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A Matter of Principle: Why the Ministerial Exception Categorically Bars Ministers from Bringing Hostile Work Environment Claims Against Their Religious Employers

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ABSTRACT

Rooted in the First Amendment, the ministerial exception represents a general principle of law that has existed at least since the Magna Carta: the church autonomy doctrine. The ministerial exception reflects the church autonomy doctrine by recognizing a religious institution's absolute right to select and control its ministers. Born in 1972 and receiving Supreme Court recognition in 2012, the ministerial exception's application to most Title VII employment discrimination claims is unquestioned. But the ministerial exception's application to hostile work environment claims, which arise from employment discrimination statutes like Title VII, is unclear.

The Supreme Court of the United States has not yet ruled on this issue. And the United States circuit courts of appeals are currently split. On the one hand, the Ninth Circuit has taken the position that the ministerial exception does not categorically bar hostile work environment claims. On the other hand, the Seventh and Tenth Circuits have taken a principled approach and have held that the ministerial exception categorically bars ministers' hostile work environment claims against their religious employers.

The Seventh and Tenth Circuits' holdings are more consistent with the purpose of the ministerial exception than the Ninth Circuit's holding. Allowing ministers to bring their hostile work environment claims against their religious employers violates the First Amendment because it requires secular courts to make impermissible determinations of faith and doctrine. Importantly, defending a hostile work environment claim requires the

employer (the religious institution) to justify its internal processes and decisions as "reasonable," an inquiry the courts have no business making under the First Amendment. Furthermore, forcing a religious institution to remedy a hostile work environment would most likely require tangible employment actions, violating the First Amendment.

Going deeper, the Court should do more than pay lip service to the church autonomy doctrine. The Court should recognize that the ministerial exception, which is rooted in the church autonomy doctrine, is meant to recognize religious institutions as their own distinct entities with total control and autonomy over that which is within their jurisdiction. While the total breadth of the ramifications of this approach is beyond the scope of this Comment, the employment relationship between ministers is undoubtedly covered by the church autonomy doctrine and, therefore, the ministerial exception.

Most importantly, because the Supreme Court has signaled that it is heading in a new direction with the Establishment Clause, the Court should define a term that has eluded definition throughout our nation's history: religion. Specifically, it should adopt James Madison's definition of religion: "Religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Accordingly, the ministerial exception must apply to hostile work environment claims to respect the jurisdictional boundaries established through James Madison's definition of religion. While this approach would have wide-sweeping implications, this Comment only addresses it as it pertains to the ministerial exception barring ministers from bringing hostile work environment claims against religious institutions.

This approach would not leave ministers completely without a remedy. Ministers who are subjected to harassment would still be able to seek a remedy against the harassing ministers if the conduct rose to the level of an actionable tort. Furthermore, ministers have a right to negotiate contractual terms to protect themselves from the constitutional autonomy of their religious employers. They are also free to seek new employment if their current employment environment is unsatisfactory. But the ministerial exception must categorically bar hostile work environment claims because ministers are not like other employees; their primary mission is not always

inherently to be the most productive, but to carry out the mission of the religious institution as defined by the religious institution itself.

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COMMENT

A MATTER OF PRINCIPLE: WHY THE MINISTERIAL EXCEPTION CATEGORICALLY BARS MINISTERS FROM BRINGING HOSTILE WORK ENVIRONMENT CLAIMS AGAINST THEIR RELIGIOUS EMPLOYERS

Joshua B. Davis[†]

ABSTRACT

Rooted in the First Amendment, the ministerial exception represents a general principle of law that has existed at least since the Magna Carta: the church autonomy doctrine. The ministerial exception reflects the church autonomy doctrine by recognizing a religious institution's absolute right to select and control its ministers. Born in 1972 and receiving Supreme Court recognition in 2012, the ministerial exception's application to most Title VII employment discrimination claims is unquestioned. But the ministerial exception's application to hostile work environment claims, which arise from employment discrimination statutes like Title VII, is unclear.

The Supreme Court of the United States has not yet ruled on this issue. And the United States circuit courts of appeals are currently split. On the one hand, the Ninth Circuit has taken the position that the ministerial exception does not categorically bar hostile work environment claims. On the other hand, the Seventh and Tenth Circuits have taken a principled approach and

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have held that the ministerial exception categorically bars ministers' hostile work environment claims against their religious employers.

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Going deeper, the Court should do more than pay lip service to the church autonomy doctrine. The Court should recognize that the ministerial exception, which is rooted in the church autonomy doctrine, is meant to recognize religious institutions as their own distinct entities with total control and autonomy over that which is within their jurisdiction. While the total breadth of the ramifications of this approach is beyond the scope of this Comment, the employment relationship between ministers is undoubtedly covered by the church autonomy doctrine and, therefore, the ministerial exception.

Most importantly, because the Supreme Court has signaled that it is heading in a new direction with the Establishment Clause, the Court should define a term that has eluded definition throughout our nation's history: religion. Specifically, it should adopt James Madison's definition of religion: "Religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Accordingly, the ministerial exception must apply to hostile work environment claims to respect the jurisdictional boundaries established through James Madison's definition of religion. While this approach would have wide-sweeping implications, this Comment only addresses it as it pertains to the ministerial exception barring ministers from bringing hostile work environment claims against religious institutions.

This approach would not leave ministers completely without a remedy. Ministers who are subjected to harassment would still be able to seek a

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I. INTRODUCTION

The question at issue in *Demkovich v. St. Andrew the Apostle Parish* is whether the ministerial exception categorically bars all hostile work environment claims between ministers and their religious employers.[1] The circuit courts of appeals are currently split on this issue, with the Seventh and Tenth Circuits answering yes, and the Ninth Circuit answering no.[2] At its core, this issue is a matter of whether, under the First Amendment, the authority to resolve employment disputes between ministers and religious institutions belongs to the civil government or the religious institutions themselves.

This Comment provides a great deal of background information demonstrating why this authority cannot be shared. Ultimately, this Comment takes the position that the ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious employers. Specifically, it provides three general paths the Supreme Court of the United States can take to justify the conclusion that the ministerial exception categorically bars ministers from bringing hostile work environment claims. While the interest of the civil government in enforcing employment discrimination laws may be important, when weighed against religious institutions' constitutionally protected interest in self-governance and the shaping of faith and doctrine, "the First Amendment has struck the balance for us."[3] Religious institutions must be autonomous within their own jurisdictional spheres.

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[1] Demkovich v. St. Andrew the Apostle Par. (*Demkovich III*), 3 F.4th 968, 973 (7th Cir. 2021); Demkovich v. St. Andrew the Apostle Par. (*Demkovich II*), 973 F.3d 718, 720 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021); Demkovich v. St. Andrew the Apostle Par. (*Demkovich I*), 343 F. Supp. 3d 772, 775 (N.D. Ill. 2018), *aff'd in part, rev'd in part*, 973 F.3d 718 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *rev'd in part*, *aff'd in part on other grounds*, *and remanded on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[2] *See Demkovich III*, 3 F.4th at 972–73; Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1246 (10th Cir. 2010); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 969–70 (9th Cir. 2004).

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

II. BACKGROUND

Because the history and nature of the First Amendment's ministerial exception, Title VII, and the hostile work environment claim are crucial to understanding why the ministerial exception categorically bars hostile work environment claims, this section explains the backstory of the ministerial exception and its history, purpose, and nature. It also provides a brief overview of Title VII—including its history—and the hostile work environment claim, which is often rooted in Title VII.[4]

A. The Ministerial Exception

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] Even though the ministerial exception is a "court-created doctrine,"[6] which the Supreme Court only recently recognized,[7] it is fundamentally "rooted in the First Amendment."[8] It derives from the principle of church autonomy[9] and functions as a "constitutional exception to employment discrimination laws[,]"[10] such as Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).[11] It also functions as an "affirmative defense to a claim of discrimination . . . in violation of such statutes."[12] The ministerial exception exists to prevent violations of

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[4] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination . . . has created a hostile or abusive work environment.").

[5] U.S. CONST. amend. I.

[6] Winnie Johnson, Comment, *A Balancing Act: Hostile Work Environment and Harassment Claims by Ministerial Employees*, 96 TUL. L. REV. 193, 200 (2021).

[7] *See Hosanna-Tabor*, 565 U.S. at 188.

[8] Johnson, *supra* note 6, at 200.

[9] See *Hosanna-Tabor*, 565 U.S. at 188–89.

[10] Rachel Casper, *When Harassment at Work Is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. & SOC. CHANGE 11, 15 (2021); *see also Hosanna-Tabor,* 565 U.S. at 188.

[11] Casper, *supra* note 10, at 15.

[12] *Id.*

both the Free Exercise and Establishment Clauses of the First Amendment.[13]

1. Pre-*Hosanna-Tabor*

The principle of church autonomy has existed since at least A.D. 1215,[14] when "the very first clause of the Magna Carta" stated "that 'the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.'"[15] This freedom was shaky at best and, in reality, "more theoretical than real."[16] The Act of Supremacy of 1534 eliminated whatever theoretical religious freedom there may have been by making the "English monarch the supreme head of the Church."[17] Our Founding Fathers, who were all too "[f]amiliar with life under the established Church of England," created the First Amendment in part to prevent the federal government from meddling in church affairs.[18] Because of this fundamental understanding of the First Amendment and a lack of employment discrimination laws, the Supreme Court did not have to address a situation where the government interfered with a church's employment decisions for quite some time.[19] In fact, it was not until 1952 "that the Supreme Court officially recognized that churches had the freedom to select their clergy members."[20]

Before the Supreme Court officially recognized the ministerial exception in 2012, all of the circuit courts of appeals "uniformly recognized the

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[13] *See Hosanna-Tabor*, 565 U.S. at 188–89.

[14] *Id.* at 182.

[15] *Id.* (quoting J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965)).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 183; *see* 1 ANNALS OF CONG. 757–58 (1789) (remarks of James Madison).

[19] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 185 (2012). The first time the Supreme Court even addressed the constitutionality of government interference with a church's employment decisions was in 1952. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

[20] Sara Riddick, *The Seventh Circuit Got It Right the First Time: Addressing the Ministerial Exception and Workplace Harassment*, 71 DEPAUL L. REV. 141, 144 (2021); *see Kedroff*, 344 U.S. at 116.

existence of a 'ministerial exception.'"[21] In 1972, in *McClure v. Salvation Army*, the Fifth Circuit Court of Appeals became the first circuit court to officially recognize a ministerial exception.[22] There, the Salvation Army employed McClure as "one of its ordained ministers."[23] McClure sued the Salvation Army, claiming it engaged in unlawful employment discrimination practices under Title VII when it fired her and removed her from her position as a minister.[24] Specifically, McClure alleged that the Salvation Army provided her less salary and benefits than it had given male ministers in similar positions and that it fired her in retaliation for her complaints to her superiors.[25] The court recognized the ministerial exception's existence because "[t]he relationship between an organized church and its ministers is its lifeblood."[26] The court further reasoned that the relationship between a church and its ministers "must necessarily be recognized as of prime ecclesiastical concern."[27] Accordingly, applying Title VII to the "employment relationship . . . between The Salvation Army and Ms. McClure, a church and its minister[,] . . . would result in an encroachment by the State into an area of religious freedom which it is

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[21] *Hosanna-Tabor*, 565 U.S. at 188; *see* Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 204–09 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006); EEOC v. Roman Cath. Diocese, 213 F.3d 795, 800–01 (4th Cir. 2000); Combs v. Cent. Tex. Ann. Conf. of the United Methodist Church, 173 F.3d 343, 345–50 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–27 (6th Cir. 2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991); Werft v. Desert Sw. Ann. Conf., 377 F.3d 1099, 1100–04 (9th Cir. 2004)(per curiam); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1301–04 (11th Cir. 2000); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 460–63 (D.C. Cir. 1996).

[22] Riddick, *supra* note 20, at 144; *see* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).

[23] *McClure*, 460 F.2d at 554.

[24] *Id.* at 555; Riddick, *supra* note 20, at 144.

[25] *McClure*, 460 F.2d at 555.

[26] *Id.* at 558.

[27] *Id.* at 559.

forbidden to enter" under the First Amendment.[28] Thus, the ministerial exception was born. In the time between the decision in *McClure* and the eventual 2012 Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[29] "every circuit recognized a ministerial exception."[30]

2. *Hosanna-Tabor*, *Our Lady of Guadalupe*, and the Supreme Court's Recognition of the Ministerial Exception

In 2012, the Supreme Court officially recognized the ministerial exception for the first time in a unanimous decision in *Hosanna-Tabor*.[31] In *Hosanna-Tabor*, Cheryl Perich worked as a teacher for Hosanna-Tabor Evangelical Lutheran Church and School.[32] Perich held the title of a "called teacher," and "Hosanna-Tabor held [her] out as a minister."[33] Accordingly, the Supreme Court held that she was a minister for purposes of the ministerial exception.[34] Perich was diagnosed with narcolepsy in June 2004,

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[28] *Id.* at 560.

[29] *Hosanna-Tabor* was the opinion in which the Supreme Court officially recognized the ministerial exception. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[30] Riddick, *supra* note 20, at 145; *see* Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 204–09 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006); EEOC v. Roman Cath. Diocese, 213 F.3d 795, 800–01 (4th Cir. 2000); Combs v. Cent. Tex. Ann. Conf. of the United Methodist Church, 173 F.3d 343, 345–50 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–27 (6th Cir. 2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991); Werft v. Desert Sw. Ann. Conf., 377 F.3d 1099, 1100–04 (9th Cir. 2004)(per curiam); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1301–04 (11th Cir. 2000); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 460–63 (D.C. Cir. 1996).

[31] *Hosanna-Tabor*, 565 U.S. at 188.

[32] *Id.* at 178.

[33] *Id.* at 178, 191.

[34] *Id.* at 190. In addition to the fact that Hosanna-Tabor held Perich out as a minster, the Court considered a variety of facts in concluding Perich was a minister for purposes of the ministerial exception. For example, the Court pointed out that Perich "was tasked with performing" her job duties "according to the Word of God and the confessional standards of

which caused her to go on disability leave.[35] "[I]n exchange for her resignation," Hosanna-Tabor offered to "pay a portion of her health insurance premiums."[36] However, Perich refused to resign and was subsequently fired.[37] Perich filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), "alleging that her employment had been terminated in violation of the [ADA]."[38] The EEOC then brought an action against Hosanna-Tabor, in which Perich intervened,[39] alleging violations of the ADA.[40] The Supreme Court held that Perich was a minister

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the Evangelical Lutheran Church as drawn from the Sacred Scriptures." *Id.* at 191. Additionally, the Court recognized that Hosanna-Tabor required Perich to receive a "significant degree of religious training" and "had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id.* Furthermore, the Court pointed out that "Perich held herself out as a minister." *Id.* Most importantly,

> Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." . . . Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

Id. at 192.

[35] *Id.* at 178.

[36] *Id.*

[37] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 179 (2012).

[38] *Id.*

[39] Individual Plaintiffs often intervene in employment discrimination suits brought by the EEOC because the EEOC is primarily interested in enforcing Title VII in terms of public policy, while individual plaintiffs are more concerned with personally receiving compensation and damages. Gen. Tel. Co. v. EEOC, 446 U.S. 318, 331–33 (1980).

[40] *Hosanna-Tabor*, 565 U.S. at 180.

in her role as a teacher but *declined* "to adopt a rigid formula for deciding when an employee qualifies as a minister."[41] Because she was a minister, the Supreme Court held that the ministerial exception barred the claims Perich and the EEOC brought.[42]

In recognizing the ministerial exception, the Supreme Court stated that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[43] The Court also acknowledged that the ministerial exception "precludes application of [Title VII] to claims concerning the employment relationship between a religious institution and its ministers."[44] "The exception . . . ensures that the authority to select and *control* who will minister to the faithful . . . is the church's alone."[45] And "the First Amendment protects the exclusive and uninhibited right of religious institutions to select and control their ministers."[46] The Court stated:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. 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

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41 *Id.* at 190–91.

42 *Id.* at 196.

43 *Id.* at 184.

44 *Id.* at 188.

45 *Id.* at 194–95 (emphasis added).

46 Johnson, *supra* note 6, at 202.

> Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[47]

Although the Supreme Court officially recognized the ministerial exception in *Hosanna-Tabor*, it intentionally declined to provide the lower courts with specific and clear guidance regarding what constitutes a minister.[48] But it did give additional guidance in *Our Lady of Guadalupe School v. Morrissey-Berru*. *Our Lady of Guadalupe* consisted of two consolidated cases, one addressing a violation of the ADEA and the other addressing a violation of the ADA.[49] In the first case, Agnes Morrissey-Berru, a fifth and sixth grade teacher, worked for Our Lady of Guadalupe School, a Roman Catholic school.[50] At the school, Morrissey-Berru taught religion among other subjects.[51] Each year, teachers entered into employment contracts with the school that made it abundantly clear that "teachers were expected to 'model and promote' Catholic 'faith and morals.'"[52] Additionally, the contracts provided that Our Lady of Guadalupe had the right to terminate a teacher for failing to conform to these principles or for conducting themselves in a manner that discredits the Roman Catholic Church.[53] In addition to teaching religious doctrine, Morrissey-Berru led her students in prayer and prepared them for their regular religious services.[54] After Our Lady of Guadalupe asked her to switch from full-time to part-time and declined to renew her contract the following year, Morrissey-Berru sued Our Lady of Guadalupe for age discrimination.[55]

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

48 *Id.* at 190.

49 Casper, *supra* note 10, at 17.

50 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056 (2020)

51 *Id.*

52 *Id.*

53 *Id.* at 2057.

54 *Id.*

55 *Id.* at 2057–58.

In the second case, Kristen Biel, who was also a teacher, worked at St. James, a Catholic school.[56] Biel's employment contract, "in pertinent part nearly identical to Morrissey-Berru's," included provisions that "required teachers to serve [the school's] mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases."[57] Like Morrissey-Berru, Biel taught religion to her students, including the norms, customs, and doctrines of Catholicism, but St. James decided not to renew her contract after only a year.[58] Biel then sued, "alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer."[59] The school countered this assertion and claimed that it fired her for poor performance.[60]

In dismissing both suits, the Court affirmed its commitment to the ministerial exception and "attempted to clarify how courts may determine if an employee qualifies as a minister for purposes of the exception."[61] It held that to determine whether an employee is a minister, "[w]hat matters, at bottom, is what an employee does."[62] *Our Lady of Guadalupe* thus created a broader view of who constitutes a minister, which, by nature, broadens the ministerial exception's reach.[63] While it is arguable that the Supreme Court's decision in *Our Lady of Guadalupe* led to a wider variety of employees being categorized as ministers in some circuits,[64] the most important takeaway is that the Court affirmed that a religious institution's "independence on matters 'of faith and doctrine' requires the authority to

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56 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2058 (2020).

57 *Id.*

58 *Id.* at 2059.

59 *Id.*

60 *Id.*

61 Casper, *supra* note 10, at 17.

62 *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

63 Casper, *supra* note 10, at 17.

64 *Id.* at 17–18.

select, supervise, and if necessary, remove a minister without interference by secular authorities."[65]

B. Title VII and the Hostile Work Environment Claim

The question at issue in *Demkovich III* was whether the ministerial exception categorically bars hostile work environment claims that plaintiffs bring under Title VII or other similar anti-discrimination laws when the claims originate from "minister-on-minister harassment."[66] Therefore, it is critical not only to understand the nature of the ministerial exception but also the hostile work environment claim itself. Furthermore, one needs to understand the broader history of Title VII before evaluating the interplay between the ministerial exception and hostile work environment claims.

1. The History of Title VII

On January 9, 1963, "various senators and representatives introduced a 'plethora of civil rights' legislation."[67] Representative James Roosevelt introduced House Resolution (H.R.) 405 as part of this legislation.[68] H.R. 405, Title VII's ancestor, "primarily dealing with equal employment opportunity" and was "[e]ntitled 'A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age.'"[69] Although Congress never adopted H.R. 405 as a standalone statute, it did incorporate H.R. 405 into H.R. 7152, which was "a more comprehensive piece of civil rights legislation proposed by President Kennedy's administration."[70]

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[65] *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 179, 186 (2012)).

[66] *Demkovich III*, 3 F.4th 968, 973 (7th Cir. 2021).

[67] Rylee B. Seabolt, Comment, *Standing at a Crossroads: How to Navigate the Intersection of Title VII and RFRA in Federal Employment Religious Discrimination Cases*, 17 LIBERTY UNIV. L. REV. 115, 120 (2022); *see also* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433 (1966).

[68] Seabolt, *supra* note 67, at 120; *see also* Vaas, *supra* note 67, at 433.

[69] Seabolt, *supra* note 67, at 120; *see also* Vaas, *supra* note 67, at 433.

[70] Seabolt, *supra* note 67, at 120; *see also* Vaas, *supra* note 67, at 435.

"H.R. 7152, including Title VII, became the Civil Rights Act of 1964."[71] On June 19, 1964, the Senate passed the Civil Rights Act of 1964.[72] A short time later, on July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[73] "While the Civil Rights Act of 1964 provides broad civil rights protection for individuals,"[74] Title VII is more narrowly focused and prohibits employment discrimination based on an "individual's race, color, religion, sex, or national origin."[75] Along with Title VII, Congress created the Equal Employment Opportunity Commission (EEOC), which processes and oversees Title VII claims.[76]

2. The Hostile Work Environment Claim

As previously mentioned,[77] Title VII prohibits employment discrimination based on an "individual's race, color, religion, sex, or national origin."[78] In 1986 in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that a plaintiff could bring a hostile work environment claim as a form of employment discrimination under Title VII.[79] The victim of a hostile work environment does not have to suffer any tangible, economic injury before bringing a hostile work environment claim.[80] For a plaintiff to have standing for a hostile work environment claim, the workplace must be "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[81]

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[71] Seabolt, *supra* note 67, at 121; *see* 110 CONG. REC. 14409, 14511 (1964).

[72] 110 CONG. REC. 14409, 14511 (1964).

[73] History.com Editors, *Civil Rights Act of 1964*, HISTORY.COM (Jan. 10, 2023), https://www.history.com/topics/black-history/civil-rights-act.

[74] Seabolt, *supra* note 67, at 121.

[75] 42 U.S.C. § 2000e-2(a)(1).

[76] Seabolt, *supra* note 67, at 121; 42 U.S.C. § 2000e–4.

[77] *See* discussion *supra* Section II.B.1.

[78] 42 U.S.C. § 2000e-2(a)(1).

[79] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

[80] *Id.* at 65.

[81] Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (citations omitted) (quoting *Meritor*, 477 U.S. at 65, 67).

Accordingly, a hostile work environment claim requires the establishment of two elements, one objective and the other subjective.[82] First, the conduct must be "severe or pervasive enough to create an *objectively* hostile or abusive work environment . . . that a reasonable person would find hostile or abusive."[83] Second, the victim must "subjectively perceive the environment to be abusive."[84] Accordingly, even if the conduct in question is objectively abusive or hostile, there is no basis for a hostile work environment claim if the victim does not *subjectively* see it that way. In other words, the conduct must be unwelcome to the particular victim.[85] The Seventh Circuit laid out these requirements as follows: To succeed on a hostile work environment claim, a plaintiff must show: (1) unwelcome harassment; (2) based on a protected characteristic; (3) that was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) a basis for employer liability.[86]

The burden to defend against a hostile work environment claim demonstrates why the ministerial exception bars it. "When no tangible employment action is taken," an "employer may raise an affirmative defense" to a hostile work environment claim.[87] This affirmative defense, known as the *Ellerth*/*Faragher* affirmative defense, requires proving two elements.[88] First, the employer must prove, by a preponderance of the evidence, "that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior."[89] Second, the employer must prove, by a preponderance of the evidence, that the "plaintiff employee unreasonably failed to take advantage of any preventative or corrective

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[82] *Id.* at 21–22.

[83] *Id.* (emphasis added).

[84] *Id.*

[85] *Id.*

[86] Howard v. Cook Cnty. Sheriff's Off., 989 F.3d 587, 600 (7th Cir. 2021) (quoting EEOC v. Costco Wholesale Corp., 903 F.3d 618, 625 (7th Cir. 2018)).

[87] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[88] *Id.*

[89] *Id.*

opportunities provided by the employer or to avoid harm otherwise."[90] This affirmative defense—especially the first element—naturally requires courts to delve into the internal workings of religious organizations and impose "objective" standards as to what the organization should have done.[91]

III. THE CIRCUIT SPLIT

The Seventh, Ninth, and Tenth Circuits are currently split on whether the ministerial exception categorically bars hostile work environment claims.[92] In 2004 in *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit followed its reasoning from *Bollard v. California Province of the Society of Jesus* and held that the ministerial exception does not categorically bar hostile work environment claims arising under Title VII.[93] In 2010 in *Skrzypczak v. Roman Catholic Diocese*, the Tenth Circuit deviated from the Ninth Circuit and held that the ministerial exception categorically bars hostile work environment claims.[94] In 2021 in *Demkovich III*, the Seventh Circuit sat *en banc* and overturned its panel's decision from *Demkovich II*.[95] In doing this, the Seventh Circuit joined the Tenth Circuit and thus deepened the split with the Ninth Circuit.[96] Within the jurisdiction of the various circuit courts that have not addressed this question, the district court decisions vary wildly.[97]

A. The Ninth Circuit's Narrow Ministerial Exception

In *Elvig*, the Ninth Circuit held that the ministerial exception does not categorically bar hostile work environment claims.[98] The Ninth Circuit's

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[90] *Id.*

[91] *See Demkovich II*, 973 F.3d 718, 740–41 (7th Cir. 2020) (Flaum, J., dissenting), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[92] Patrick Hornbeck, *A Nun, a Synagogue Janitor, and a Social Work Professor Walk up to the Bar: The Expanding Ministerial Exception*, 70 BUFF. L. REV. 695, 742–44 (2022).

[93] Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 969–70 (9th Cir. 2004).

[94] Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238, 1244–46 (10th Cir. 2010).

[95] *Demkovich III*, 3 F.4th 968, 985 (7th Cir. 2021).

[96] *Id.* at 984.

[97] *See infra* Section III.D.

[98] *Elvig*, 375 F.3d at 969–70.

holding and rationale relied significantly on its previous decision in *Bollard*.[99] Accordingly, it is critical to first understand the Ninth Circuit's decision and reasoning in *Bollard* before analyzing *Elvig*.

1. *Bollard v. California Province of the Society of Jesus*

In *Bollard v. California Province of the Society of Jesus*, John Bollard trained to become a priest in the Society of Jesus, more commonly known as the Jesuits, which is an order of Roman Catholic priests.[100] Bollard claimed that his superiors sexually harassed him in many ways, such as sending him sexually explicit materials, making "unwelcome sexual advances," and "engag[ing] him in inappropriate and unwelcome sexual discussions."[101] Bollard sued the Jesuits for sexual harassment.[102] The district court held that the ministerial exception applied and that Mr. Bollard could not bring his claim arising under Title VII.[103] The district court dismissed Bollard's Title VII claim for a lack of subject matter jurisdiction because of the ministerial exception.[104] The Ninth Circuit disagreed and held that allowing the claim to proceed would not violate either the Free Exercise or Establishment Clauses of the First Amendment.[105] The Ninth Circuit reasoned that although the ministerial exception requires that churches "retain unfettered freedom" in their choices of ministers, the "scope of the ministerial exception . . . is limited to what is necessary to comply with the First Amendment."[106]

In addressing the Free Exercise aspect, the Ninth Circuit reasoned that the ministerial exception did not bar Bollard's harassment claim because "[t]he Jesuits d[id] not offer a religious justification for the harassment

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99 *Id.* at 956.

100 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*; Riddick, *supra* note 20, at 150.

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

Bollard allege[d]."[107] Because the Jesuits did not justify the harassment based on religious doctrine, and in fact condemned it, the Ninth Circuit held that "[t]here [was] no danger that" allowing Bollard's lawsuit to proceed would "thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine."[108] This rationale seemingly allowed religious organizations to endorse harassment as a religious doctrine to avoid liability but imposed liability in all cases where the organizations failed to do so.[109]

In addressing the Establishment Clause issue, the Ninth Circuit applied the Supreme Court's *Lemon* test and held that allowing Bollard's claim to proceed would not violate the Establishment Clause.[110] In *Lemon v. Kurtzman*, the Supreme Court created the *Lemon* test to evaluate Establishment Clause inquiries.[111] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."[112] The Ninth Circuit had already decided in prior cases that Title VII satisfied the first two prongs of the

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[107] *Id.* at 946–47.

[108] *Id.* at 947.

[109] *See id.* at 948.

[110] *Id.* at 948, 950.

[111] *Id.* at 948; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). It is important to note that *Lemon* and the *Lemon* test seem to have been eliminated. In *Kennedy v. Bremerton School District*, the Supreme Court said that it has abandoned the *Lemon* test and "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)). For our purposes, this Comment posits that the ministerial exception violates the First Amendment regardless of whether the *Lemon* test is good law. It then proposes a jurisdictional approach that is rooted in the historical church autonomy doctrine and promotes a principled definition of religion for purposes of the First Amendment. *See* discussion *infra* Section IV.A.

[112] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)); *see also* Riddick, *supra* note 20, at 150.

Lemon test and, therefore, only analyzed the "excessive entanglement" prong in the *Bollard* case as it applied to harassment claims.[113]

The Ninth Circuit divided this inquiry into two types: substantive entanglement and procedural entanglement.[114] When addressing substantive entanglement, the court stated generally that "applying [Title VII] to the clergy-church employment relationship creates a constitutionally impermissible entanglement with religion *if* the church's freedom to choose its members is at stake."[115] The Ninth Circuit emphasized that the ministerial exception bars the application of Title VII to tangible employment claims—"[a] religious organization's decision to employ or to terminate employment of a minister."[116] The Ninth Circuit held that allowing Bollard's claim to proceed presented no substantive entanglement issue for the same reasons it held that there was no Free Exercise violation—namely, the claim presented only a secular inquiry because the Jesuits disavowed the harassment in question.[117]

When addressing procedural entanglement, the Ninth Circuit stated that a statute's application to a religious organization could violate the First Amendment depending on the severity of the "protracted legal process pitting church and state as adversaries."[118] The court explained that violations of the Establishment Clause can arise not only from the conclusions and decisions made by the court but also through procedural entanglement arising from the "very process of inquiry leading to findings and conclusions."[119] While recognizing that the risk of prolonged government surveillance of the church's policies, activities, and decisions was the most serious concern, the Ninth Circuit pointed out that "the

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[113] *Bollard*, 196 F.3d at 948.

[114] *Id.*

[115] *Id.* at 948–49 (emphasis added).

[116] *Id.* at 949.

[117] *Id.* at 947–49.

[118] *Id.* at 949 (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)).

[119] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 949 (9th Cir. 1999) (quoting NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979)).

dangers of procedural entanglement are most acute where there is also . . . substantive entanglement at issue."[120] Having already concluded that Bollard's claim did not constitute substantive entanglement, the court held that any potential procedural entanglement that would arise from Bollard's claim would not establish a violation of the Establishment Clause.[121] Furthermore, the Ninth Circuit pointed out that "[t]he limited nature of the inquiry, combined with the ability of the district court to control discovery," sufficiently reduced the risk of an unconstitutional intrusion into religious matters.[122] Accordingly, the Ninth Circuit allowed Bollard's sex-based harassment claim to proceed.[123]

2. *Elvig v. Calvin Presbyterian Church*

In *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit addressed the issue of whether to dismiss a minister's lawsuit against a church alleging a hostile work environment claim under Title VII.[124] Monica Elvig served as the Associate Pastor of Calvin Presbyterian Church.[125] Not long after Elvig took this position, Will Ackles, the pastor of the church engaged in intimidating and sexually harassing conduct toward her, which created a hostile work environment.[126] Elvig subsequently brought an internal, "formal complaint of sexual harassment against Ackles to the Church, which . . . took no action to [end] the harassment or alleviate the hostile work[] environment."[127] In fact, the internal investigating committee decided not to file any "internal charges" against Ackles.[128] Ackles then retaliated against Elvig by "verbally abusing her" and "relieving her of

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120 *Id.*

121 *Id.*

122 *Id.* at 949–50.

123 *Id.* at 951.

124 *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 969–70 (9th Cir. 2004).

125 *Id.* at 953.

126 *Id.*

127 *Id.* at 953–54.

128 *Id.*; *id.* at 971 (Trott, J., dissenting).

certain duties."[129] Elvig then "filed a charge of discrimination [under Title VII] with the EEOC."[130] Shortly thereafter, the church voted to fire Elvig.[131] "The district court dismissed Elvig's Title VII suit . . . for failure to state a claim" and held that the ministerial exception barred Elvig's allegations.[132]

Consistent with the principles it established in *Bollard*, the Ninth Circuit reversed the district court and held that the ministerial exception does not bar a minister's hostile work environment claim against a church.[133] *Elvig* is different from *Bollard* in that Elvig followed a formal complaint process through the church's *Rules of Discipline* found in its *Book of Order*.[134] Furthermore, the church in *Elvig* actually fired Elvig, while Bollard was never fired.[135] Even though the Ninth Circuit recognized that the ministerial exception does not allow courts to review tangible employment actions, it did not dismiss Elvig's hostile work environment claim against the church.[136]

To justify its holding, the Ninth Circuit stated that the ministerial exception does not prevent churches or other religious institutions from being liable to a minister for failing to remedy a hostile work environment that occurred during the minister's employment and was not connected to a tangible employment action.[137] The court emphasized that although the church eventually took a tangible employment action—firing Elvig—the ministerial exception did not bar Elvig's hostile work environment claim

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129 *Id.* at 954 (majority opinion).

130 Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 954 (9th Cir. 2004).

131 *Id.*

132 *Id.*

133 *Id.* at 953.

134 *Id.* at 953–54; *id.* at 971 (Trott, J., dissenting).

135 *Id.* at 954 (majority opinion); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).

136 Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 960 (9th Cir. 2004). "A tangible employment action is '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.'" *Id.* at 960–61 (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)).

137 *See id.* at 960.

against the church.[138] This was because it was not related to any tangible employment action but rather her continued employment situation.[139] The Ninth Circuit noted that the church, like any other institution, could still rely on the *Ellerth*/*Faragher* affirmative defense to avoid Title VII liability resulting from a hostile work environment claim.[140]

Additionally, the Ninth Circuit pointed out that if a religious institution does not offer a religious justification for the conduct at issue in the case, the ministerial exception does not prevent a court from adjudicating alleged violations of Title VII through hostile work environment claims because all inquiries in such a case would be purely secular.[141] By allowing a church to escape liability through a doctrinal defense, the Ninth Circuit "created a concerning loophole [that] would allow [a] religious organization[] to" use the ministerial exception by arguing that the "alleged harassment is in fact a part of the Church's doctrine."[142] Although the church in *Elvig* did not provide any doctrinal justification for the harassment at issue, the Ninth Circuit clearly viewed such a potential justification as sufficient to invoke the ministerial exception.[143]

In his dissenting opinion, Judge Trott distinguished *Elvig* from *Bollard*[144] and argued that the ministerial exception should protect the church from the entirety of Elvig's claims.[145] Judge Trott made clear, however, that if *Bollard* "somehow" compelled the decision of the majority in *Elvig*, "then *Bollard* is wrong."[146] Judge Trott supported this position by arguing that

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138 *Id.*

139 *Id.*

140 *Id.* at 962; *see* discussion *supra* Section II.B.2.

141 *Id.* at 963.

142 Riddick, *supra* note 20, at 152; *see also Elvig*, 375 F.3d at 963.

143 Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 963 (9th Cir. 2004).

144 Judge Trott pointed out factual dissimilarities that supported distinguishing *Bollard* from *Elvig*, namely the facts that the plaintiff in *Bollard* "had not taken a required ordination vow 'to be governed by our Church polity, and to abide by its discipline'" nor had the plaintiff "engaged a Church's internal disciplinary process and followed it through to a final result." *Id.* at 980 (Trott, J., dissenting).

145 *Id.*

146 *Id.*

forcing a religious institution to rely on the *Ellerth*/*Faragher* affirmative defense to avoid Title VII liability under a hostile work environment claim would force the religious institution "affirmatively to defend as reasonable its formal internal processing and handling of an ordained minister's sexual harassment and retaliation claims against another ordained minister."[147] Recall the burden on the institution that raises the *Ellerth*/*Faragher* affirmative defense to a hostile work environment claim.[148] To successfully use this defense, a religious institution must prove, by a preponderance of the evidence, "that [it] exercised reasonable care to prevent and correct promptly any . . . harassing behavior."[149]

Judge Trott pointed out that the inquiry into the reasonableness of the religious institution's actions would necessarily require the secular courts to thoroughly review not only the religious institution's internal complaint and disciplinary processes, but also the final decisions the religious institution makes through those processes.[150] Judge Trott stressed that the majority's decision in *Elvig* would give secular courts the "authority to invade, to evaluate, and to overrule" the religious institution's final decisions made pursuant to its formal disciplinary process.[151] Judge Trott pointed out that the church in *Elvig* was governed by its *Rules of Discipline* found within its *Book of Order*, which specifically stated that "[c]hurch discipline is the church's exercise of authority given by Christ."[152] To avoid "wholesale substantive and procedural entanglement with the business of the Church," Judge Trott classified the church's decision not to act on Elvig's claims as an internal church decision that the ministerial exception protects.[153]

Furthermore, Judge Trott posited that allowing Elvig to proceed with her hostile work environment claim against the church "constituted ratification

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147 *Id.* at 970.

148 *See* discussion *supra* Section II.B.2.

149 Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

150 *Elvig*, 375 F.3d at 973 (Trott, J., dissenting).

151 *Id.* at 970.

152 *Id.* at 973 (emphasis omitted).

153 *Id.* at 975–76.

by the court for [Elvig] to violate her vows to the Church—in essence, violating Church doctrine."[154] Elvig voluntarily vowed to be governed by the church's *Book of Order*, including its *Rules of Discipline*.[155] Without this voluntary vow, Elvig would "not have become an ordained minister."[156] This vow prohibited Elvig from bringing any claim or dispute to any civil court for judicial resolution.[157] Accordingly, Judge Trott took the position that allowing Elvig's hostile work environment claim to proceed against the church would necessarily require the secular courts to "reject[] a critical aspect of the Church's ordination requirements," which would violate both of the First Amendment's religion clauses.[158]

B. The Tenth Circuit Splits, Accepting a Broader Ministerial Exception

In *Skrzypczak v. Roman Catholic Diocese*, the Tenth Circuit split from the Ninth Circuit and held that the ministerial exception categorically bars hostile work environment claims.[159] The facts in *Skrzypczak* are quite similar to the facts in both *Bollard* and *Elvig*.[160] In *Skrzypczak*, Monica Skrzypczak "work[ed] as the director of the Department of Religious Formation for the Roman Catholic Diocese of Tulsa."[161] In addition to holding various supervisory duties, Skrzypczak taught many religious courses from 1999 through 2007.[162] Although her performance reviews were typically positive, the Diocese ultimately fired Skrzypczak.[163] Skrzypczak

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154 Johnson, *supra* note 6, at 211; *see Elvig*, 375 F.3d at 974 (Trott, J., dissenting).

155 *Elvig*, 375 F.3d at 974 (Trott, J., dissenting).

156 *Id.*

157 *Id.*

158 *Id.* at 974–75, 79.

159 Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238, 1244–46 (10th Cir. 2010). This Tenth Circuit decision largely echoes the concerns Judge Trott raised in his dissenting opinion in *Elvig*. *Compare Elvig*, 375 F.3d 951 (Trott, J., dissenting), *with Skrzypczak*, 611 F.3d 1238.

160 *Compare* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999), *and Elvig*, 375 F.3d 951, *with Skrzypczak*, 611 F.3d 1238.

161 *Skrzypczak*, 611 F.3d at 1240.

162 *Id.*

163 *Id.* at 1240–41.

then sued the Diocese "under Title VII . . . for gender discrimination . . . and hostile work environment."[164] "In response . . . , the Diocese filed a Rule 12(b)(1) motion to dismiss, [invoking] the ministerial exception . . . [to claim that] the court lacked subject matter jurisdiction . . . ."[165] "The district court re-characterized the . . . motion as one brought [under] Rule 12(b)(6),"[166] treating it as an affirmative defense instead of a jurisdictional bar.[167]

The Tenth Circuit held that Skrzypczak was a minister because she was "important to the spiritual and pastoral mission of the [Diocese]."[168] Primarily relying on the Ninth Circuit's decision in *Elvig*, Skrzypczak posited that even if she were a minister, the court should allow her Title VII claim for hostile work environment to proceed because it "d[id] not involve a protected employment decision."[169] Recall that *Elvig* stands for the proposition that the ministerial exception does not categorically bar hostile work environment claims (unless the religious institution offers some sort of doctrinal justification for its decision or lack thereof) because they do not "involve the review of a protected employment decision such as hiring or firing."[170]

The Tenth Circuit rejected the Ninth Circuit's reasoning in *Elvig* and held that the ministerial exception categorically bars hostile work environment claims.[171] The Tenth Circuit stated that allowing Title VII

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164 *Id.* at 1241.

165 *Id.*

166 *Id.*

167 *See* Casper, *supra* note 1010, at 15.

168 *Skrzypczak*, 611 F.3d at 1244 (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)). It is important to note that Skrzypczak met the Tenth Circuit's requirements for a minister before the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*. The Supreme Court today surely would have found Skrzypczak to be a minister under its precedent in *Our lady of Guadalupe*, which broadened the scope of who constitutes a minister. *See* Casper, *supra* note 10, at 17; *see also* discussion *supra* Section II.B.2.

169 *Skrzypczak*, 611 F.3d at 1244.

170 *Id.*; *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004).

171 *Skrzypczak*, 611 F.3d at 1244–45.

hostile work environment claims may "involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy."[172] The court determined that allowing hostile work environment claims would "infringe on a church's 'right to select, manage, and discipline [its] clergy free from government control and scrutiny' by influencing it to employ ministers that lower its exposure to liability rather than those that best 'further [its] religious objective[s].'"[173]

The Tenth Circuit further supported its decision by stating that its bright-line rule "provides greater clarity in the [ministerial] exception's application and avoids the kind of arbitrary and confusing application the Ninth Circuit's approach has created."[174] The Tenth Circuit used the Ninth Circuit case of *Werft v. Desert Southwest Annual Conference* as an example of the arbitrary result of the Ninth Circuit's approach.[175] *Werft* involved a claim by a minister against his employer (a Methodist church) for a hostile work environment caused by the church's refusal and failure to accommodate his disabilities.[176] The Ninth Circuit held that, unlike hostile work environment claims arising from sexual harassment, the ministerial exception does not bar hostile work environment claims based on failures to accommodate disabilities.[177] The Ninth Circuit distinguished between the claims by arguing that, unlike hostile work environment claims based on sexual harassment, those based on failures to accommodate disabilities involve internal church decisions, which are clearly covered by the ministerial exception.[178] The Ninth Circuit essentially held through *Werft* that decisions not to take action to alleviate hostile work environments arising from *sexual harassment* are subject to judicial scrutiny.[179] However,

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172 *Id.* at 1245 (quoting *Elvig*, 375 F.3d at 976 (Trott, J., dissenting)).

173 *Id.* (alteration in original) (quoting Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 803–04 (9th Cir. 2005) (Kleinfeld, J., dissenting) (order denying petition for rehearing)).

174 *Id.*

175 *Id.* (citing Werft v. Desert Sw. Ann. Conf., 377 F.3d 1099, 1103 (9th Cir. 2004)).

176 *Werft*, 377 F.3d at 1100, 1103.

177 *Id.* at 1103.

178 *Id.* at 1101–03.

179 Johnson, *supra* note 6, at 212; *see Skrzypczak*, 611 F.3d at 1245.

it simultaneously held that decisions not to take action to alleviate hostile work environments arising from a failure to accommodate *disabilities* are "internal church decisions unquestionably protected by the ministerial exception."[180] The Tenth Circuit adopted its approach in part to avoid such arbitrary distinctions.[181] As this Comment will explain later,[182] the only principled approach is that the ministerial exception functions as a categorical ban on all hostile work environment claims between ministers and the religious institution from whatever source derived.

C. The Seventh Circuit Agrees, Joining the Split in a Post-Hosanna-Tabor World

At the time of writing, the Seventh Circuit is the only federal appellate court to address whether the ministerial exception categorically bars hostile work environment claims after the Supreme Court decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[183] While the Seventh Circuit in *Demkovich III* ended up joining the split by siding with the Tenth Circuit,[184] it is critical to first understand *Demkovich I* and *II*, which led to the Seventh Circuit's en banc decision in *Demkovich III*.

Sandor Demkovich, a homosexual man, served as the music director, choir director, and organist for St. Andrew the Apostle Parish, a Roman Catholic Church of the Archdiocese of Chicago.[185] Reverend Jacek Dada, a Catholic priest at the church, supervised Demkovich.[186] This supervisory relationship deteriorated over time to the point that Reverend Dada fired Demkovich.[187] According to Demkovich, Reverend Dada repeatedly harassed Demkovich about his sexual orientation, weight, and various

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180 Johnson, *supra* note 6, at 212; *see Skrzypczak*, 611 F.3d at 1245.

181 *Skrzypczak*, 611 F.3d at 1245.

182 *See infra* Section IV.A.

183 *See Demkovich II*, 973 F.3d 718, 736 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

184 *Demkovich III*, 3 F.4th 968, 984–85 (7th Cir. 2021).

185 *Id.* at 973.

186 *Id.*

187 *Id.*

medical issues.[188] The frequency and severity of the harassment allegedly worsened once Reverend Dada became aware that Demkovich planned to marry Demkovich's partner (another man) while still working for the church.[189] Following Demkovich's marriage, Reverend Dada requested his resignation, informing him that the "marriage was against the teachings of the Catholic Church."[190] Demkovich then sued St. Andrew the Apostle Parish for employment discrimination.[191]

In his initial complaint, Demkovich challenged the church's decision to fire him as a violation of Title VII.[192] In *Demkovich I*, the district court promptly granted the church's motion under Federal Rules of Civil Procedure 12(b)(6) and dismissed Demkovich's complaint pursuant to the ministerial exception, "albeit without prejudice."[193] Demkovich then amended his complaint and changed his claims to allege that the church fostered a hostile work environment.[194] The church once again invoked the ministerial exception.[195] The district court allowed Demkovich's hostile work environment claim to proceed as it pertained to his disability but dismissed his hostile work environment claims based on "sex, sexual orientation, and marital status."[196]

In large part following the Ninth Circuit's lead in *Bollard* and *Elvig*, the district court justified its decision by holding that "[c]laims based on tangible employment actions . . . [a]re categorically barred[,] [while] claims based on intangible employment actions, such as discriminatory remarks and insults, [a]re not."[197] Much like the Ninth Circuit, the district court

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188 *Demkovich II*, 973 F.3d at 721.

189 *Demkovich III*, 3 F.4th at 973.

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Demkovich I*, 343 F. Supp. 3d 772, 776 (N.D. Ill. 2018), *aff'd in part rev'd in part*, 973 F.3d 718 (7th Cir. 2020) *reh'g en banc granted*, *opinion vacated* (Dec. 9, 2020), *rev'd in part*, *aff'd in part on other grounds*, *and remanded on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

195 *Id.*

196 *Demkovich III*, 3 F.4th 968, 973 (7th Cir. 2021).

197 *Id.* at 974.

viewed the ministerial exception's application to intangible employment actions as dependent on a case-by-case balancing approach, which is heavily dependent upon the facts of each case.[198] Like the Ninth Circuit, the district court evaluated several factors in its balancing approach, including whether the church offered religious justifications for the alleged discrimination, the church's inherent and "absolute right to choose its own ministers without civil interference," and other practical and procedural concerns.[199] Applying the balancing approach, the district court allowed Demkovich's hostile work environment claims based on disability to proceed, but dismissed the others.[200] Following the church's motion, the district court certified this question of law to the Seventh Circuit: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?"[201] Thus, the Seventh Circuit had to answer this question in *Demkovich II*.

1. The Seventh Circuit's First Decision: *Demkovich II*

In its divided panel decision, the Seventh Circuit answered the certified question of law with a clear and resounding statement: "Our answer is no."[202] Not only did the panel decide that the ministerial exception does not categorically bar hostile work environment claims, but it also reversed the district court's dismissal of Demkovich's hostile environment claims based on "sex, sexual orientation, and marital status."[203] The Seventh Circuit

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[198] *Id.* This balancing approach, however, seems to be at odds with not only the purpose of the ministerial exception but even Supreme Court precedent. "In the end, between the 'interest of society in the enforcement of employment discrimination statutes' and 'the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission,' . . . 'the First Amendment has struck the balance for us.'" *Id.* at 976 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 179, 196 (2012)).

[199] *Id.* at 974.

[200] *Id.*

[201] *Id.*

[202] *Demkovich II*, 973 F.3d 718, 720 (7th Cir. 2020), *reh'g en banc granted*, *opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[203] *Demkovich III*, 3 F.4th 968, 974 (7th Cir. 2021).

recognized that the ministerial exception guarantees that religious organizations have the authority to "select and control" their ministers.[204] Accordingly, it took the position that the ministerial exception protects religious employers from liability for their hiring, firing, and other like decisions.[205] Declining to follow its precedent set in *Alicea-Hernandez v. Catholic Bishop of Chicago*,[206] the Seventh Circuit decided that "[s]upervisors within religious organizations have no constitutionally protected individual rights . . . to abuse those employees they manage, whether or not they are motivated by their personal religious beliefs."[207] The "right balance," according to the Seventh Circuit panel, "is to bar claims by ministerial employees challenging tangible employment actions but to allow hostile [work] environment claims that do not challenge tangible employment actions."[208]

The Seventh Circuit justified its holding in a multitude of ways. Addressing the Free Exercise Clause, the panel drew a hard line between tangible employment actions[209] and intangible employment actions, reasoning that applying the ministerial exception as a categorical bar only to tangible employment actions sufficiently protects religious institutions'

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[204] *Demkovich II*, 973 F.3d at 727 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 (2012).

[205] *Id.*

[206] In this case, the Seventh Circuit stated that "[t]he 'ministerial exception' applies without regard to the type of claims being brought." Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003).

[207] *Demkovich II*, 973 F.3d at 730; *see also* Riddick, *supra* note 20, at 154. This ignores the fact that what is at issue is whether the religious institution is liable for the hostile work environment between ministers, not whether ministers are liable to other ministers for their own actionable torts.

[208] *Demkovich II*, 973 F.3d 718, 720 (7th Cir. 2020), *reh'g en banc granted*, *opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[209] According to the panel decision in *Demkovich II*, tangible employment decisions include actions such as "[h]iring, firing, promoting, retiring, transferring, . . . decisions about compensation and benefits, working conditions, resources available to do the job, training, [and] support from other staff and volunteers." *Id.* at 727.

constitutional right to "'select and control' their ministers."[210] While hostile work environment claims arise under the same statutes (Title VII) as employment discrimination claims that are barred by the ministerial exception, the Seventh Circuit pointed out that "they involve different elements and specially tailored rules for employer liability."[211] The court determined that the right to "control" a minister does not include the right to harass or degrade.[212] The court argued that the church can sufficiently "select and control" its ministers, as guaranteed by the Constitution, without creating a hostile work environment.[213] In fact, the court's reasoning implied that Reverend Dada could have encouraged Demkovich, "in a respectful or loving way, . . . to bring his conduct into conformity with church teaching."[214] The court further justified its conclusion by claiming that, since hostile work environment claims are essentially tortious, religious institutions should be subject to them so long as they do not challenge tangible employment decisions.[215]

Addressing the Establishment Clause, the Seventh Circuit approached the issue of excessive entanglement in much the same way as the Ninth Circuit in *Bollard* and *Elvig*. The court first broke the inquiry down into procedural entanglement and substantive entanglement.[216] While recognizing that "pitting church and state as adversaries" might cause excessive procedural entanglement, the Seventh Circuit concluded that this

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[210] *Demkovich II*, 973 F.3d at 727 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 (2012).

[211] *Id.*

[212] *Id.* at 728–29.

[213] *See id.* at 729.

[214] *See* Ira C. Lupu & Robert 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, 292 (2019). This seems easy to agree with, but one must take a closer look to appreciate the ramifications of the panel's approach here. Who decides what is respectful? Who decides what is loving? Who draws the line to determine where love, respect, and matters of discipline end and where harassment begins? The answer must be one of two options: the courts or the religious institutions. To comply with either religion clause of the First Amendment, the answer must be religious institutions.

[215] *Demkovich II*, 973 F.3d at 729.

[216] *Id.* at 732–33.

possibility "does not justify a categorical rule against all hostile environment claims by ministerial employees."[217] Accordingly, the court decided that courts can address procedural entanglement issues as they arise on a case-by-case basis "rather than closing the courthouse doors to an entire category of cases."[218]

Turning to the issue of substantive entanglement, the Seventh Circuit admitted that it was a more difficult and complicated issue.[219] To avoid excessive substantive entanglement, the Seventh Circuit stated that a court cannot "decide questions of correct faith and practice" and may only decide other disputes "if they avoid issues of faith and stick to applying neutral, secular principles of law."[220] To defend its conclusion that substantive entanglement was not excessive, the court posited that certain internal church decisions, which themselves are protected by the ministerial exception, caused harassing behavior that was abusive under neutral, secular, and generally applicable principles of law.[221] The court then concluded that the risk of excessive substantive entanglement "can be managed by . . . balancing First Amendment rights with the employee's rights and the government's interest in regulating employment discrimination."[222]

In his dissenting opinion in *Demkovich II*, Judge Flaum made multiple points that must be noted here. First, Judge Flaum pointed out that the Free Exercise Clause guarantees religious institutions the right to control their ministers, which "necessarily includes the ability to supervise, manage, discipline, and communicate with the minister, including by telling the minister that his behavior does not conform with church doctrine and by instructing him to change his behavior."[223] Because courts cannot infringe

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217 *Id.* at 732.

218 *Id.* at 733.

219 *Id.*

220 *Id.*

221 *Demkovich II*, 973 F.3d 718, 734 (7th Cir. 2020), *reh'g en banc granted*, *opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

222 *Id.* at 735.

223 *Id.* at 739 (Flaum, J., dissenting).

on a religious institution's right to be the "sole governing body of its ecclesiastical rules and religious doctrine"[224] and "[q]uestions of church discipline . . . are at the core of ecclesiastical concern,"[225] Judge Flaum posited that allowing ministers to bring hostile work environment claims against their religious employers "threatens the free exercise rights of . . . religious employers."[226]

Second, in addressing the Establishment Clause and excessive entanglement concerns, Judge Flaum pointed out a critical flaw in the majority's reasoning.[227] He pointed out that the majority essentially erased any distinction between ministers and typical employees regarding hostile work environment claims, which completely ignores the fact that the "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."[228] By failing to recognize this critical fact, Judge Flaum posited that the majority missed the whole point of the ministerial exception.[229]

Third, and most importantly, Judge Flaum pointed out that "the risk of excessive religious entanglement is arguably even greater when ministers base their employment discrimination claims on intangible rather than tangible employment actions."[230] Following a thorough review of the nature of the hostile work environment claim and the affirmative defense derived from *Ellerth* and *Faragher*,[231] Judge Flaum posited that, to determine the appropriateness of the religious work environment,

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[224] *Id.* at 740 (quoting Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000)).

[225] *Id.* (quoting Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696, 717 (1976)).

[226] *See id.*

[227] *See Demkovich II*, 973 F.3d 718, 740–41 (7th Cir. 2020), *reh'g en banc granted*, *opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[228] *Id.* at 740 (quoting McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972)).

[229] *Id.* at 740–41.

[230] *Id.* at 741.

[231] *See* discussion *supra* Section II.B.2.

> *every step* the Church took to respond and react to [Demkovich's] claims will be reviewed by the district court to determine whether it was reasonable. Such an inquiry into whether the Church exercised "reasonable care" will involve, by necessity, penetrating discovery and microscopic examination by litigation of the Church's disciplinary procedures and subsequent responsive decisions.[232]

Accordingly, Judge Flaum concluded that the ministerial exception categorically bars hostile work environment claims brought by ministers against their religious employers.[233]

2. The Seventh Circuit Reverses Course: *Demkovich III*

Following the Seventh Circuit's panel decision in *Demkovich II*, St. Andrew the Apostle Parish filed a motion for a rehearing en banc, which was granted in December 2020.[234] Accordingly, the Seventh Circuit vacated the *Demkovich II* opinion, held oral argument on February 9, 2021,[235] and decided the case on July 9, 2021.[236]

After rehearing the case en banc, the Seventh Circuit reversed its original panel decision and held that the ministerial exception categorically bars hostile work environment claims brought by ministers against their religious employers.[237] Echoing many of the concerns of Judge Trott's dissenting opinion in *Elvig* and Judge Flaum's dissenting opinion in *Demkovich II*, the Seventh Circuit based its reasoning on two guiding principles derived from the Supreme Court in *Hosanna-Tabor* and *Our*

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[232] *Demkovich II*, 973 F.3d at 741 (Flaum, J., dissenting) (quoting Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 973 (9th Cir. 2004) (Trott, J., dissenting)).

[233] *Id.* at 742.

[234] Demkovich v. St. Andrew the Apostle Par., No. 19-2142 (7th Cir. Dec. 9, 2020) (order granting petition for rehearing en banc).

[235] *Id.*; Demkovich v. St. Andrew the Apostle Par., No. 19-2142 (7th Cir. Dec. 17, 2020) (notice of oral argument).

[236] *Demkovich III*, 3 F.4th 968, 973 (7th Cir. 2021).

[237] *Id.* at 985.

Lady of Guadalupe.[238] First, "[t]he protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and *supervising* in between."[239] Second, the court emphasized that the ministerial exception exists to prevent harmful "civil intrusion and excessive entanglement."[240] In deciding in favor of a categorical ban, the Seventh Circuit stated that allowing hostile work environment claims arising from "minister-on-minister harassment would not only undercut a religious organization's constitutionally protected relationship with its ministers, but also cause civil intrusion into, and excessive entanglement with, the religious sphere."[241]

In addressing the first guiding principle, the court started its analysis by pointing out that any judgment against a church under a hostile work environment claim would "legally recognize that it fostered a discriminatory employment atmosphere for one of its ministers."[242] The court then emphasized that this recognition, by its very nature, amounts to a court's determination that the church "failed in supervision and control, either directly or indirectly."[243] This result is unacceptable, according to the Seventh Circuit, because, since ministers and non-ministers are fundamentally "different in kind, the First Amendment requires their hostile work environment claims to be treated differently."[244] Furthermore, allowing a court to decide hostile work environment claims arising among ministers would result in not just legal judgment, but also "religious judgment about how ministers interact."[245] Because "[t]he contours of the ministerial relationship are best left to a religious organization, . . . [d]eciding where a minister's supervisory power over another minister ends and where employment discrimination begins is not

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238 *Id.* at 976.

239 *Id.* at 976–77 (emphasis added).

240 *Id.* at 977.

241 *Id.* at 977–78.

242 *Demkovich III*, 3 F.4th 968, 978 (7th Cir. 2021).

243 *Id.*

244 *Id.*

245 *Id.* at 979.

a line to be drawn in litigation."[246] As the Seventh Circuit pointed out, this is the whole point of the ministerial exception. [247] In emphasizing a religious institution's right to *control* and *supervise* its ministers, the Seventh Circuit declined to draw any distinction between tangible and intangible employment actions for purposes of the ministerial exception.[248]

In addressing the second principle, the Seventh Circuit evaluated each religion clause in turn. First, in addressing the Free Exercise Clause, the court pointed out that matters of "church discipline . . . are at the core of ecclesiastical concern."[249] Accordingly, the court reasoned that even a minimally invasive hostile work environment claim would "intrude upon the religious realm" and "fundamentally alter the ministerial relationship and work environment."[250] The Seventh Circuit explained that this intrusion violates the Free Exercise Clause.[251] It further explained that not only do hostile work environment claims interfere with matters of church discipline, but they also "interfere with a religious organization's internal governance."[252] Pointing out that civil government and the courts have no power over religious governance, the Seventh Circuit reasoned that allowing hostile work environment claims to proceed has the potential to chill religiously motivated speech and expression within religious organizations.[253] Critically, the court stated: "[W]hat one minister says in supervision of another could constitute stern counsel to some or tread into bigotry to others. How is a court to determine discipline from discrimination? Or advice from animus? These questions and others like them cannot be answered without infringing upon a religious organization's

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246 *Id.*

247 *Id.*

248 *Demkovich III*, 3 F.4th 968, 980 (7th Cir. 2021).

249 *Id.* (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717 (1976)).

250 *Id.*

251 *Id.* at 981.

252 *Id.*

253 *Id.*

rights."[254] Accordingly, the Seventh Circuit decided that hostile work environment claims violate the Free Exercise Clause because "ministers should have an eye toward liturgy, not litigation."[255]

Second, in addressing the Establishment Clause, the court concluded that those violations of the First Amendment are just as serious.[256] Recognizing that there must be excessive entanglement to rise to a violation of the Establishment Clause under the *Lemon* test, the Seventh Circuit explained that hostile work environment claims "based on the relationship between ministers 'would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus.'"[257] The court reasoned that such inquiries are no task for the courts.[258] While recognizing that the First Amendment interests of religious institutions and the civil government's interest in enforcing employment discrimination are both important, "[w]hen these interests conflict, . . . the ministerial exception must prevail."[259] Accordingly, the court held that the ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious institutions.[260]

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[254] *Demkovich III*, 3 F.4th 968, 981 (7th Cir. 2021) (citation omitted). This point is of critical importance and demonstrates the kind of judicial restraint that courts must show to comply with the First Amendment. In its panel decision, the Seventh Circuit originally took the opposite approach and essentially decided that it was up to the courts, not the church, to decide where to draw the line. *See Demkovich II*, 973 F.3d 718, 729 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021). The folly of this approach is clear, and the ramifications are especially terrifying. *See supra* note 214 and accompanying text.

[255] *Demkovich III*, 3 F.4th at 981.

[256] *See id.*

[257] *Id.* (quoting Alicea-Hernandez v. Cath. Bishop of Chicago, 320 F.3d 698, 703 (7th Cir. 2003)).

[258] *Id.*

[259] *Id.* at 983.

[260] *Id.* at 985.

D. In All of the Other Circuits, the District Court Decisions Answering this Question Vary

While the primary circuit split is between the Seventh, Ninth, and Tenth Circuits, the district courts in the other circuits have varied in answering the question presented in *Demkovich III*. For example, in *Koenke v. Saint Joseph's University*, a case decided after *Our Lady of Guadalupe*, a district court in Pennsylvania held that the ministerial exception categorically bars hostile work environment claims brought by ministers against their religious employers.[261] Emphasizing that the Supreme Court in *Our Lady of Guadalupe* "expressly held 'the "ministerial exception" [applies] to *laws governing the employment relationship* between a religious institution and [ministerial] employees,'" the district court reasoned that "[p]lainly, hostile work environment discrimination claims are employment discrimination claims, and Title VII and Title IX are federal statutes governing, *inter alia*, employment relationships. Consequently, hostile work environment claims . . . clearly fall within the scope of cases banned by the ministerial exception."[262] Similarly, in *Preece v. Covenant Presbyterian Church*, the district court held the same, positing that "[t]he type of claim is irrelevant because 'any Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference.'"[263]

Another district court held the opposite in *Rojas v. Roman Catholic Diocese of Rochester*.[264] The crux of this district court's position was that there is no per se bar under the ministerial exception of hostile work environment claims brought by ministers against their religious

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[261] Koenke v. Saint Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *12 (E.D. Pa. Jan. 8, 2021).

[262] *Id.* at *8–9 (first and second alteration in original) (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020)). This rationale is the easiest and most straightforward resolution to the circuit split. *See infra* Section IV.A.1.

[263] Preece v. Covenant Presbyterian Church, No. 13CV188, 2015 U.S. Dist. LEXIS 52751, at *17 (D. Neb. Apr. 22, 2015) (quoting Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010)).

[264] *See* Rojas v. Roman Cath. Diocese of Rochester, 557 F. Supp. 2d 387, 399 (W.D.N.Y. 2008).

employers.[265] Instead, the court took an approach similar to the Seventh Circuit panel in *Demkovich II* in that it held a case-by-case analysis was the more sound approach.[266] If the Supreme Court does not take up this issue soon, more circuit courts of appeals will likely have to step in to resolve this question for the sake of consistency within their circuits.

IV. THE MINISTERIAL EXCEPTION CATEGORICALLY BARS MINISTERIAL EMPLOYEES FROM BRINGING HOSTILE WORK ENVIRONMENT CLAIMS AGAINST RELIGIOUS EMPLOYERS

When this circuit split reaches the Supreme Court, the Court should hold that the ministerial exception categorically bars hostile work environment claims brought by ministers against their religious employers. To this end, this section provides three different avenues the Court can take to justify its decision. It then addresses some practical considerations, including alternative remedies available to ministers and best practices by religious institutions going forward. At bottom, this Comment proposes that the Seventh Circuit's conclusion was correct and that the ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious employers.

A. Allowing Ministerial Employees to Bring Hostile Work Environment Claims Against Religious Employers Violates the First Amendment.

The Supreme Court should hold that allowing ministerial employees to bring hostile work environment claims against religious employers violates the First Amendment and is, therefore, categorically barred by the ministerial exception. This section provides three ways the Court could reach and justify this holding. First, the most likely (and least controversial) option: the Court could simply use its precedent to foreclose the argument. Second, the Court could take a more principled approach and hold that the First Amendment, through the doctrine of church autonomy, *mandates* that the ministerial exception categorically bar hostile work environment claims brought by ministers against their religious employers. Third, and

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[265] *See id.*

[266] *See id.*

most radical, the Court could finally define "religion" for First Amendment purposes, adopt James Madison's definition, and hold that adjudicating hostile work environment claims against religious institutions lies outside the jurisdiction of civil government to begin with. With the Supreme Court signaling that its approach to the First Amendment (at least for Establishment Clause purposes) will now focus much on historical underpinnings and understandings,[267] the second and third approaches seem to fit even better. Regardless of the path the Supreme Court takes, one thing is clear: the First Amendment does not allow ministers to bring hostile work environment claims against their religious employers, period.

1. Supreme Court Precedent

When the Supreme Court takes up this issue, it should at least hold that its own precedent requires that the ministerial exception, which is rooted in both the Free Exercise and Establishment Clauses, categorically bars ministers from bringing their hostile work environment claims. The Supreme Court can reach this conclusion solely from its own precedent at three levels of depth. The first and more shallow approach is merely a straightforward application of Supreme Court precedent. The second and deeper approach is a direct application of Supreme Court precedent to the decisions in *Elvig* and *Demkovich II*, demonstrating the folly of alternative approaches. The third and deepest approach is an evaluation of the nature of the hostile work environment claim itself, revealing that a hostile work environment claim is—by its very nature—diametrically opposed to the function and purpose of the ministerial exception as articulated by the Supreme Court. Each of these three approaches is fundamentally rooted in Supreme Court precedent and clearly demonstrates why, under Supreme Court precedent, the ministerial exception categorically bars hostile work environment claims brought by ministers against their religious employers.

a. A straightforward application

First, at a shallow level, the Supreme Court in *Our Lady of Guadalupe* bluntly stated that, under the ministerial exception, "courts are bound to

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[267] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

stay out of employment disputes" between ministers and their religious employers.[268] Regardless of a claim's facts and circumstances, a hostile work environment claim is, at its core, an employment dispute.[269] It follows naturally, then, that the ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious employers because such claims would entail a court resolving an employment dispute between a minister and the minister's religious employer, which is directly contrary to Supreme Court precedent. It does not matter the nature of the hostile work environment claim because, so long as it is at its core an employment dispute, the ministerial exception categorically bars it. While this is a simplistic approach, it may be appealing to the Supreme Court as it avoids any ambiguity regarding the ministerial exception.

b. The folly of alternative approaches

If that simple approach is not enough, the Court can go deeper by scrutinizing the alternative approaches of the Ninth Circuit in *Elvig* and the Seventh Circuit's panel decision in *Demkovich II* and contrasting both with current precedent. Those two decisions are fundamentally flawed in that they each operate contrary to Supreme Court precedent. Recognizing the flaws in its decision, the Ninth Circuit sought to mitigate its ramifications by allowing religious institutions to defeat hostile work environment claims if the alleged conduct was doctrinal.[270] However, the idea of requiring religious institutions to provide doctrinal justifications for their conduct is long dead, and the Supreme Court expressly rejected it in 1871 in *Watson v. Jones*.[271]

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[268] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020). This approach is valid because "[w]here the Title VII violation is among the ministers of a church, the government cannot regulate it without regulating religion itself." Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 803 (9th Cir. 2005) (order denying petition for rehearing en banc) (Kleinfeld, J., dissenting).

[269] *See supra* note 79 and accompanying text.

[270] *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004).

[271] *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 727–30 (1872).

Another fundamental flaw in *Elvig* is that the Ninth Circuit blatantly ignores what the Supreme Court itself has held: the ministerial exception protects religious institutions' exclusive authority to "establish their own rules and regulations for internal discipline and government"[272] and to "select, *supervise*, and[,] if necessary, remove a minister without interference from the secular authorities."[273] The Ninth Circuit's error is evidenced by the fact that it allowed Elvig's claim to proceed even though the church had a formal dispute resolution and discipline procedure in place, the church claimed that it followed that procedure, Elvig herself vowed to be bound by such procedure, and that procedure resulted in a determination that no further action was needed.[274] By allowing claims like that in *Elvig* to proceed, district courts would inevitably end up evaluating the sufficiency of the procedures and the correctness of the result of the procedures—causing the courts to violate both the Free Exercise Clause and the Establishment Clause.[275]

The Seventh Circuit's panel decision in *Demkovich II* is just as flawed. First, one of the ways the Seventh Circuit panel justified its holding was through this statement: "[T]he First Amendment is not the only source of law and values that we must consider here."[276] In other words, the Seventh Circuit engaged in a balancing act between religious institutions' First Amendment rights and the "interest of society in the enforcement of employment discrimination statutes."[277] What the Seventh Circuit seems to have flatly ignored, however, is that in weighing these competing interests, "the First Amendment has struck the balance for us."[278] That is not to say that individual employment rights are not important. However, the

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[272] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 187 (2012) (quoting Serbian E. Orthodox Diocese v. Milivejevich, 426 U.S. 696, 724 (1976)) (internal quotations omitted).

[273] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (emphasis added).

[274] *See Elvig*, 375 F.3d at 973–74 (Trott, J., dissenting).

[275] *See supra* notes 270–74 and accompanying text.

[276] *Demkovich II*, 973 F.3d 718, 736 (7th Cir. 2020).

[277] *Hosanna-Tabor*, 565 U.S. at 196.

[278] *Id.*

"ministerial exception is a form of constitutionalized at-will employment."[279] The safeguard for ministers is an absolute right to leave the religious institution for any reason whatsoever.[280] However, while ministers remain voluntarily employed as ministers, their employment interest must defer to the First Amendment rights of the institution itself.

Worse yet, much like the Ninth Circuit, the Seventh Circuit panel posited that all that was necessary for a religious employer to exercise the control guaranteed by the First Amendment was the freedom to take tangible employment actions.[281] The panel decision relied heavily on the idea that "a hostile work environment simply is not a permissible means of exerting (constitutionally protected) 'control' over employees and accomplishing the mission of the business or religious organization."[282] While this may be true for a business, the same cannot be said for a religious institution. In fact, the civil courts have *no* say in even defining or determining what the religious institution's mission is.[283] Furthermore, the idea that tangible employment actions are the ceiling for religious institutions' control over their ministers is plain silly because "[m]any religious groups consider guiding and training wayward ministers as a spiritual command."[284] The Seventh Circuit panel's approach, however, effectively means that religious institutions will have to choose between following what they perceive as spiritual commands, "internal church decision[s] that affect[] the faith and *mission* of the church itself,"[285] and potential Title VII liability. The ministerial exception prevents the courts

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[279] Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 71 (2011).

[280] *Id.* at 71–72.

[281] *Demkovich II*, 973 F.3d at 728–29.

[282] *Id.* (citing Harris v. Forklift Sys., 510 U.S. 17, 23 (1993)).

[283] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020).

[284] Brief for The Ethics and Religious Liberty Comm'n of the S. Baptist Convention et al. as Amici Curiae Supporting Defendants-Appellants and Rehearing En Banc, *Demkovich III*, 3 F.4th 968, (7th Cir. 2021) (No. 19-2142), 2021 U.S. 7th Cir. Briefs LEXIS 2387 at *14.

[285] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 173 (2012) (emphasis added).

from enforcing Title VII claims that force religious institutions into making this kind of decision.

c. The nature of the hostile work environment claim

The deepest level the Supreme Court should have to reach to conclude that the ministerial exception categorically bars ministers from bringing their hostile work environment claims is to evaluate the nature of the hostile work environment claim itself. Allowing a court to determine whether the elements of a hostile work environment are met in a given case violates current Supreme Court First Amendment precedent. Furthermore, and most egregiously, the burden on a religious institution to defend such a claim, particularly the institution's burden to prove the *Ellerth*/*Faragher* affirmative defense, is absolutely impermissible under the Supreme Court's First Amendment precedent.

First, recall that to succeed on a hostile work environment claim, the plaintiff (minister) must prove (1) unwelcome harassment; (2) based on a protected characteristic; (3) that was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) a basis for employer liability.[286] The first and the third elements are particularly troublesome. What constitutes unwelcome harassment? Does the court set the standard? Or is the standard set by the religious institution itself? Importantly, the conduct that the minister alleges created the hostile work environment must be "severe or pervasive enough to create an *objectively* hostile or abusive work environment . . . that a *reasonable* person would find hostile or abusive."[287] How will a court determine whether specific conduct was severe and pervasive to the point where a *reasonable* person would find it hostile or abusive? Who is this reasonable person? Surely it must be a reasonable minister under all the same circumstances as the plaintiff. Surely it cannot be some imaginary, secular ministerial employee, created by the courts for this analysis, without regard to the doctrine and beliefs of the religious institution. This would

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[286] Howard v. Cook Cnty. Sheriff's Off., 989 F.3d 587, 600 (7th Cir. 2021).

[287] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (quoting Harris v. Forklift Sys., 510 U.S. 17, 21 (1993)) (emphasis added).

constitute an establishment of religion because a court would critique a religious employer's treatment of its ministers against secular standards, stripping from religious institutions the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[288] Furthermore, courts surely cannot take into consideration "all the circumstances," including the "social context," as the Supreme Court requires for hostile work environment claims,[289] because this would require courts to delve into religious doctrine and justifications which "misses the point of the ministerial exception."[290] In fact, the very decision that the *terms* and *conditions* of *ministerial employment* were altered strips religious institutions of their right to control those conditions for their ministers.

This fundamental and irreconcilable conflict between what it takes to prove a hostile work environment and the protections the ministerial exception provides religious institutions is best articulated by Judge Kleinfeld:

> [S]uppose a minister takes the view, as some do, that the Bible requires women to occupy a subordinate position in the family, and that only men should be permitted to preach. If he repeatedly, in his public prayers, asks God to bring about such a world, and repeatedly tells his female associate pastor that the Bible compels these views, she will no doubt sense that the environment is hostile to her work and denies her equality because of her sex. Yet the pastor (and his church) are entitled to the free exercise of religion by spreading this view, which he and perhaps his sect understand to be God's word. These opinions and prayers

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[288] *Hosanna-Tabor*, 565 U.S. at 186 (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

[289] *Oncale*, 523 U.S. at 81.

[290] *Hosanna-Tabor*, 565 U.S. at 194.

> are political heresy. But in matters of religion, churches get to define heresy, not the government.[291]

The list of hypotheticals has no end, and the hypotheticals are not merely theoretical. In *Demkovich III*, the behaviors at issue regarded comments made about Demkovich's weight and sexual orientation.[292] Must a religious institution change its doctrine to no longer condemn gluttony? Must it endorse what it believes unequivocally to be a sin (homosexuality)? As previously mentioned, the Seventh Circuit's original panel decision casually swept this concern under the rug by positing that a religious organization can simply fire the minster to exert control but cannot exercise this control through "harassment."[293] Again, this is illogical because "[m]any religious groups consider guiding and training wayward ministers as a spiritual command" and "various faiths use criticism as a tool to prompt self-reflection and spiritual improvement, as part of a religious obligation to step in and help other members of the faith avoid violating tenets of the faith."[294] It is clear, then, that the only way to accurately determine whether a reasonable minister in the plaintiff's shoes would find certain conduct hostile or abusive requires a court to make a final determination on matters "of faith and doctrine."[295] Thus, the very nature of the hostile work environment claim is diametrically opposed to the function and purpose of the ministerial exception and, therefore, must be categorically barred.

However, the most egregious reason that the ministerial exception must categorically bar hostile work environment claims brought by ministers against their religious employers is the burden of defending a hostile work

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[291] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 805 (9th Cir. 2005) (Kleinfeld, J., dissenting) (order denying petition for rehearing en banc).

[292] *Demkovich III*, 3 F.4th 968, 973 (7th Cir. 2021).

[293] *Demkovich II*, 973 F.3d 718, 729 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[294] Brief for The Ethics and Religious Liberty Comm'n of the S. Baptist Convention et al. as Amici Curiae Supporting Defendants-Appellants and Rehearing En Banc, *Demkovich III*, 3 F.4th 968, (7th Cir. 2021) (No. 19-2142), 2021 U.S. 7th Cir. Briefs LEXIS 2387 at *13–14 (emphasis omitted).

[295] *Hosanna-Tabor*, 565 U.S. at 186 (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

environment claim, specifically the *Ellerth*/*Faragher* affirmative defense. Recall that to succeed on this defense, the religious employer must prove, by a preponderance of the evidence, "that the employer exercised *reasonable care* to *prevent* and *correct promptly* any . . . harassing behavior[]" and that the "plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[296] The Supreme Court has made clear that religious institutions alone have the authority to "select and control" their ministers and can "establish their own rules and regulations for internal discipline and government."[297] Further, religious institutions have the *sole* "authority to select, *supervise*, and if necessary, remove a minister without interference from the secular authorities."[298]

If religious institutions have independent authority to control and supervise their ministers and to create their own rules and regulations regarding *internal* discipline and governance, as the Supreme Court has stated they do, how can secular courts evaluate whether a religious institution's exercise of this authority was reasonable "without entangling the courts in the kind of review of church affairs" that they are forbidden from engaging in under the First Amendment's ministerial exception?[299] They cannot. To determine whether a religious institution exercised reasonable care, not only would courts have to engage in the types of invasive inquiries that Judge Trott pointed out in his dissent in *Elvig*,[300] but courts would actually have to decide both whether a religious institution's "preventative or corrective opportunities"[301] were adequate and whether the

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[296] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (emphases added).

[297] *Hosanna-Tabor*, 565 U.S. at 195; *Id.* at 187 (quoting Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 724 (1976)).

[298] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (emphasis added).

[299] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 807 (9th Cir. 2005) (Gould, J., dissenting) (denying petition for rehearing en banc).

[300] Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 974–75 (9th Cir. 2004) (Trott, J., dissenting).

[301] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

action (or inaction) such opportunities brought about were reasonable—"a searching and therefore impermissible inquiry into church polity."[302]

The answer here is clear. Supreme Court precedent forecloses the argument that certain employment disputes arising from antidiscrimination statutes can dodge the ministerial exception. Every attempt to do so at the circuit court level has led to fundamentally flawed decisions that run directly contrary to Supreme Court precedent. Furthermore, courts cannot adjudicate hostile work environment claims brought by ministers against religious institutions without violating the First Amendment. On the other hand, religious institutions cannot defend against such claims without courts violating the First Amendment. Accordingly, the ministerial exception categorically bars such claims.

2. A Jurisdictional Approach: The Church Autonomy Doctrine

If the Supreme Court decides to take a more principled approach, it can rest its decision—that the ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious employers—on the doctrine of church autonomy. In *Our Lady of Guadalupe*, the Supreme Court stated that "the general principle of church autonomy" was "the constitutional foundation" for the ministerial exception.[303] If the Court meant what it said, it should hold that the doctrine of church autonomy mandates, at a jurisdictional level, that the ministerial exception categorically bars ministers from bringing their hostile work environment claims against their religious employers.

The doctrine of church autonomy is a distinct legal doctrine rooted in the Founders' vision that the government "would have no jurisdiction over religious matters, thus ensuring the autonomy of religious institutions."[304] It represents a fundamental principle that religious institutions "have a constitutionally protected interest in managing their own institutions free

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[302] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976). The most egregious example comes from *Elvig*. *See supra* note 274 and accompanying text.

[303] *Our Lady of Guadalupe*, 140 S. Ct. at 2061 (2020).

[304] Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 38 (2002).

of government interference."[305] Even deeper, the doctrine of church autonomy views religious institutions as "coordinate with the state, not subordinate to it," and requires that "they should generally be treated as sovereign, or autonomous, within their individual spheres."[306] In essence, this creates a jurisdictional approach where a religious institution can "make out a good church autonomy claim simply by saying this is internal to the [religious institution]. This is our business; it is none of your business."[307] The question is this: what exactly falls within the jurisdiction of religious institutions under the church autonomy doctrine? While a comprehensive answer to that question is outside the scope of this Comment, what matters is that internal governance, supervision and discipline of ministers, and resolutions of internal disputes make the cut because courts must "stay out of internal church controversies, as churches ha[ve] rights to govern themselves and resolve their own disputes."[308]

A hostile work environment claim is, at its core, an internal employment dispute. Under the doctrine of church autonomy, the resolution of internal employment disputes between ministers and their religious employers belongs to the religious institutions, not the state. Religious institutions usually "have their own procedures for handling disputes, and these procedures go back centuries."[309] Whether these procedures are formal or informal,[310] allowing ministers to bring hostile work environment claims against religious institutions is directly contrary to the doctrine's recognition of religious institution's autonomy in such matters.

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[305] 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, 1373 (1981).

[306] Paul Horwitz, *Churches as First Amendment Institutions: of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 96, 114 (2009).

[307] Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 254 (2009).

[308] Lund, *supra* note 279, at 13.

[309] *Id.* at 46.

[310] *Id.*

As previously shown,[311] a hostile work environment claim requires an invasive examination into the nature of the alleged harassment,[312] the quality and reasonableness of the internal procedures,[313] and the correctness of the result and remedial actions taken (or not taken).[314] Each step of this inquiry violates the autonomy of religious institutions because "courts, and the state itself, are simply not authorized to intervene in life at the heart of churches."[315] This would constitute not only an intervention in life at the heart of a religious institution, but an overt interference with the relationship between the institution and its ministers, the "lifeblood" of a religious organization.[316] The doctrine of church autonomy bars such intervention. Once a court determines that the defendant is a religious institution[317] and that the plaintiff is its minister, the court must dismiss *any* internal employment dispute between the two because the religious institution is sovereign in this regard.

While this approach may seem radical to some, especially to "those who have grown accustomed to thinking that the state is the ultimate arbiter," it is clearly a principled approach and "a fundamental part of the structure of American religious freedom."[318] The Supreme Court can follow this approach if it desires to clarify the doctrine of church autonomy within its current precedent. Regardless, the doctrine of church autonomy requires

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311 *See supra* Section IV.A.1.

312 Prudent supervision? Barred. Civil courts have no jurisdiction to evaluate or control religious organizations' supervision of employees. *See* Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244, 248 (2021).

313 Determination of the adequacy of doctrine or polity? Barred. This kind of intrusion is equally off the table for civil courts. *See id.*

314 This directly strips the religious institution of the right to self-govern because the government would essentially be the final say on all internal church decisions of this kind.

315 Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. L. REV. COLLOQUY 156, 161 (2011).

316 McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

317 The parameters of what constitutes a religious institution are not relevant for purposes of this Comment.

318 Horwitz, *supra* note 315, at 162–63.

that the ministerial exception categorically bar ministers from bringing their hostile work environment claims against their religious employers.

3. A Matter of Principle: Defining Religion

The most principled path forward is to adopt James Madison's definition of religion for First Amendment purposes. Recall that the First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[319] To date, however, the Supreme Court has declined to define the most fundamental term in the religion clauses: religion. In his *Memorial and Remonstrance Against Religious Assessments*, Madison defined religion in this legal context[320] as follows:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe; And if a member of Civil Society, who enters into

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[319] U.S. CONST. amend. I.

[320] Jeffrey C. Tuomala, The Casebook Companion, pt. 9, ch. 2, at 8 (Aug. 28, 2020) (unpublished manuscript) (on file with author).

> any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[321]

Religion was first defined as the "duty which we owe to our Creator, and the manner of discharging it" in the Virginia Declaration of Rights.[322] This is critical because the Supreme Court has already stated that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[323] Thus, the connection between Madison's definition of religion and religion as used in the First Amendment is direct and not at all a stretch.

Importantly, under Madison's view, this duty that is religion takes precedence over the claims of civil society and lies entirely outside its jurisdiction and cognizance. Accordingly, Madison drew a line between the duties that are enforceable under civil laws and those that cannot be enforced by the civil magistrate.[324] While "Madison acknowledged that it is

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[321] James Madison, *Memorial and Remonstrance Against Religious Assessments (1785)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-madison-memorial-and-remonstrance-against-religious-assessments-1785 (last visited Oct. 7, 2023).

[322] Tuomala, *supra* note 320, at 4.

[323] Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[324] Jeffrey C. Tuomala, The Casebook Companion, pt. 1, ch. 2, at 2 (Aug. 28, 2020) (unpublished manuscript) (on file with author) ("In so writing, [Madison] drew a jurisdictional line between civil government and religion. Those matters properly within the jurisdiction of civil government can be governed by force. All other matters fall within the jurisdiction of religion and are to be governed only by conscience. Whenever civil

not always easy to draw the jurisdictional lines,"[325] he nonetheless stressed that the civil authority must default to a hands-off approach:

> [I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst by an entire abstinence of the Govt from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst trespasses on its legal rights by others.[326]

Under this view, the civil authority must not interfere with religious institutions *in any way whatever* unless it is *absolutely necessary*. Employment disputes are internal to religious institutions, and the civil government must entirely abstain from interfering with such internal religious matters.

Madison's approach is entirely consistent with the view of Thomas Jefferson that "God hath created the mind free."[327] Free in that:

> [T]o suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and

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government enforces laws that lie outside its jurisdiction, it violates the liberty of conscience and thus establishes religion.").

[325] Tuomala, *supra* note 320, at 13.

[326] Letter from James Madison to Reverend Jasper Adams (1833), *in* JEFFERSON AND MADISON ON SEPARATION OF CHURCH AND STATE 395 (Lenni Brenner ed., 2004).

[327] *A Bill for Establishing Religious Freedom (1779)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/thomas-jefferson-a-bill-for-establishing-religious-freedom (last visited Oct. 6, 2023).

> approve or condemn the sentiments of others only as they shall square with or differ from his own.[328]

Allowing the civil magistrate to intrude on matters of opinion, especially regarding internal employment disputes between ministers and religious institutions, impermissibly makes the civil government's opinion the standard against which all others are judged. Critically, Thomas Jefferson viewed the government of the United States as "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises."[329] Consistent with Madison's view, the civil government may interfere with religion and religious institutions *only* "when principles break out into overt acts against peace and good order."[330] Hostile work environment claims evaluate matters strictly internal to religious institutions—the terms of employment, internal governance and dispute resolution, and the discipline and supervision of ministers—not overt acts against good order.

While the implications of Madison's definition, as supplemented by Jefferson, are broad and far-reaching,[331] all that matters within the scope of

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[328] *Id.*

[329] Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* JEFFERSON AND MADISON ON SEPARATION OF CHURCH AND STATE 182 (Lenni Brenner ed., 2004). This line of thinking applies to all sources of civil government now that the First Amendment is incorporated to the states through the Fourteenth Amendment. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[330] *A Bill for Establishing Religious Freedom (1779)*, *supra* note 327. An "overt act" in this context is one that exceeds the religious institution's jurisdiction and falls within the jurisdiction of the civil government. Defining the borders of those separate jurisdictions is beyond the scope of this Comment. *See supra* notes 302–06 and accompanying text. Without providing a formula for determining precisely what acts are "overt," this Comment establishes that only such acts fall within the jurisdiction of the civil government.

[331] Under this definition, religion lies completely outside the cognizance of the civil government. Religion encompasses much more than one may think. Although outside the scope of this Comment, it is important to note that this definition would render state schools unconstitutional, along with the welfare state. Jeffrey C. Tuomala, The Casebook Companion pt. 9, ch. 3, at 1 (Aug. 28, 2020) (unpublished manuscript) (on file with author) ("As for education, the mind is to be free from the control of civil government because the duties we owe to our Creator include all matters of thought and opinion, not just . . . doctrinal issues . . . . Similarly, charity by its very nature cannot be compelled."). *See also* Tuomala,

this Comment is that the civil government would clearly have no jurisdiction to enforce *any* civil law that interferes with the employment relationships between religious institutions and their ministers. Under this approach, religious institutions, which consist of their members and are operated by their ministers, have an *absolute right* to operate within their own jurisdictional sphere, free from any governmental interference whatsoever. The civil government can step in only when necessary, such as to break up a fight between two distinct religious institutions or to liberate a minister when a religious institution prevents the minister from leaving it.[332] The government can intervene to protect each institution's legal rights from trespasses by others, or to prevent *overt acts* against the peace of society at large.[333] What one minister says to another, whether that statement changes the conditions of the minister's employment, and what those conditions of employment actually are constitute internal, not overt or outward acts and, therefore, lie solely within the jurisdiction of the religious institution. They are matters of principle, subject to the dictates of conscience, and fall outside the cognizance of the civil government.[334]

Title VII itself, even when applied to "secular" businesses, forces individuals to conform to an orthodoxy of opinion.[335] Under Madison and

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supra note 320, at 14 ("Though the jurisdictional line between civil government and religion may be difficult to trace at some points, as a general principle, education and charity are clearly within the jurisdiction of religion. The religion clauses, properly understood, do not relegate religion to some narrow domain of personal devotion.").

[332] *See* Lund, *supra* note 279, at 13–14.

[333] *A Bill for Establishing Religious Freedom (1779)*, *supra* note 327. The government's ability to intervene in these ways reflects its own jurisdictional sphere, which encompasses the ability to enforce certain criminal laws even though such enforcement may impact the employment relationship. However, the government has no direct authority to control a religious institution's internal matters.

[334] *See* Tuomala, *supra* note 320, at 3–8.

[335] This is not to say that Title VII violations are morally virtuous. They usually are not (and are often morally reprehensible), but that is a matter between man and his God. The question is whether the civil government can impose such orthodoxy of opinion on its subjects. It cannot. Title VII, although well-intentioned, destroys religious liberty by making its opinions the rule of judgment on matters that are dictated by conscience. It is the civil government "assum[ing] dominion over the faith of others, setting up their own opinions

Jefferson's view, however, *all* matters of opinion are governed between man and God, so it would seem Title VII as a whole may be an unconstitutional establishment of religion.[336] This is outside the scope of this Comment, however, because it is clear at the very least that Madison's definition removes the internal government, operations, and workings of religious institutions from the cognizance of the civil government entirely. Accordingly, if the Supreme Court adopts James Madison's definition of religion, ministers are categorically barred from bringing hostile work environment claims against their religious employers.

B. Practical Considerations

It is important to note that categorically barring ministers from bringing hostile work environment claims does not leave ministers without a remedy. First, ministers may be able to bring claims against other ministers if they are "independently actionable, as the protection of the ministerial exception inures to the religious organizations, not to the individuals within them."[337] Hostile work environment claims, however, are not independently actionable and arise solely because of the employment relationship. If a minister walked over to another and punched him in the face, the minister that was punched would have an independently actionable claim against the other minister for battery, fully cognizable in the civil courts.

It is also important to emphasize the moral burden on religious institutions. Religious institutions, with this God-given freedom that We the People have recognized through the First Amendment, have a great moral responsibility to take care of their ministers. They have an obligation to "treat complainants with love and compassion,"[338] and should make a conscious effort to set up effective procedures for resolving disputes. This is not to say that religious institutions must yield to the dictates of one minister whenever he complains about the behavior of other ministers.

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and modes of thinking as the only true and infallible," which violates the First Amendment. *A Bill for Establishing Religious Freedom (1779)*, *supra* note 327.

336 *See supra* note 328 and accompanying text.

337 *Demkovich III*, 3 F.4th 968, 982 (7th Cir. 2021).

338 Horwitz, *supra* note 315, at 169.

They do not. Through their internal dispute procedures, religious institutions have the sole authority to settle hostile work environment claims. Religious institutions do, however, have a moral duty to take seriously all hostile work environment concerns brought to their attention by ministers and must itself weigh whether the alleged harassment is mandated by doctrine or merely an offspring of the animus of other ministers.

Religious institutions should, "at the start of the employment relationship and after any material change in the relationship," provide notice to each and every one of its employees that they view as a minister.[339] This approach, proposed by Professor Hornbeck, would effectively "balance the interests of employers and employees" without violating the First Amendment.[340] This is important because it provides greater weight to the voluntary association aspect, because ministers will know from the get-go that they are ministers and are therefore subject to the jurisdiction of the religious institution when it comes to employment disputes.

Of utmost importance is the right of both ministers and the religious employers to cut ties at any time for any reason whatever.[341] Because the "ministerial exception is part of the voluntary principle," this safeguards the rights of both in that, once one is done with the other, the other has no power to bind to it the one.[342] From the religious employer's perspective, this guarantees it the right to fire a minister at any time for any reason without any interference by the civil government. From the perspective of the minister, this guarantees him the right to cut ties entirely and seek new employment for any reason or for no reason at all. This is the universal remedy for all ministers as it pertains to hostile work environment claims: "The right to leave."[343] If a minister feels he is being harassed, he can leave. This freedom to leave is itself a bargaining tool against the religious institution, which will be forced to decide between meeting the demands of

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339 *See* Hornbeck, *supra* note 92, at 762.

340 *Id.* at 763.

341 *See supra* notes 273–74 and accompanying text.

342 Lund, *supra* note 279, at 71–72.

343 *Id.*

the minister to retain his services on the one hand and continuing whatever action (or inaction) grievances the minister on the other.[344]

Hostile work environment claims brought by ministers against their religious employers are categorically barred by the ministerial exception. Religious institutions should take complaints of harassment seriously, set up legitimate processes for the resolution of internal disputes, and treat their ministers with dignity. Ministers have remedial options and a bag of tools for bargaining against their religious employer. All of these are true, and they are not mutually exclusive.

V. CONCLUSION

The ministerial exception categorically bars ministers from bringing hostile work environment claims against their religious employers. The Seventh and Tenth Circuit's conclusions are consistent not only with current Supreme Court precedent but with our nation's historical practices and understandings. This is not a stripping of rights from individuals but the recognition that religious institutions, both as separate entities and as aggregates of individuals, are free to shape their own faith and mission without governmental interference. In the words of Thomas Jefferson, "to suffer the civil magistrate to intrude his powers into the field of opinion . . . at once destroys all religious liberty" because, regardless of good intentions, the civil magistrate "will make his opinions the rule of judgment."[345] But by the sacrifice of our Founding Fathers, the First Amendment prohibits such judgment.

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[344] This is not to say that a minister's decision to leave or stay in a dissatisfactory work environment is an easy one. There are often financial burdens that make such a decision quite difficult. But ministers cannot have their cake, eat it too, and require their religious employers to spoon-feed them.

[345] *A Bill for Establishing Religious Freedom (1779)*, *supra* note 327.