreme Court precedents, noting:

> It would be incongruous if the independence of religious organizations mattered only at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment) . . . segmenting the ministerial relationship runs counter to the teachings of *Hosanna-Tabor* and *Our Lady of Guadalupe*, from which we see no reason to depart.[89]

The court definitively asserts that its decision follows the precedent set by the previous Supreme Court cases, stating: "[W]e apply the ministerial exception in the way the Supreme Court has applied it."[90]

III. ANALYSIS

Though claiming consistency with *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Seventh Circuit improperly expanded the boundaries of the ministerial exception in its en banc *Demkovich* decision beyond both the purpose identified by the Supreme Court and the requirements embodied by the First Amendment Religion Clauses. This Analysis section will, first, explain why such an expansion of the ministerial exception's boundaries is unfounded in light of Supreme Court precedent. It will then explain why such an expansion is also not required under the First Amendment. Finally, this section will argue, instead, that a presumption *against* the application of the ministerial exception is appropriate in the context of hostile work environment claims.

A. The Seventh Circuit's Expansion of the Boundaries in Demkovich

In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court *took care* to align their holdings with the narrowly tailored purpose, context, and rationale of the ministerial exception. The purpose in both cases was to protect church autonomy concerning employment decisions. The context of both decisions was a tangible employment action, specifically termination. The rationale for such protection of church autonomy was the furtherance of the organization's core mission.

The Seventh Circuit's en banc decision in *Demkovich*, however, pushes the ministerial exception's scope beyond these boundaries. This expansion is erroneously conceived because it does not directly align with the exception's purpose, context, and rationale as outlined in the Supreme

89. *Id.* at 979.
90. *Id.* at 980.

Court decisions. This section will argue, first, that the en banc *Demkovich* opinion turns on supervision, *not* minister selection or termination, and thereby inappropriately reaches beyond the exception's prescribed boundaries. Second, this section will argue that, even if supervision *were* included within said boundaries, the ministerial exception *still* should not categorically bar hostile work environment claims like those in *Demkovich*. Hostile work environment claims require harassment and abuse, neither of which should be considered an aspect of employment supervision. Finally, this section will argue that the en banc *Demkovich* opinion does not turn on the furtherance of the organization's core mission, but on harassing comments that lack any relationship to religious doctrine, and thus the ministerial exception should not apply.

1. Expansion Beyond the Termination Context

The en banc *Demkovich* opinion inappropriately expands the ministerial exception because it expands the authority of selection and control beyond the termination context. Although the court repeatedly invokes *Hosanna-Tabor* and *Our Lady of Guadalupe*, purporting to align with these precedential decisions, the court also openly admits to expanding the exception's reach but never provides proper justification for doing so. The court states:

> From *Hosanna-Tabor* and *Our Lady of Guadalupe*, we take two principles. First, *although these cases involved allegations of discrimination in termination*, their rationale is not limited to that context. The protected interest of a religious organization in its ministers *covers the entire employment relationship*, including hiring, firing, and *supervising in between*.[91]

Here the court acknowledges that both Supreme Court cases are narrowly restricted to "allegations of discrimination in termination." However, the court expands the control over ministerial selection beyond the termination context. The court simply asserts that the rationale is not limited to the termination context because it includes "supervising in between" and, thus, "covers the entire employment relationship."

The en banc *Demkovich* court's reliance on the phrase "supervising in between" to extend the exception to "cover[] the entire employment relationship" is problematic. The Supreme Court, in interpreting and defining the ministerial exception, has not expressly included supervision.

91. *Id.* at 976–77 (emphasis added).

The words "supervise," "supervision," or "supervisor" were not even used in the *Hosanna-Tabor* decision at all—not once. "Supervise/supervision" makes its first appearance in the Supreme Court's ministerial exception jurisprudence in *Our Lady of Guadalupe*.[92] And in that second Supreme Court decision, "supervise/supervision" occurs only three times (only two of which are substantively related to the opinion).[93] Thus, while the word is admittedly present in *Our Lady of Guadalupe*, the Court provides no emphasis, commentary, or discussion, thereby giving its inclusion negligible weight. A court is bound by the precedential holdings of cases, not the language present within them.[94] The precedential holdings of *Hosanna-Tabor* and *Our Lady of Guadalupe* revolve around the termination of ministerial employees, not supervision. Expansion based on the language of supervision, rather than the holdings of termination, is inappropriate.

2. Why Hostile Work Environment Claims Do Not Fall Under Supervision

Even if the Supreme Court *did* intend the ministerial exception's boundaries to encompass supervision, the ministerial exception *still* should not apply to hostile work environment claims. Such claims, by definition, involve harassment, and harassment should not be considered a means of supervision in any employment context.

A hostile work environment claim requires that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'"[95] and that this permeation is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[96] As the district court in *Demkovich* stated, to succeed on

92. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

93. The first use of "supervision" is as follows: "The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." *Id.* The second use of "supervision" is as follows: "The three prior decisions on which we primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy." *Id.* at 2061. Note that this second use of supervision is simply a clarification regarding previous decisions, not a substantive contribution to the holding in this opinion. The first and only use of "supervise" is as follows: "But it is instructive to consider why a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Id.* at 2060.

94. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 282 (2001).

95. Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

96. *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

a hostile work environment claim, a plaintiff must show

> (1) she was subject to unwelcome harassment; (2) the harassment was based on her national origin or religion (or another reason forbidden by Title VII); (3) the harassment was severe or pervasive so as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is basis for employer liability.[97]

These required elements reveal that hostile work environment claims arise when there is severe or pervasive harassment. As such, supervision of an employee should never qualify for a hostile work environment claim because severe or pervasive harassment should never come under the umbrella of employment supervision.

The Court, likewise, has identified the disconnect between appropriate employee supervision and workplace harassment. Indeed, the Court has found in non-ministerial settings many forms of harassment to be outside the scope of employment altogether.[98] In *Faragher v. City of Boca Raton*, one of the foundational cases establishing hostile work environment claims, the Court took care to ferret out acts of harassment potentially falling within the scope of employment and acts which are "frolics or detours from the course of employment."[99] In so doing, the Court emphasized that the line to be drawn between scope and frolic lies between those acts which might arguably be done (however ill-advisedly) in the interest of the employer and those "having no apparent object whatever of serving an interest of the employer."[100]

If acts done in the interest of the employer is the litmus test for acts within the scope of employment, then harassment necessarily fails the test. Harassment does not serve, but rather inhibits, the interest of the employer, because it is "abuse that actively inhibits job performance . . . ."[101] Indeed, due to the frequency with which harassment is excluded from the scope of employment, hostile work environment claims have largely been litigated under alternative employer liability principles that find vicarious liability based on the "aided in the agency relation standard."[102] The Court has

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97. Demkovich v. St. Andrew the Apostle Par., Calumet City, 343 F. Supp. 3d 772, 778–83 (N.D. Ill. 2018), *aff'd in part*, *rev'd in part en banc*, 3 F.4th 968 (7th Cir. 2021).

98. *E.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.").

99. 524 U.S. 775, 798–99 (1998).

100. *Id.* at 799.

101. Demkovich v. St. Andrew the Apostle Par., Calumet City, 973 F.3d 718, 729 (7th Cir. 2020), *aff'd in part, rev'd in part en banc*, 3 F.4th 968 (7th Cir. 2021).

102. *Ellerth*, 524 U.S. at 759–60 ("When a party seeks to impose vicarious liability based on an

recognized that harassment is not a form of supervision and is, therefore, not a part of the employment relationship.

For a minister to establish a hostile work environment claim against a religious organization, she must be able to demonstrate severe or pervasive intimidation, ridicule, or insult sufficient to "create an abusive working environment."[103] Surely intimidation, ridicule, and insult are not what the *Our Lady of Guadalupe* Court meant by the "supervising in between" hiring and firing.

It seems much more likely that, if the Court intended to include supervision in the ministerial exception, it intended to encompass the types of interactions that would align with the legal definition of supervisor. Black's Law Dictionary first defines "supervisor" quite generally as "[o]ne having authority over others; a manager or overseer."[104] From this general definition, Black's Law Dictionary proceeds to reference the more specific legal definition of a supervisor under the National Labor Relations Act (NLRA).[105] This specific definition helpfully enumerates the types of interactions or duties in which a supervisor might engage: hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, disciplining, directing, adjusting grievances of other employees, or effectively recommending such action.[106] The supervisor, moreover, is to exercise authority in these interactions "in the interest of the employer."[107]

The definition of a hostile work environment claim does not align with any of these supervisory actions. None of these actions requires, or even allows for, intimidation, ridicule, or insult. Indeed, all thirteen of these actions can, and should, be carried out without such abusive behavior. Thus, even if the scope of the ministerial exception is extended beyond the narrowly tailored termination decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*, its expansion would include these legally defined and enumerated supervisory actions, rather than intimidation, ridicule, or insult. The ministerial exception could, conceivably, expand to encompass the legally defined actions of supervision, but not harassment. As such, the ministerial exception should not categorically bar hostile

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agent's misuse of delegated authority, the Restatement's aided in the agency relation rule . . . appears to be the appropriate form of analysis.").

103. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

104. *Supervisor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

105. *Id.*

106. 29 U.S.C. § 152(11).

107. *Id.*

work environment claims even if it encompasses supervision.

3. Expansion Beyond Furtherance of the Organization's Core Mission

Finally, the en banc *Demkovich* opinion inappropriately expands the ministerial exception because it applies the exception to all workplace interactions or conflicts, not only to those that further the organization's core mission. The court includes all "workplace conflict" and all ministerial interaction under the umbrella of constitutional protection. It states:

> Within a religious organization, *workplace conflict among ministers* takes on a constitutionally protected character. *See* [*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049,] 2060 [(2020)] (explaining that the First Amendment protects the autonomy of a religious organization "with respect to *internal management decisions that are essential to the institution's central mission*"). To render a legal judgment about Demkovich's work environment is to render a religious judgment about how ministers interact.[108]

The court here conflates "internal management decisions that are essential to the institution's central mission" with "workplace conflict among ministers" and "how ministers interact." Workplace conflict and interaction among ministers may well involve "decisions that are essential to the institution's central mission," but they must not *necessarily* do so. A conflict could exist among ministers that does not involve the central mission at all. For instance, ministers might disagree over an aspect of the organization's physical property, such as which side of the building to build the new playground or whether the building funds should be used to repave the parking lot. These would constitute internal management decisions, but do not qualify as decisions that "are essential to the institution's central mission." Not all workplace conflict implicates the core mission.

The en banc *Demkovich* court assumes a very wide interpretation of "internal management decisions that are essential to the institution's central mission." This wide interpretation is problematic because it expands the ministerial exception's applicability to *all* ministerial interactions, rather than constraining it, as the Supreme Court does, to those that implicate the organization's core mission. Because of this wide interpretation, the court considers the workplace conflict between

108. Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 979 (7th Cir. 2021) (en banc) (emphasis added).

Reverend Dada and Demkovich to be constitutionally protected under the ministerial exception. But the Dada-Demkovich conflict involves harassment about Demkovich's diabetes, metabolic syndrome, and weight.[109] The issues surrounding Demkovich's disability do not implicate the furtherance of the core mission.

The church's divergent responses to Demkovich's various claims reveal which conflicts implicated the church's core mission and which did not. "The church offered no religious justification" for Reverend Dada's behavior with respect to "Demkovich's disability-based hostile work environment claims."[110] In contrast, the church *did* offer religious justification for Reverend Dada's behavior with respect to Demkovich's claims based on his sex, sexual orientation, and marital status.[111] The absence or presence of a religious justification here demonstrates that some work conflict touches upon an organization's core mission, and some does not. It is, therefore, an unnecessary and inappropriate expansion of the ministerial exception to consider *all* work conflict among ministers within a religious organization as essential to the organization's core mission.

Such an expansion is particularly inappropriate in the context of hostile work environment claims. As discussed above, hostile work environment claims necessarily include "intimidation, ridicule, and insult"[112] that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[113] To appropriately warrant application of the ministerial exception, then, a religious organization's core mission would need to involve harassment and abuse. But harassment and abuse rarely (if ever) make it into an organization's mission statement. Based on an admittedly brief survey of various religious organizations' mission statements, most appear to aim for just the opposite.[114] This sampling of mission statements included

109. *Id.* at 973.

110. *Id.* at 974.

111. *Id.*

112. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

113. *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

114. A brief Google search found the following "core mission" statements from various religious organizations. While clearly not conclusive evidence, these mission statements suggest that religious organizations do not generally have a core mission that involves harassment or abuse: (1) "CAIR Oklahoma's vision is to be a leading advocate for justice and mutual understanding. Our mission is to enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims." *Vision, Mission, and Core Principles*, CAIR OKLA., https://www.cairoklahoma.com/about/vision-mission-and-core-principles [https://perma.cc/P2WB-

aspirations to: "be a leading advocate for justice and mutual understanding," "protect civil rights," "promote justice," "enrich[] and uplift[] our lives with understanding, warmth, friendship and meaning," and "serv[e] individuals, communities and the world as the representative, loving presence of God and as witnesses to God's salvation and grace."[115] While anecdotal, this sampling reveals that, in many instances at least, the use of harassment and abuse would not be in furtherance of the organization's core mission. As such, claims based on harassment and abuse would fall outside of the ministerial exception.

The Seventh Circuit's en banc *Demkovich* decision rests upon an expansion of the ministerial exception beyond that narrowly tailored in *Hosanna-Tabor* and *Our Lady of Guadalupe*. This expansion seeks to push the limits of what constitutes control of the selection of ministers, as well as what constitutes the furtherance of the religious organization's core mission. This expansion is unwarranted by precedent. More than that, it is dangerous. Justice Sotomayor, in her dissent in *Our Lady of Guadalupe*, stressed the need to maintain the narrowly tailored limits the Seventh Circuit is stretching here. She urged that "the exception's stark departure from antidiscrimination law [be] narrow," citing "the exception's 'potential for abuse'"[116] and its potential to "even condone[] animus."[117] The ministerial exception exposes ministers "to discrimination without recourse."[118] The court must, therefore, be vigilant to guard the exception's borders, reigning in any unnecessary expansion.

B. Why the First Amendment Religion Clauses Do Not Require Hostile Work Environment Claims to Be Protected by the Ministerial Exception

An expansive reading of the ministerial exception is not only

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Q7W7]; (2) "The mission of North Shore Synagogue is to join with our members in building a community where the practice of Reform Judaism enriches and uplifts our lives with understanding, warmth, friendship and meaning." *Mission and Vision*, N. SHORE SYNAGOGUE, https://northshoresynagogue.org/our-mission-and-vision/ [https://perma.cc/36YQ-8CZ2]; (3) "The mission of the Christian Methodist Episcopal Church is to be disciples of Jesus the Christ by serving individuals, communities and the world as the representative, loving presence of God and as witnesses to God's salvation and grace." *Our Mission*, CHRISTIAN METHODIST EPISCOPAL CHURCH, https://thecmechurch.org/about-the-cme-church/ [https://perma.cc/X7VY-F86U].

115. *See supra* note 114 and accompanying text.

116. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) (quoting Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991)).

117. *Id.* (Sotomayor, J., dissenting).

118. *Id.* at 2072–73 (Sotomayor, J., dissenting) (citing *Scharon*, 929 F.2d at 363 n.3).

precluded by Supreme Court precedent, as discussed above, but is also unwarranted under the Religion Clauses of the First Amendment. The ministerial exception, apart from any expansion endorsed by the en banc *Demkovich* court, already provides sufficient protections both to ensure that religious organizations may freely practice their religions and to avoid excessive government entanglement with religious organizations.

1. The First Amendment: The Free Exercise Clause

The free exercise of religion is not threatened by allowing ministers to bring hostile work environment claims against their employers. The level of protection already afforded religious organizations to self-govern and operate upon their faith and doctrine is sufficient under the current, circumscribed ministerial exception. The exception provides religious organizations with plentiful opportunities to control the selection of employees to guard their Free Exercise Clause autonomy. A religious organization may control a ministerial employee in any of the following ways: "deciding whether to hire him and whether to fire him, or by deciding his job duties, his place of work, his work schedule, his compensation, the resources he needed to work, and so forth."[119] Such an array of options, and powerful ones at that, demonstrates that religious organizations have been given considerable and sufficient sway by the ministerial exception. Any further Free Exercise protection preventing harassment claims would serve, not to protect church autonomy, but to prevent church accountability.

Not all scholars agree. Ryan W. Jaziri contends that secular government intrusion into harassment issues will impact how religious organizations make decisions regarding employee hiring and firing, constituting "a direct interference with the constitutional rationales underlying the ministerial exception."[120] Jaziri envisions hiring decisions being made with "an eye toward litigation" and liability exposure rather than "based purely on doctrinal prerogatives."[121] As such, allowing ministerial employees to bring hostile work environment claims against their employers will undermine church autonomy.

There is, however, no such thing as a hiring decision made "based on

119. Demkovich v. St. Andrew the Apostle Par., Calumet City, 973 F.3d 718, 729 (7th Cir. 2020), *aff'd in part, rev'd in part en banc*, 3 F.4th 968 (7th Cir. 2021).

120. Ryan W. Jaziri, Note, *Fixing a Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719, 745 (2011).

121. *Id.*

purely doctrinal prerogatives." Employers necessarily balance a multitude of factors when choosing to hire an employee, not the least of which is potential interpersonal conflicts between a new hire and a co-worker or supervisor. Churches are no different. In other words, the alleged exposure to liability adds nothing new to the hiring consideration. An employee will only be able to take legal action if the work environment is so severely or pervasively permeated with insult, ridicule, and intimidation as to be considered abusive. A religious organization employer is presumably already taking considerable pains to avoid hiring an employee who would trigger such a toxic atmosphere. The potential threat of litigation would not so significantly add to this calculation as to tread upon "the constitutional rationales underlying the ministerial exception."[122]

The constitutional protections the ministerial exception already guarantees sufficiently protect church autonomy and the free exercise of religion. "[A] church may [still] hire, fire, promote, [or] refuse to promote" an employee without proffering any justification, whether religious or secular, for its decision, and it does so "free from [any] judicial scrutiny under Title VII."[123] This, in and of itself, is a sweepingly, and sufficiently, broad provision allowing for religious autonomy.

2. The First Amendment: The Establishment Clause

The primary Establishment Clause concern with respect to the ministerial exception revolves around the potential for excessive entanglement at the intersection of government and religious organization.[124] The Supreme Court has clarified, however, that "[n]ot all entanglements . . . have the effect of advancing or inhibiting religion."[125] As such, entanglement is not always forbidden but is, rather, a matter of degree; that is, "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause."[126] The Court has also acknowledged that "[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two."[127] So, in any consideration of the Establishment Clause, one does not aim for an absolute lack of interaction between church and state, but an interaction of

122. *Id.*

123. Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 795 (9th Cir. 2005) (Fletcher, J., concurring).

124. *See* Weese, *supra* note 29, at 1334–36.

125. Agostini v. Felton, 521 U.S. 203, 233 (1997).

126. *Id.* (citations omitted).

127. *Id.* (internal citations omitted) (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

such a nature or to such an extent that it does not become excessive entanglement.

What precisely constitutes excessive entanglement is not always clear. Nonetheless, courts regularly, and successfully, navigate potential entanglement issues in all manner of church litigation, "from contracts and property disputes to employment disputes, torts, and church elections and schisms."[128] Courts accomplish such incursions into church litigation by utilizing "neutral principles of law . . . which can be applied without 'establishing' churches" or entangling excessively.[129] As such, concerns about the Establishment Clause and excessive government entanglement need not prohibit ministers from bringing hostile work environment claims.

Indeed, in the context of hostile work environment claims, entanglement concerns are even further lessened in degree.[130] Hostile work environment claims are not likely to touch on the sensitive issues of faith, doctrine, and religious practice because, typically, when a hostile work environment claim is brought against an employer, the employer will invoke the *Ellerth* affirmative defense.[131] This defense, laid out in *Burlington Industries, Inc. v. Ellerth*, requires the employer to show that, in response to any harassing behavior, the employer "exercised reasonable care to prevent and correct" and that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities."[132] A court or jury, then, need only evaluate whether the religious organization took reasonable care in prevention or correction, which is unlikely to trigger excessive entanglement.[133] Ira Lupu and Robert Tuttle argue as much

128. Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 993 (7th Cir. 2021) (en banc) (Hamilton, J., dissenting).

129. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

130. *But see* Jaziri, *supra* note 120, at 745–46 ("Litigating the issue of whether a minister was subjected to sufficiently severe or pervasive sexual harassment to be actionable under Title VII may seem, on its face, to be a 'restricted inquiry.' However, since sexual harassment controversies in this context relate to ministerial employment—the behavior of ministers within a church, their fitness to hold ministerial positions, and their objection to employment decisions—they implicate the fears inherent in the founding ministerial exception cases.").

131. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999) ("Nothing in the character of [the *Ellerth*] defense will require a jury to evaluate religious doctrine or the 'reasonableness' of the religious practices . . . . Instead, the jury must make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the Jesuits to prevent or correct it.").

132. 524 U.S. 742, 765 (1998).

133. *See* Casper, *supra* note 53, at 33 ("Liability for hostile work environments, at most, implicates a religious employer's non-decision – its negligence and failure to take reasonable care. A

regarding the *Ellerth* defense:

> The most common steps that employers take to prevent harassment are (1) development and articulation of a policy about sexual harassment, including gender-based denigration and unwanted sexual attention in the workplace; (2) training of employees in the purposes, operation, and meaning of such a policy; and (3) taking care in the employment of supervisors. None of these steps are likely to invite judicial evaluation of theological understandings.[134]

It would, thus, seem that excessive entanglement fears with respect to hostile work environment claims are largely unfounded. If, however, a particular hostile work environment case did uniquely evoke excessive entanglement concerns, the judge would still be at liberty to dismiss the case on Establishment Clause grounds.[135]

C. An Argument for a Presumption Against Application of the Ministerial Exception with Hostile Work Environment Claims

The scope of the ministerial exception is "limited to what is necessary to comply with the First Amendment."[136] As such, the ministerial exception need only apply to hostile work environment claims if it is "constitutionally necessary" because either "[the] investigation and judicial inquiry itself" or the "burdens of the affirmative defense" violate the First Amendment Religion Clauses.[137] But, in the vast majority of cases, religious defendants do not defend or sanction, but in fact condemn, the harassing behavior.[138] Hence, the harassment involved in these claims is rarely religiously motivated[139] and would, thereby, rarely implicate the selection and control of ministers protected by the ministerial exception. In those rare instances when a religious organization might defend harassment as based on their religious doctrine, "a secular court's inquiry will be limited," asking "whether such grounds are sincere" but not

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religious employer's non-decision does not implicate their protected right to select and control their ministerial employees.").

134. Lupu & Tuttle, *supra* note 1, at 295.

135. Casper, *supra* note 48, at 14 ("Some cases will, undoubtedly, interfere with a church's choice in who communicates their faith or otherwise undermine protected church autonomy. In such situations, the First Amendment mandates that the case not go forward. In other cases, a hostile work environment claim may completely fail to implicate a church's choice in their minister, the church-minister relationship, or church autonomy.").

136. *Bollard*, 196 F.3d at 947.

137. Casper, *supra* note 53, at 38.

138. *Id.*

139. *Id.* at 39.

questioning "the veracity of religious claims."[140] In light of these rare instances, a case-by-case analysis might seem appropriate.

Such a case-by-case approach does avoid the high cost associated with categorically barring all hostile work environment claims, the high cost of "devastating the rights of, and imposing irremediable harm on, hundreds of thousands of employees."[141] However, given the low risk of entanglement concerns discussed above, as well as the potential for inconsistency across courts and unpredictability for litigants, this Comment argues a case-by-case approach is not the ideal response. Hostile work environment claims rarely fall within the scope of employment[142] and rarely implicate religious doctrine. As such, it seems more appropriate to presume a hostile work environment claim should *not* be barred by the ministerial exception.[143] This presumption has the advantage of requiring a religious organization to publicly assert that its doctrine endorses the "intimidation, ridicule, or insult" that constitutes a hostile work environment claim.[144] Such a requirement would likely have a deterrent effect on invocation of the ministerial exception in hostile work environment cases[145] and would, thus, help contain the troubling expansion of the ministerial exception. Utilizing a presumption would also allow hostile work environment claims to be considered on the merits.[146]

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140. *Id.* at 38.

141. *Id.* at 14. *But see* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391–92 (1981) (arguing a case-by-case analysis is not sufficient because it still allows for the possibility of government-induced changes because of the "fluidity of doctrine and the many factors that can contribute to doctrinal change. . . . Such government-induced changes in religion are too unpredictable to be avoided on a case-by-case basis. They can be minimized only by a strong rule of church autonomy.").

142. *See* Casper, *supra* note 53, at 33 ("The creation of a hostile work environment is generally outside the scope of employment . . . ").

143. *Cf.* Renee M. Williams, Comment, *The Ministerial Exception and Disability Discrimination Claims*, 2011 U. CHI. LEGAL F. 423, 445 (2011) (arguing for a similar presumption in the case of disability discrimination cases brought by ministerial employees against religious organization employers).

144. *See* Casper, *supra* note 53, at 18, 38 (finding this explicit endorsement of harassment valuable as "information-forcing").

145. Williams, *supra* note 143, at 445 (noting the deterrent effect of public embarrassment that might follow the explicit endorsement of disability discrimination if a similar presumption were required for ADA cases).

146. *See id.* ("Such a [presumption] would have the practical effect of reducing the expansion of the ministerial exception into the realm of disability discrimination claims, allowing such claims to be addressed on the merits.").

IV. CONCLUSION

The question of how expansive the ministerial exception should be is a crucial one. It is crucial, first of all, to secure "hundreds of thousands of employees' rights to dignified workplaces free from severe or pervasive harassment."[147] The impact is more extensive than one might assume. "Approximately two million workers in the United States are employees of religious organizations. When the ministerial exception applies, it grants incredible deference to religious employers, and leaves employees with a stark lack of legal recourse."[148] Ministerial employees should not have to choose between working for a religious organization and having the legal right to work free from intimidation, ridicule, or insult.

It is also crucial because categorically banning hostile work environment claims might chill the newly-developed societal openness toward harassment victims. One thinks, naturally, of the #MeToo movement and the hard-fought gains in many victims' willingness to speak publicly about their own severe or pervasive abuse situations. The recently enlarged appreciation for the challenges of systemic racism likewise demands a legal system that prohibits harassment in all contexts. At this juncture in our society's history, and given the natal stage of these societal movements in particular, advances for harassment victims could be threatened by an exception that allows harassment to be swept under the rug.

Finally, it is crucial because it protects religious organizations as well. While it may seem counter-intuitive, a less-expansive exception works in favor of religious organizations. Legal recourse encourages accountability. This benefits religious organizations by ensuring that bad actors do not escape legal consequences, thus continuing to abuse and harass to the detriment of ministerial employees and religious organizations alike. Such accountability also ensures that organizations are proactive in preventing harassment whenever possible by instilling policies and procedures that protect their most valuable assets, their ministers. Finally, such accountability improves the reputation of religious organizations in society as a whole because non-members recognize within these organizations a like-minded effort to protect against abuse.

A presumption that hostile work environment claims are not included within its scope appropriately narrows the ministerial exception. This

147. Casper, *supra* note 53, at 14.

148. Ferraris, *supra* note 3, at II-295.

narrowing benefits not only victims, but societal movements, religious organizations, and our general human progress toward a less abusive world.