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PIERCING THE MINISTERIAL EXCEPTION: AN ENDEAVOR TO HOLD RELIGIOUS EMPLOYERS ACCOUNTABLE FOR HARASSING BEHAVIOR

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* Meghan Kathleen Golden, Juris Doctor Candidate, UIC School of Law. I would like to thank my family for their endless support. Our spirited debates and tenacious energy continue to inspire me. Thanks to you all, I am well-equipped to challenge the status quo and speak up for what I believe in. Additionally, I would like to thank Professor Samuel Olken, Margaret Nicosia, Oliver Kassenbrock, and the other members of UIC Law Review who diligently worked alongside me on this piece. This Comment would not be the same without your thoughtful edits and astute insight.

I. INTRODUCTION

Sandor Demkovich was a beloved music director, choir director, and organist employed by St. Andrew the Apostle Parish, a Roman Catholic church in Illinois.[1] Demkovich describes himself as a devout Catholic who loves the church, music, and spirituality.[2] Demkovich is also gay and diabetic.[3] At work, Demkovich's direct supervisor continuously made derogatory comments and demeaning epithets relating to Demkovich's sexual orientation and physical condition.[4] After two years at St. Andrew's, Demkovich married his long-term partner of fifteen years.[5] Almost immediately, Demkovich was asked to resign because his marriage was "against the Catholic Church."[6] When he refused to resign, St. Andrew's fired him.[7]

This religious organization's decision to fire a well-qualified[8] and experienced employee based solely on sexual orientation is not an isolated incident.[9] In fact, it is a frequent occurrence.[10] Roncalli High School, a private Catholic school in Indianapolis, fired Lynn Starkey after she had worked there for almost forty years.[11] She held several positions,

1. Demkovich v. St. Andrew the Apostle Par. (Demkovich II), 3 F.4th 968, 973 (7th Cir. 2021) (en banc). Demkovich began working at St. Andrews in 2012. *Id*.

2. Tina Sfondeles, *Catholic Music Director Fired After Same-sex Wedding Files Complaint*, CHI. SUN TIMES (Jun. 24, 2016), www.chicago.suntimes.com/2016/6/24/18405397/catholic-music-director-fired-after-same-sex-wedding-files-complaint [perma.cc/8VW9-DRPV].

3. *Demkovich II*, 3 F.4th at 973.

4. *Id.*

5. Sfondeles, *supra* note 2.

6. *Id.*

7. *Id.*

8. Throughout the course of litigation, St. Andrews never took issue with Demkovich's ability to perform his job duties.

9. Patrick Hornbeck, *Chicago Archdiocese takes 'religious liberty' too far in Demkovich case*, NAT'L CATHOLIC REP. (Feb. 17, 2021), www.ncronline.org/news/opinion/chicago-archdiocese-takes-religious-liberty-too-far-demkovich-case [perma.cc/7SD7-5ZL2].

10. *See* Francis DeBernardo & Robert Shine, *Employees of Catholic Institutions Who Have Been Fired, Forced to Resign, Had Offers Rescinded, or Had Their Jobs Threatened Because of LGBT Issues*, NEW WAYS MINISTRY (last updated Sept. 21, 2021), www.newwaysministry.org/issues/employment/employment-disputes/ [perma.cc/592C-DULT] (providing a list from 2007 to date of "workers in Catholic institutions who have been fired, forced to resign, had offers rescinded, or had their jobs threatened because of LGBT issues."). As of September 21, 2021, over 80 employees lost their jobs due to LGBT issues. *Id*.

11. Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 2021 U.S. Dist. LEXIS 158254, at *3 (S.D. Ind. Aug. 11, 2021). Starkey worked at Roncalli from 1978 to 2019. *Id.* Starkey was hired as a New Testament Teacher, which required her to obtain a certification to teach religion classes. *Id*. In 1997, Starkey became a Guidance Counselor, a role in which she served for 10 years. *Id*. While in this position, she did not teach religion or maintain her certification to do so. *Id.* Finally, in 2007, Starkey became Co-Director of Guidance. *Id*. Starkey held this position until her termination in 2019. *Id*. at *4. Accordingly, the final 21 years of her tenure at Roncalli were spent in

including New Testament teacher, Choral Director, Fine Arts Chair, Guidance Counselor, and Co-Director of Guidance.[12] In 2015, Starkey entered a same-sex marriage.[13] Despite being aware of Starkey's sexual orientation long before her decision to marry her partner and despite continuing to employ her for several years after the marriage, Roncalli terminated Starkey because her marriage violated Catholic teachings.[14]

In addition to being terminated for their sexual orientations, both Starkey[15] and Demkovich[16] were harassed in the workplace because of their marginalized identities. They each sued the religious entities that employed them under Title VII of the Civil Rights Act.[17] Among other things, Title VII prohibits employers from creating hostile work environments through "discriminatory intimidation, ridicule, and insult."[18] Unfortunately, although both Demkovich and Starkey are clear victims of discrimination under Title VII, their claims against the religious organizations that employed them were barred by a legal doctrine known as the ministerial exception.[19]

The ministerial exception is a judicially created doctrine that protects religious organizations from discrimination suits brought by

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the role of Guidance Counselor and Co-Director of Guidance. *Id.*

12. *Id.*

13. Starkey v. Roman Catholic Archdiocese of Indianapolis, 496 F. Supp. 3d 1195, 1199 (S.D. Ind. 2020).

14. *Id.* at 1205 (examining the Church's argument that the offered religious justification for not rehiring Starkey is a neutral, nondiscriminatory reason for her termination).

15. In 2018, Shelly Fitzgerald served as Starkey's co-Director of guidance. *Starkey*, 496 F. Supp. 3d at 1199. Fitzgerald is also lesbian and married to a woman. *Id*. Roncalli officials confronted Fitzgerald about her marital status and put her on paid administrative leave. *Id*. This treatment of Fitzgerald left Starkey with the understanding that gay employees were not welcome at Roncalli. *Id*. at 2000. Starkey lived in constant fear that she would be terminated next. *Id*. After the Roncalli principal confronted Starkey about being in a civil union, Starkey learned that her contract would not be renewed. *Id*.

16. Demkovich alleged that Reverend Dada, his direct supervisor, "humiliated and belittled" him on a repeated basis. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 721(7th Cir. 2020) (*rev'd en banc*). Reverend Dada frequently used epithets that showed hostility towards Demkovich's sexual orientation. *Id*. When Demkovich married, these epithets worsened. *Id*. Dada also repeatedly ridiculed Demkovich for his weight and medical issues. *Id*. These comments had no connection to Demkovich's job performance. *Id*.

17. Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e-2(a) (1964) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual…because of such individual's race, color, religion, sex, or national origin."). *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (finding Title VII prohibits discrimination based on sexual orientation).

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

19. *Demkovich II*, 3 F.4th at 985 (holding "the ministerial exception precludes Demkovich's hostile work environment claims against the church."); *Starkey*, 2021 U.S. Dist. LEXIS 158254 at *2 (holding "the ministerial exception bars all of Starkey's claims. . ."), *aff'd*, 41 F. 45h 931, 935 (7th Cir. 2022).

"ministerial employees."[20] It is an affirmative defense that religious employers can raise when they are sued under various anti-discrimination statutes like Title VII.[21] Generally, if an employer is religiously affiliated and an employee is deemed a minister for the purpose of the exception, the ministerial exception may bar a plaintiff's claim.[22] Though often applied in lower courts, the Supreme Court deferred ruling on the extent of the ministerial exception until 2012.[23]

Today, there are several questions left unanswered by the Supreme Court regarding the application of the ministerial exception: To whom should such an exception apply? Should the exception categorically bar certain kinds of claims against religious organizations? What standard of review should apply when determining whether the ministerial exception applies? For individuals like Demkovich and Starkey, the answers to these questions are critical. The uncertainty surrounding the application of the ministerial exception at the lower court level led to all claims brought being absolutely barred, despite Starkey[24] and Demkovich[25] having a

20. *See generally* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1973-1976 (2007) (discussing the ramifications of the ministerial exception through a constitutional lens).

21. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, n.4 (2012) (clarifying that the ministerial exception operates as an affirmative defense).

22. Blair A. Crunk, *New Wine in an Old Chalice: The Ministerial Exception's Humble Roots*, 73 LA. L. REV. 1081, 1087 (2013) (breaking down the application of the ministerial exception into two steps).

23. Corbin, *supra* note 20, at 1968; *Hosanna-Tabor*, 565 U.S. at 190 (concluding that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment."); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

24. *Starkey*, 2021 U.S. Dist. LEXIS 158254, at *1. Starkey provided evidence that her day-to-day responsibilities were actually secular in nature. *Id.* at 20. She explained that her regular duties include "scheduling students for classes, helping students with college applications, providing SAT and ACT test prep tools, administering AP exams, and offering career guidance." *Id.* Citing concerns of excessive entanglement, the district court ignored Starkey's characterization of her actual job duties and instead found that because her employer "clearly intended for [her] role to be connected to the school's [Catholic] mission," Starkey was a minister for the purposes of the exception. *Id*. at *21 (citing Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d, 655, 660 (7th Cir. 2018)).

25. Demkovich v. St. Andrew the Apostle Par., 2017 U.S. Dist. LEXIS 161658 at *7 (N.D. Ill. 2017). At this point in the litigation, the district court was tasked with determining the threshold question of whether Demkovich was a minister for the purposes of the exception. *Id*. at *5. The Archdiocese argued that Demkovich was a minister because he "performed the ministerial function of selecting, directing, and playing the music at Catholic masses." *Id*. at *6. Demkovich asserted that the Archdiocese was placing too much value on his job title and ignoring the actual substance of the work he engaged in. *Id*. at *7. He explained that he was only a part-time employee, that Reverend Dada made the final decisions on music selection, and that Demkovich never actually planned the liturgy himself. *Id.* The district court ultimately found that because Demkovich's Complaint stated that he "select[ed] music played during masses," the applicability of the ministerial exception was "inescapable." *Id.* at *8.

tenuous connection to their organizations' religious duties.[26]

This Comment challenges the conclusion that the ministerial exception bars all claims of hostile work environments brought against religious organizations. After exploring the roots of the ministerial exception, this Comment asserts that the ministerial exception must be treated as a rebuttable presumption when hostile work environment claims are being adjudicated. Part II discusses the history of the ministerial exception, its significance, and how it has evolved over time. Part III examines how the ministerial exception has been used in the adjudication of hostile work environment claims, noting the benefits it brings to society while also recognizing what has been sacrificed in its application. Part IV asserts that the ministerial exception should not categorically bar all claims of hostile work environment. Instead, the court should treat the application of the ministerial exception as a rebuttable presumption and allow an employee to show that their claim involves entirely secular issues. This approach will simultaneously support religious freedom while respecting the rights and dignity of disenfranchised individuals who may otherwise have no form of recourse for discriminatory action.

II. BACKGROUND

There have been conflicting viewpoints surrounding the breadth of religious liberty in this country.[27] The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[28] Broadly, the Court has interpreted the First Amendment as protecting individuals against state intrusion on religious liberty, commonly referred to as the separation of

26. Rachel Barrick, *The Ministerial Exception: Seeking Clarity and Precision Amid Inconsistent Application of the Hosanna-Tabor Framework*, 70 EMORY L.J. 465, 470 (2020) (recognizing that although "a teacher with negligible religious duties should be differentiated from a teacher with significant and constant religious duties, many courts have not taken this approach, in part due to the subjectivity of what the religious employer itself would consider to be negligible versus significant and courts' fear of intruding on church autonomy in that expectation."). *See generally* Katherine Hinkle, *What's in a Name? The Definition of "Minister" in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 343 (2013) (advancing a theory that the Court's decision to give deference to religious employers regarding the application of the ministerial exception may lead to increased discrimination against their employees).

27. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C.L. REV. 787, 791 (2014) (reviewing how "[t]he history of religious liberty emerges through a complicated and fractured narrative that includes periods of heightened commitment to pluralism and periods of intense neglect."); *see also* S.I. Strong, *Religious Rights in Historical, Theoretical, and International Context: Hobby Lobby as a Jurisprudential Anomaly?*, 48 VAND. J. TRANSNAT'L L. 813, 818 (2015) (placing religious rights into "historical, international, and comparative context" so that modern-day Supreme Court decisions can be best understood).

28. U.S. CONST. amend. I.

"church and state."[29] To preserve this separation, the government cannot impermissibly interfere with the exercise of religion, nor can it establish a State religion.[30] In this spirit, courts have held that religious organizations should be free from state interference when handling matters "of faith and doctrine."[31] The separation of church and state, however, is not absolute.[32]

This section begins by exploring the history of religious liberty in our nation. It highlights the seemingly inevitable tension between religious liberty principles and anti-discrimination safeguards in the employment context.[33] Under this framework, this section introduces the concept of the ministerial exception and its judicial creation. This section proceeds to introduce hostile work environment claims, which are distinct employment disputes that address concerns of unlawful harassment in the workplace.[34] Finally, this section returns to the story of Demkovich, the beloved choir director at St. Andrew the Apostle Parish who brought two hostile work environment claims against his religious employer.[35]

A. Religious Liberty at the Federal Level

In the past, the Supreme Court treated the free exercise of religion as an especially protected interest.[36] Restrictions on the free exercise of

29. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (maintaining that "[t]he First Amendment has erected a wall between church and state."); Reynolds v. United States, 98 U.S. 145, 162 (1878) (enunciating that "[r]eligous freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.").

30. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (detecting that the Establishment Clause "commands a separation of church and state" and the Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people.").

31. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952).

32. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952) (pointing out that "[t]he First Amendment, however, does not say that in every and all respect there shall be a separation of Church and State."); *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (declaring that religious institutions do not enjoy a general immunity from secular law).

33. *See generally* Marilyn Gabriela Robb, *Pluralism at Work: Rethinking the Relationship Between Religious Liberty and LGBTQ Rights in the Workplace*, 54 HARV. C.R.-C.L. L. REV. 917, 919 (presenting several cases that "pit[ted] religious liberty interests against antidiscrimination rights.").

34. *See Hostile Work Environment (Abusive Work Environment)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012). A hostile work environment is "a workplace in which harassment, whether by intentional discrimination or by ridicule, is caused or allowed by the employer, which either interferes with the employee's performance of the job or is sufficiently severe or sufficiently pervasive as to amount to abuse." *Id.*

35. *See Demkovich II*, 3 F.4th at 973; *see also* discussion *supra* Part I.

36. John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & C.R. L. REV. 1, 5 (1997) (summarizing that "for approximately the past fifty years, the Supreme Court has on occasion stated that the free exercise of religion under the First Amendment is an especially protected

religion were allowed only when there were "the gravest abuses, endangering paramount interest[s] . . ."[37] Early on, the Supreme Court applied a balancing test that looked at whether the challenged action imposed a substantial burden on religion and whether the state action served a compelling interest.[38] This test, known as the *Sherbert* balancing test, was designed to protect religious practice from any form of government intrusion.[39] Under the *Sherbert* balancing test, the government must have a compelling interest to justify the substantial infringement of an individual's First Amendment right to religious liberty.[40] Following *Sherbert v. Verner* in 1963, a challenged government regulation was almost always struck down for burdening an individual's religious liberties.[41]

Later on, the Court strayed from this approach of treating the free exercise of religion as a supreme right.[42] Instead, the Court began to uphold neutral, generally applicable laws that implicated religious concerns.[43] In *Employment Division v. Smith*, the Court was asked to determine whether an Oregon law that prohibited the possession of all non-prescribed controlled substances, including peyote—used for sacramental and religious purposes in the Native American community—violated an individual's free exercise rights.[44] Ultimately, the Court found no constitutional issue with the law.[45] The Court's decision was rooted in the belief that the right to free exercise does not make religious entities immune from other laws.[46] Thus, the criminal statute was upheld despite the religious implications.[47]

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interest.").

37. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1940)).

38. *Sherbert*, 374 U.S. at 403 (creating the *Sherbert* balancing test); *see also* Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972) (applying the *Sherbert* balancing test).

39. *See generally* Allison J. Cornwell, *Free Exercise Clause-Sacrificial Rites Become Constitutional Rights on the Altar of Babalu Aye,* 16 U. ARK. LITTLE ROCK L.J. 623, 623–25 (1994) (distinguishing *Sherbert* as the first Supreme Court decision to set forth the "compelling interest" test that "provide[s] substantive protection from governmental interference with religious exercise.").

40. *Sherbert*, 374 U.S. at 403–07.

41. *See id.*at 410 (finding that an employee who was fired for not working on the Sabbath could not be denied unemployment benefits); *see also Yoder*, 406 U.S. at 207 (finding that Wisconsin's state laws mandated school attendance until age 16 were unconstitutional because they interfered with Amish values). *But see* Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding a criminal statute that required merchants to close on Sunday).

42. Whitehead, *supra* note 36, at 6 (illustrating how the Court began to treat the supremacy of the free exercise clause as a "constitutional anomaly.").

43. Employment Division v. Smith, 494 U.S. 872, 876 (1990) (declining to apply the *Sherbert* balancing test).

44. *Id*.

45. *Id.* at 890 (holding that Oregon's prohibition on the possession of peyote was constitutional).

46. *Id.* at 878–97.

47. *Id*.

By holding that the Free Exercise Clause was only triggered when religion was targeted for unique "burdens," the Court rejected prior contentions that religious organizations should be free from state involvement entirely.[48] Immediately following the *Employment Division* decision, states were free to legislate in ways that impacted religious beliefs, so long as the government regulation did not specifically target religion.[49] Thus, this decision is often viewed by legal scholars as overruling several years of Free Exercise precedent, as it strayed from the traditional approach of treating religious liberty as a supreme right.[50]

Three years after the Court's decision in *Employment Division*, Congress enacted the Religious Freedom Restoration Act of 1993 (hereinafter "RFRA") to preserve religious liberty.[51] The RFRA restored and codified the compelling interest test set forth in *Sherbert* and "provide[d] a claim or defense to persons whose religious exercise is substantially burdened by government."[52] Since its enactment, there has been a divide in the federal circuit courts regarding its application.[53] Originally, the RFRA applied to both state and federal governments.[54] However, in *City of Boerne v. Flores*, the Supreme Court held that Congress lacked power under the Fourteenth Amendment to enforce the RFRA against state and local governments.[55] Nevertheless, the RFRA continues

48. Mark W. Cordes, *The First Amendment and Religion After Hosanna-Tabor*, 41 HASTINGS CONST. L.Q. 299, 301 (2014); *see also Emp't Div. v. Smith*, 494 U.S. at 879 (reasoning that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law . . .").

49. *Compare* Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 355 (2d Cir. 1990) (upholding a zoning law as a valid, neutral regulation despite having an incidental effect on religious organizations), *with* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 524 (1993) (striking down a city ordinance that banned animal sacrifice because there was clear legislative intent to target the Santiera religion).

50. Kenneth Kirk, *Parsing the First Amendment for the Faithful*, 28 ALASKA BAR RAG 6, 6 (2004); *see also* Whitehead, *supra* note 36, at 5 (describing *Employment Division* as the "apparent burial" of free exercise).

51. Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C.S. § 2000bb (1993).

52. 42 U.S.C.S. § 2000bb(b)(2) (1993) (setting forth the purpose of the RFRA); *see also Sherbert*, 347 U.S. at 406 (requiring South Carolina to show a "compelling state interest" that "justifies the substantial infringement of appellant's First Amendment right.").

53. Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343–44 (2013) ("The circuits are split as to whether RFRA can be claimed as a defense in citizen suits . . .").

54. *See generally* David B. Rosengard, *"Three Hots and a Cot and a Lot of Talk": Discussing Federal Rights-Based Avenues for Prisoner Access to Vegan Meals*, 23 ANIMAL L. 355, 380 (2017) (laying out the history of the RFRA); James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare*, 19 ANIMAL L. 295, 313 n.107 (2013) (addressing the nuances of an RFRA claim).

55. City of Boerne v. Flores, 521 U.S. 507, 536 (1997); *see also* Mary L. Topliff, *Validity, Construction, and Application of the Religious Freedom Restoration Act (42 U.S.C.A. 2000bb et seq.)*, 135 A.L.R. Fed. 121, *3 (2021) (clearing up that the *City of Boerne* invalidated the RFRA only as applied to state and local governments and that the unconstitutional parts of the RFRA were severable).

to apply to the federal government.[56]

Today, the compelling interest test[57] is used when determining whether a federal government action that interferes with religious liberty is permissible.[58] This test gives a large amount of deference to religious organizations, which often permits them to operate free from government interference.[59] Still, there exists a large amount of uncertainty regarding how much religious liberty citizens must be afforded in certain contexts, including the employment context.

B. Religious Liberty in the Employment Context

The Court's obligation to protect religious liberty exists in tension with federal and state anti-discrimination laws.[60] Under Title VII, it is unlawful for employers to discriminate against individuals because of their race, color, religion, sex or national origin.[61] Congress enacted Title VII of the Civil Rights Act with the intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.[62] Acknowledging the tension between Title VII and religious liberty, Congress permitted religious employers to discriminate based on religion.[63] Title VII explicitly states that it does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion."[64] As such, religious associations are permitted to hire based on an applicant's religion, so long as it is a "bona fide occupational qualification."[65]

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56. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (adjudicating a Free Exercise claim through the application of the RFRA).

57. 42 U.S.C.S. § 2000bb-1 (1993). The compelling interest test is explicitly included in the RFRA. *Id*. The test comes from a series of Supreme Court decisions, all going back to the free exercise principles laid out in *Sherbert*.

58. *Gonzales*, 546 U.S. at 439 (holding that the RFRA protected members of religious society from having sacramental tea banned by the Controlled Substances Act seized); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688 (2014) (utilizing the RFRA to determine whether government regulations that mandated corporations to provide health insurance coverage for contraception significantly burdened the corporation's religious freedom).

59. *See, e.g.*, *Burwell*, 573 U.S. at 682 (exempting for-profit corporations from the Affordable Care Act's contraception requirement due to their corporate owner's religious objections). *See generally* Sara K. Finnigan, *The Conflict Between the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964*, 48 FLA. ST. U.L. REV. 257, 273–79 (2020) (outlining how courts have interpreted the RFRA thus far).

60. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (analyzing whether a baker's refusal to make a cake for a same-sex wedding violates the Constitution where the baker cited religious reasons for the refusal).

61. Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e-2(a).

62. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dept. of Water and Power v. Manhart, 43 U.S. 702, 707 n.13 (1978)).

63. 42 U.S.C. § 2000e-1(a) (1964).

64. *Id*.

65. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 744 n.8 (2010).

This statutory exemption does not, however, permit religious employers to discriminate against other enumerated, protected classes such as race or sex.[66] Thus, it was left open to the judiciary to determine how Title VII applies to religious organizations.[67] A study of court cases involving religious liberty and discrimination claims reveals that an employee's interest in gaining employment free from discrimination, an employer's interest in their own free exercise of religion, and the state's interest in eliminating discrimination often conflict with one another.[68]

Two recent rulings on the Supreme Court's 2020 docket best illustrates these competing interests.[69] First, in *Bostock v. Clayton County*, the Court held that an employer who fired an individual for being homosexual or transgender was discriminating in violation of Title VII.[70] Additionally, the *Bostock* Court acknowledged a general concern that compliance with Title VII in this manner may require some employers to violate their religious convictions.[71] The Court ultimately concluded, however, that religious liberty was not at issue in *Bostock*.[72] Still, by expanding Title VII anti-discrimination safeguards through a

66. *See* Patsakis v. Greek Orthodox Archdiocese of Am., 339 F. Supp. 2d 689, 693 (W.D. Pa. 2004); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (propounding that "[t]he language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.").

67. *See* George L. Blum, *Application of First Amendment's "Ministerial Exception" or "Ecclesiastical Exception" to Federal Civil Rights Claims,* 41 A.L.R. Fed. 2d 445, *2 (2021) (scrutinizing how the ministerial exception has been applied in court).

68. *See* Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L SCH. L. REV 719, 724–26 (1996) (exploring the philosophical underpinnings of employee and employer's religious interests).

69. Timothy J. Tracey, *Deal, No Deal: Bostock, Our Lady of Guadalupe, and the Fate of Religious Hiring Rights at the U.S. Supreme Court*, 19 AVE MARIA L. REV. 105, 106 (2021) (noticing the court's conflicting decisions on religious freedom and LGBTQ rights).

70. *Bostock*, 140 S. Ct. at 1754. The *Bostock* Court used a plain textualist approach in reaching this conclusion. *See* Marc Spindelman, *Justice Gorsuch's Choice: From Bostock v. Clayton County to Dobbs v. Jackson Women's Health Organization*, 13 CONLAWNOW 11, 13 (2021), Ohio State Legal Studies Research Paper No. 647, available at www.ssrn.com/abstract=3912127 [perma.cc/4FJP-7XXB] (analyzing the impact of the *Bostock* decision). Even though Title VII does not explicitly include sexual orientation or transgender status as a protected class, the court found that the "plain terms" of Title VII's prohibition on "sex"-based discrimination included a ban on sexual orientation or transgender-status discrimination. *Bostock*, 140 S. Ct. at 1743.

71. *Bostock*, 140 S. Ct. at 1754. It was undisputed that the employees in *Bostock* were fired for being homosexual or transgender. *Id.* at 1744. A legitimate religious objection to homosexuality or being transgender is often assumed by courts. *See* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 196 (1999) (outlining the historical relationship between religious organizations and homosexual individuals).

72. *Bostock*, 140 S. Ct. at 1754 (advising that "[h]ow these doctrines protecting religious liberty interact with Title VII are questions for future cases."). Because none of the employers in Bostock argued that compliance with Title VII would interfere with their right to religious liberty, the Court declined to provide guidance on how to address the existing tension between Title VII (1964) and religious liberty. *Id.*

"straightforward application of legal terms with plain and settled meaning," the Court's ruling highlights the importance of having anti-discrimination safeguards in place, even when religious concerns may be implicated.[73] Thus, the *Bostock* ruling seemingly left open the question of whether anti-discrimination laws under Title VII, which now protect the rights of homosexual and transgender individuals, categorically infringe on an employer's right to religious liberty.

Just one month later, the Court decided *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, which bolstered a religious employer's right to follow their religious convictions.[74] In *Little Sisters of the Poor*, the Court upheld the constitutionality of a religious and moral exemption from the contraceptive mandate included in the Affordable Care Act.[75] After discussing the extensive history behind the religious exemption and previous challenges made to it, the Court found that the administrators of the Affordable Care Act had adequate statutory authority to exempt or otherwise accommodate religious employers.[76] Though *Little Sisters of the Poor* did not involve a Title VII claim, it still reinforced a religious employer's right to operate in accordance with their "sincerely held religious beliefs."[77] This decision has also been

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73. Spindelman, *supra* note 70, at 13 (citing *Bostock*, 140 S. Ct. at 1743).

74. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) (upholding a religious exemption to the Affordable Care Act's contraceptive mandate); *see* Tracey, *supra* note 69, at 107 (describing this decision, along with *Our Lady of Guadalupe*, as showing a "continued concern for accommodating religious exercise.").

75. *Little Sisters of the Poor,* 140 S. Ct. 2367, 2373 (holding that the Departments who administer the relevant ACA provision "had the authority to provide exemptions for the regulatory contraceptive requirements for employers with *religious and conscientious objections*.") (emphasis added).

76. *Id*. at 2380. Statutory authority was found in a portion of the Affordable Care Act which reads:

> a group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirement for— (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration. . .

42 U.S.C.S. § 300gg-13(a)(4) (2010). Because the statute is silent regarding what the guidelines are or how the Health Resources and Service Administration ("HRSA") must create them, the Court found that Congress intended to empower the HRSA with "virtually unbridled discretion" to make determinations regarding what is a preventative care screening that must be required. *Little Sister of the Poor*, 140 S. Ct. at 2380–81; *but see id.* at 2404–07 (Ginsberg, J., dissenting) (arguing that the text of the ACA does not authorize a blanket exemption).

77. *Little Sisters of the Poor*, 140 S. Ct. at 2385 (majority opinion) (concluding that the plain text of the statute is illustrative of congressional intent to give broad discretion to the departments to define preventive care and provide exemptions). The dissent rests its disagreement "on the basic principle" of law that although "the Government may 'accommodate religion beyond free exercise requirements', when it does so, it may not benefit religious adherents at the expense of the rights of third parties." *Id*. at 2048 (Ginsburg, J., dissenting) (citing *Cutter*, 544 U.S. at 713). The

viewed as a strong endorsement of the values set forth in the RFRA.[78]

Scholars have recognized that *Bostock*'s expansion of Title VII safeguards coupled with *Little Sisters of the Poor's* endorsement of religious exemptions is illustrative of the Court attempting to compromise in the seemingly inevitable "clash between ever expanding nondiscrimination protections for LGBTQ[79] Americans and the rights of people of faith to live according to that faith."[80]

C. Judicial Creation and Development of the Ministerial Exception

The ministerial exception developed out of concern for how Title VII may impact the separation of church and state.[81] It is based on religious liberty principles rooted in the Free Exercise and Establishment Clauses.[82] Two religious liberty concepts are fundamental to why the exception exists: a historical desire to have religious entities be free to control their own ministers and a general concern of excessive entanglement of church and state if a court were to adjudicate issues involving religion.[83] Thus, under the ministerial exception, religious organizations are granted immunity from several kinds of suits, including Title VII suits brought by ministerial employees for discrimination based on sex, race, and national origin.[84] Because the exception operates as an affirmative defense to Title VII claims, an employee who qualifies as a minister is unable to litigate an otherwise viable claim for discrimination.[85]

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dissent also points out that the "expansive religious exemption . . . imposes significant burdens on women." *Id.* at 2048. The Government estimated that "[b]etween 70,500 and 126,400 women" would immediately lose access to no-cost contraceptive services if the exception was upheld. *Id.* Ultimately, however, the majority dismisses the dissenter's concern as one of mere policy that "cannot justify supplanting the text's plain meaning." *Id.* at 2381 (majority opinion).

78. Tracey, *supra* note 69, at 128 (observing that *Little Sisters of the Poor* was the first time the Court addressed the circuit split surrounding whether the RFRA should be available as a claim or defense); *see generally Little Sisters of the Poor*, 140 S. Ct. at 2383 (acknowledging that it was appropriate for the departments to consider the RFRA when formulating the religious exemption, but declining to explicitly answer whether the RFRA was sufficient, independent authority to do so).

79. LGBTQ is commonly used as an umbrella term for sexuality and gender identity. Emanuella Grinberg, *What the 'Q' in LGBTQ Stands For, And Other Identity Terms Explained*, CNN (Jun. 14, 2019), www.cnn.com/interactive/2019/06/health/lgbtq-explainer/ [perma.cc/H6RD-35W7]. LGBTQ stands for lesbian, gay, bisexual, transgender, and queer or questioning. *Id*.

80. Tracey, *supra* note 69, at 106.

81. Corbin, *supra* note 20, at 1972.

82. Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 500 (2001); U.S. CONST. amend. I.

83. *See* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (creating the ministerial exception).

84. Coon, *supra* note 82, at 502.

85. Allison R. Ferraris, *Ministerial Exception After our Lady of Guadalupe School v.*

In 1972, the Fifth Circuit was the first to create and apply such an exception.[86] Billie B. McClure, a fully trained and commissioned officer at the Salvation Army, filed suit alleging that the Salvation Army violated Title VII when it paid her less than similarly situated male officers, offered her fewer benefits than similarly situated male officers, and terminated her for complaining to her superiors and the Equal Employment Opportunity Commission about these practices.[87] Because the Salvation Army is a religious organization[88] and McClure served as a "minister" to their organization,[89] Title VII did not apply, and the court dismissed all of McClure's claims.[90] With this ruling, the Fifth Circuit created the ministerial exception that is employed by courts today.[91]

Since *McClure*, every federal court of appeals and several state supreme courts have adopted similar exceptions.[92] Under the ministerial exception, courts have found that religious organizations are immune from Title VII claims even when the lawsuit does not directly implicate religious issues.[93] Moreover, although *McClure* made it clear that religious

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Morrissey-Berru, 62 B.C. L. REV. E. SUPP. 280, 281 (2021).

86. Corbin, *supra* note 20, at 1973 (discussing *McClure*).

87. *McClure*, 460 F.2d at 555.

88. *Id.* at 556. Drawing on several court decisions that recognize the Salvation Army's status as a religious organization, the district court had previously found that the Salvation Army was a religious organization. *See id*. at 556 n.5 (citing Salvation Army v. United States, 138 F. Supp. 914, 915 (S.D. N.Y. 1956); Bennett v. City of LaGrange, 112 S.E. 482, 485 (Ga. 1922); Hull v. State, 22 N.E. 117, 117 (Ind. 1889)). The Salvation Army's status as a religious organization was not at issue on appeal. *McClure*, 460 F.2d at 556.

89. *Id.* at 556. The district court reasoned that because McClure's responsibilities ". . . were connected with carrying on of the religious activities of the Salvation Army," the Salvation Army was exempt from Title VII. *Id.* Though the Court of Appeals applied the ministerial exception in a somewhat different manner, McClure's status as a minister was not at issue on appeal. *Id.*

90. The Fifth Circuit set out that:

> [a]pplication of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.

Id. at 560.

91. Corbin, *supra* note 20, at 1974 (demonstrating that *McClure* created the ministerial exception); *Hosanna-Tabor*, 565 U.S. at 196 (citing to *McClure* for the proposition that the ministerial exception had been around for over forty years before the Supreme Court addressed the issue).

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

93. *See, e.g.*, Martin v. SS Columba-Brigid Catholic Church, 2022 U.S. Dist. LEXIS 144616, at *20–21 (W.D.N.Y. Aug. 11, 2022) (dismissing a Choir Director's claim for race discrimination because the Court believed that she held a ministerial role that they could not interfere with); Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (holding that the ministerial exception barred plaintiff's claim of race discrimination). Because Rweyemamu was a priest in the Catholic Church, the court quickly found that the ministerial exception applied, as his responsibilities were intertwined with the

organizations should be afforded a certain degree of independence in ministerial employment decisions, lower courts have grappled with how to decide who qualified as a "minister."[94] The inquiry focused on the function of a position, rather than traditional beliefs on who is or is not a minister.[95] Most courts generally asked whether the employee's primary duties involve carrying out some aspect of the employer's religious mission.[96] Such an inquiry aimed to "preserve the independence of religious institutions in performing their spiritual religious functions" while ensuring religious organizations are not immune from federal anti-discrimination law.[97] The lack of certainty surrounding how to apply the exception has led to most claims being barred, even when brought by employees who had little to do with the religious aspect of an organization.[98]

D. Supreme Court Endorsement of the Ministerial Exception

The Supreme Court finally addressed the ministerial exception doctrine and its constitutional underpinnings in 2012 through *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[99] Hosanna-Tabor was an Evangelical Lutheran Church that operated a small school in Redford, Michigan.[100] Cheryl Perich was an elementary teacher at Hosanna-Tabor.[101] After her fifth year of teaching at Hosanna-Tabor,

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Church. *Id. See also* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 700 (7th Cir. 2003) (holding that the ministerial exception barred plaintiff's claim of discrimination based on national origin). Alicea-Hernandez served as the Hispanic Communications Managers, which required her to complete press secretarial duties. *Id.* at 703. The Seventh Circuit addressed the novel question of whether the ministerial exception should apply to press secretaries. *Id*. at 704. Because a press secretary is "responsible for conveying the message of an organization to the public," the court found that the position serves as a "ministerial function for the church." *Id*. Thus, her claim for racial discrimination was barred by the ministerial exception. *Id*.

94. *Patsakis*, 339 F. Supp. 2d at 694 (indicating that "[a]lthough the phrase 'ministerial exception' would seem to apply to clergy, several courts have extended the doctrine to claims of lay employees . . .").

95. EEOC v. Roman Catholic Diocese, 213 F.3d 795, 801 (4th Cir. 2000); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184, 186 (7th Cir. 1994).

96. Crunk, *supra* note 22, at 1087 (revealing that courts are "hardly uniform" when applying the ministerial exception).

97. *EEOC v. Roman Catholic Diocese*, 213 F.3d at 801.

98. *See, e.g.*, *Alicea-Hernandez*, 320 F.3d 698 (barring communication manager's claim of sex discrimination); Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174, 1181 (E.D. Wis. 2001) (barring a choir director's claim of racial discrimination); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457 (1996) (barring a law faculty member's claim of sex discrimination); *see also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (expressing that the ministerial exception extends to any employee who serves in a position that "is important to the spiritual and pastoral mission of the church.").

99. *Hosanna-Tabor*, 565 U.S. at 171.

100. *Id.*

101. *Id*. at 178. The school classified teachers into two categories: called and lay. *Id*. at 177. Called teachers were those thought to have "been called to their vocation by God through a congregation." *Id.* Lay teachers were appointed by the school board and

Perich was diagnosed with narcolepsy and had to take disability leave for part of the following school year.[102] Almost immediately, Hosanna-Tabor filled her position and asked her to resign.[103] When she refused to resign and attempted to go back to work with medical clearance, Hosanna-Tabor fired her.[104] Perich filed a charge with the Equal Employment Opportunity Commission, alleging that she was discriminated against because of her disability.[105]

Hosanna-Tabor moved for summary judgment and argued that all of Perich's claims were barred due to the ministerial exception.[106] For the ministerial exception to apply, "the employer must be a religious institution and the employee must have been a ministerial employee."[107] Both parties agreed that as a religiously affiliated school, Hosanna-Tabor was a "religious institution" for the purposes of the exception.[108] Thus, the primary question in *Hosanna-Tabor* was whether Perich qualified as a ministerial employee.[109]

Along with the historical context in which the First Amendment was drafted, the Court looked at the extensive precedent set by the lower courts to determine how far the ministerial exception should reach.[110] The Court's ruling built on several lower court decisions and used four factors to determine whether an employee qualified as a minister.[111] These factors were Perich's title, whether Perich had religious training or commissioning, whether Perich held herself out as a minister, and whether Perich's job responsibilities reflected a role in conveying the employer's religious message and mission.[112] Under this analysis, the Court found that Perich was a minister and dismissed all of her claims.[113] By expanding the ministerial exception to bar an elementary teacher's claim of discrimination based on medical disability, *Hosanna-Tabor* upheld the exception's validity and reaffirmed a religious organization's right to act in accordance with their religious beliefs.[114]

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had no duty to be religious. *Id*. Perich began her career as a lay teacher and was eventually promoted to called. *Id.*

102. *Id.* at 178.

103. *Id.*

104. *Id.* at 179.

105. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008).

106. *Id.* at 886. At this point in time, the Michigan Court of Appeals had acknowledged the ministerial exception in their own jurisprudence. *See* Weishuhn v. Catholic Diocese, 279 Mich. App. 150, 152 (2008) (concluding, for the first time, that "the ministerial exception exists in Michigan.").

107. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

108. *EEOC v. Hosanna-Tabor*, 582 F. Supp. 2d at 887.

109. *Hosanna-Tabor*, 565 U.S. at 179.

110. *See id.* at 188 n.2 (citing to cases indicating that the ministerial exception had been addressed by each circuit court).

111. David E. Schwartz & Risa M. Salins, *Supreme Court Review: LGBTQ Rights, Ministerial Exemption, Contraception*, N.Y. L. J. (Aug. 6, 2020).

112. *Hosanna-Tabor*, 565 U.S. at 191–93.

113. *Id*.

114. *Id*. at 188 (validating the ministerial exception for the first time); *See generally* Ioanna Tourkochoriti, *Revisiting Hosanna-Tabor v. EEOC: The Road Not Taken*, 49 TULSA

Hosanna-Tabor was almost immediately criticized by scholars as a "profound misinterpretation of the First Amendment."[115] While the Court stated it intended to grant a "special solicitude"[116] to religious organizations, some commentators viewed the decision as giving religious groups a "special freedom to disobey the law."[117] Moreover, the *Hosanna-Tabor* decision provided little guidance on how far the exception should reach.[118] The Court stated that it did not intend for its analysis to create a "rigid formula" for determining whether an employee falls within the exception.[119] Thus, *Hosanna-Tabor* still left open the question of what factors should apply when determining if a position should qualify for the ministerial exception.[120] Following *Hosanna-Tabor*, district courts continued to have complete discretion in determining whether an employee qualifies as a minister.[121] This lack of clarity led to several claims of employees being barred, despite the employees holding no real relation to the religious operations of an organization.[122]

The Supreme Court addressed the scope of the ministerial exception for a second time in *Our Lady of Guadalupe v. Morrissey-Berru*.[123] As in *Hosanna-Tabor*, this case involved employment discrimination claims brought by elementary school teachers.[124] The first teacher, Morrisey-Berru, filed an age discrimination suit against her employer after being terminated and replaced with a younger teacher.[125] Utilizing the factors identified in *Hosanna-Tabor*, the Ninth Circuit found that Morissey-Berru was not a minister for purposes of the ministerial exception because her title of "teacher" was secular, and she did not have religious credentials, training, background, or reputation.[126]

Kristen Biel, the second teacher involved, was terminated from her

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L. REV. 47, 47 (2013) (reporting that in *Hosanna*-Tabor, the Supreme Court decided to endorse the ministerial exception after "balancing between the competing rights of freedom of religion…and the rights of the disabled to equal treatment.").

115. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L. J. 981, 983 (2013) (contending that "the Court mistakenly protected religious institutions' religious freedom at the expense of their religious employees.").

116. *Hosanna-Tabor*, 565 U.S. at 189.

117. Griffin, *supra* note 115, at 984 (criticizing Hosanna-Tabor for giving applying a "lawless interpretation of the religious clauses.").

118. Hinkle, *supra* note 26, at 288 (exposing *Hosanna-Tabor* for "add[ing] even more confusion to the issue" of who will be considered a minister for the purpose of applying the ministerial exception).

119. *Hosanna-Tabor*, 565 U.S. at 190.

120. Leslie C. Griffin, *A Word of Warning from a Woman: Arbitrary, Categorical, and Hidden Religious Exemptions Threaten LGBT Rights*, 7 ALA. C.R. & C.L. L REV. 97, 116 (2015).

121. Griffin, *supra* note 115, at 1006.

122. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238 (10th Cir. 2010) (dismissing claims of guidance counselor); Zaleuke v. Archdiocese of St. Louis, 2021 U.S. Dist. LEXIS 214496 (E.D. Mo. 2021) (dismissing claims of school principal).

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

124. *Id.* at 2055.

125. *Id.* at 2058.

126. Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 461 (9th Cir. 2019).

position as an elementary school teacher after requesting a leave of absence to seek breast cancer treatment.[127] Biel filed suit against the Catholic school that employed her alleging that she was discriminated against because of disability.[128] The Ninth Circuit once again used the factors set forth in *Hosanna-Tabor* and found that Biel was not a minister for the purposes of the exception.[129] The religious organizations in the cases filed a petition for certiorari, which the Court granted, consolidating the two cases.[130]

The Supreme Court reversed the decisions of the Ninth Circuit, holding that both teachers were ministers because they educated their students in the Catholic Faith.[131] Thus, both Morrisey-Berru's claim for age discrimination and Biels' claim for disability discrimination were dismissed despite the substantive claims having nothing to do with their employers' religious beliefs.

In deciding *Our Lady of Guadalupe*, the Court rejected the application of the *Hosanna-Tabor* factors and instead regressed back to a vague inquiry that focuses on what an employee does.[132] As the dissenters pointed out, by applying the exception to two elementary school teachers who had few religious responsibilities at their respective schools, this decision effectively immunizes religious organizations from any potential discrimination suit, regardless of whether a case genuinely raises religious liberty concerns.[133] Not only does the exception have potential to bar all kinds of discrimination claims, but the exception now has the potential to apply to all employees, religious or secular.

E. Ministerial Exception & Hostile Work Environment Claims

Among the types of claims that have been barred following the *Our Lady of Guadalupe* decision are hostile work environment claims.[134]

127. Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018).

128. *Id.* at 606.

129. *Id.* at 611 (expressing that "we cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties . . .") (citing *Hosanna-Tabor*, 565 U.S. at 196)).

130. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 679, 679 (2019) (consolidating cases).

131. *Our Lady of Guadalupe*, 140 S. Ct. 2049, 2069 (rationalizing that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

132. *Id*. at 2064 (announcing that "what matters, at bottom, is what an employee does.").

133. *See id.* at 2072 (Sotomayor, J., dissenting) (condemning the majority for giving employers "free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs.") (citing *Hosanna-Tabor*, 565 U.S. at 194-195)).

134. *See, e.g.*, *Demkovich II*, 3 F.4th at 985 (holding "the ministerial exception precludes Demkovich's hostile work environment claims against the church.").

Under Title VII, individuals can state a claim for harassment in the workplace.[135] These allegations must assert that an employer created a "hostile work environment" that negatively affected conditions of an employee's employment.[136] Notably, not all harassment is illegal under Title VII.[137] To prevail on a hostile work environment claim, an individual must show that the workplace was permeated with "discriminatory intimidation, ridicule, and insult" so "severe or pervasive" that it negatively impacted the working environment.[138] Crucially, the discrimination must also be rooted in an employee's protected class.[139]

The theory of hostile work environment was first recognized by the Court in 1986 and continues to be well-accepted and applied.[140] By reading Title VII expansively to encompass a ban on workplace harassment, courts can address invidious discrimination in all employment matters, not just hiring and firing decisions.[141] Hostile work environment claims have allowed many employees to recover damages from abusive employers.[142] In wake of the *Our Lady of Guadalupe* decision, however, these rights have not been afforded to individuals employed by religious organizations.[143]

F. The Adjudication of Demkovich's Claims

In July of 2021, one year after *Our Lady of Guadalupe* was decided, the Seventh Circuit[144] invoked the Supreme Court's broad endorsement

135. *See* Richard D. Glovsky, Practice Note, *Harassment Claim Prevention and Defense* (LexisNexis Aug. 3, 2022); *Demkovich II*, 3 F.4th at 977 (announcing that the elements for a hostile work environment under the ADA and Title VII are the same); *Meritor*, 477 U.S. at 64 (declaring that Title VII claims are not limited to tangible and economic discrimination).

136. Glovsky, *supra* note 135.

137. *Id*.

138. *Harris*, 510 U.S. at 21 (citing *Meritor*, 477 U.S. at 65).

139. Eric Bachman, *The Differences Between Workplace Bullying and a "hostile work environment"*, FORBES (Aug. 11, 2020), www.forbes.com/sites/ericbachman/2020/08/11/the-differences-between-workplace-bullying-and-a-hostile-work-environment/ [perma.cc/XCQ7-CKF8].

140. *Meritor*, 477 U.S. at 66; *see also* Jamar, *supra* note 68, at 738-741 (recapitulating the development of hostile work environment claims).

141. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998) (finding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII because it addresses discriminatory "conditions of employment.").

142. Bachman, *supra* note 139 (spotlighting several large verdicts, including an $11.6 million verdict against the New York Knicks).

143. *See, e.g., Martin v. SS Columba-Brigid Catholic Church*, 2022 U.S. Dist. LEXIS 144616 at *25 (W.D.N.Y. 2022) (dismissing Choir director's complaint for racial discrimination).

144. Prior to the publication of the Supreme Court's decision in *Our Lady of Guadalupe*, a three-judge panel of the Seventh Circuit heard oral arguments on St. Andrew's interlocutory appeal. *Demkovich I*, 973 F.3d at 718 (7th Cir. 2007) (affirming in part and reversing in part the decision of the district court). In a 2-1 decision, the Seventh Circuit flat-out rejected the Church's proposition of a categorical bar, explaining that "[t]he First Amendment does not require complete immunity from the sometimes horrific abuse that defendants' bright-line rule would protect." *Id*.

of the ministerial exception and barred all claims brought by Sandor Demokovich, the beloved choir director at St. Andrew the Apostle Parish.[145] Demokovich brought two types of hostile work environment claims: a claim based on his sex, sexual orientation, and marital status (hereafter "sexual orientation claim") and a claim based on his disability status (hereafter "disability claim").[146] The district court originally employed a balancing test to determine if each respective claim of hostile work environment should be barred.[147] The primary focus of the court's inquiry was whether the claim raised concerns of the excessive entanglement of church and state.[148] Under this approach, the district court dismissed Demkovich's sexual orientation claim while allowing his disability claim to survive.[149]

The key distinction was that the Archdiocese asserted a religious justification for harassing Demokovich because of his sexual orientation, but they provided no religious justification for harassing Demokovich

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145. The Seventh Circuit synthesized *Hosanna-Tabor* and *Our Lady of Guadalupe* as follows:

> From Hosanna-Tabor and Our Lady of Guadalupe, we take two principles. First, although these cases involved allegations of discrimination in termination, their rationale is not limited to that context. The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between. Second, we cannot lose sight of the harms—civil intrusion and excessive entanglement—that the ministerial exception prevents. Especially in matters of civil employment, the First Amendment thus "gives special solicitude to the rights of religious organizations."

Demkovich II, 3 F.4th at 976–77 (citing *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61, 2069; *Hosanna-Tabor*, 565 U.S. at 187–89,194–96).

146. *Demkovich II*, 3 F.4th at 973.

147. Demkovich v. St. Andrew the Apostle Par., 343 F. Supp. 3d 772, 785 (N.D. Ill. 2018). At this point, the district court had previously ruled on a motion to dismiss and found that Demokovich qualified as a minister for the purpose of the exception. *Id.* at 778 (citing Demkovich v. St. Andrew the Apostle Par., 2017 U.S. Dist. LEXIS 161658 (N.D. Ill. 2017)). The district court was now tasked to determine whether the exception acted as a categorical bar to hostile work environment claims, which "seek relief only for harassment that did not result in a tangible employment action." *Demkovich*, 343 F. Supp. 3d at 778. The district court held that claims based on tangible employment actions, such as hiring and firing decision, were categorically barred; claims based on intangible employment actions, such as discriminatory remarks and insult, were not. *Id.* at 778–86. Thus, the ministerial exception did not categorically bar either one of Demkovich's hostile work environment claims. *Id.* at 783–86. The Seventh Circuit later expanded on this reasoning, clarifying that "[s]ubjecting plaintiff to the abuse alleged here is neither statutorily permissible nor constitutionally protected means of 'control' within the meaning of *Hosanna-Tabor*." *Demkovich I,* 973 F.3d at 729 *rev'd en banc*, *Demkovich II*, 3 F.4th at 985.

148. *Demkovich*, 343 F. Supp. 3d at 785 (debriefing that a case-by-case analysis allows federal courts to evaluate whether "an employee's particular case would pose too much of an intrusion into the religious employer's Free Exercise and Establishment clause rights" rather than categorically barring all claims exclusively due to minister status).

149. *Id.* at 789.

because of his disability.[150] The Archdiocese's religious justification for the derogatory remarks and harassment relating to Demkovich's sexual orientation claims was that they "reflect the pastor's opposition, in accord with Catholic doctrine, to same sex marriage."[151] The court acknowledged that whether Catholicism mandates an opposition to same-sex marriage is not subject to court scrutiny, but ultimately found that such opposition is commonly known and accepted.[152] Thus, because analyzing the religious justification for harassment based on sexual orientation would inevitably present an excessive-entanglement[153] concern due to the religious justification offered, the court dismissed his sexual orientation claim.[154]

On the church's motion for interlocutory appeal, the Seventh Circuit was asked to revisit the question of whether the ministerial exception categorically barred all claims of hostile work environment, including Demkovich's disability claim.[155] In a divided ruling, the Seventh Circuit originally found that Demkovich's hostile work environment claims should not be barred by the ministerial exception.[156] Rather, the Seventh Circuit held that the proper balance between First Amendment protections and individual liberties can be found by "bar[ring] claims by ministerial employees challenging tangible employment actions but allow[ing] hostile work environment claims . . ."[157] This is because "hostile

150. *Id.* at 786–89.

151. *Id.* at 786 (citing Defendant's Reply Brief at 5).

152. *See generally* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages,* 50 HARV. C.R.-C.L. L. REV. 99, 102-104 (2015) (exploring why the legal field readily accepts and adopts broad religious exemptions relating to same-sex marriage despite historically rejecting similar exceptions for interracial marriage when both issues were equally pervasive).

153. Courts have interpreted the First Amendment religion clauses as a prohibition on "excessive government entanglement with religion." Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1197 (1980) (citing Walz v. Tax Commission, 397 U.S. 664, 674 (1970)). To determine if an excessive entanglement risk is present, the district court employed the three-part *Lemon* test. *Demkovich*, 343 F. Supp. 3d. at 785. The test is as follows:

> 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 government entanglement with religion.

Id. (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

154. *Demkovich*, 343 F. Supp. 3d. at 787 (appreciating that when "no religious justification is offered at all. . .there would be little or no risk of violating the Free Exercise Clause.").

155. *Demkovich II*, 3 F.4th at 974 (identifying the certified question for review as "[u]nder Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?").

156. *Demkovich I*, 973 F.3d at 720.

157. *Id*. (adding that "[r]eligious employers' control over tangible employment actions . . . provides ample protection for the free exercise of religion.").

[work] environment claims are essentially tortious in nature" and are "not essential to the management and supervision and control of employees."[158] As such, both Demkovich's sexual orientation claim and disability claim were allowed to proceed.[159]

The Seventh Circuit sitting en banc reversed this decision entirely, finding that *all* adjudication of "allegations of 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."[160] Through this decision, the Seventh Circuit effectively gave religious organizations a license to harass under the guise of religious freedom, even when religious concerns are not genuinely at issue.[161]

As the dissent pointed out, the Seventh Circuit did not have to adopt a categorical bar.[162] The dissenters stated four reasons as to why the Seventh Circuit Court of Appeals should have ruled the other way: 1) the Supreme Court has yet to rule on the application of the ministerial exception in the context of hostile work environment claims, 2) circuit and state courts are split on the issue, 3) the majority's rule "draws an odd, arbitrary line in constitutional law," and 4) "the line between tangible employment actions and hostile work environments fits the purpose of the ministerial exception."[163] In the dissenters' view, these four reasons should have led the court to "weigh competing interests case-by-case to protect both religious liberty and laws against employment discrimination" rather than imposing a categorical bar.[164]

158. *Id.* at 727–28. In this opinion, the Seventh Circuit repeatedly emphasized how hostile work environment claims are more akin to torts or breaches of conduct, and not relevant to an employer's right to control. *Id*. at 728. As they wrote: "Supervisors within religious organizations have no constitutionally protected individual rights under Hosanna—Tabor to abuse those employees they manage, whether or not they are motivated by their personal religious beliefs." *Id*. at 730.

159. *Id*. at 736. While the opinion was issued in August, 2020, oral arguments for *Demkovich I* were heard in November, 2019, and the decision for *Our Lady of Guadalupe* was not published until July 2020. *Id.* at 718; *Our Lady of Guadalupe*, 140 S. Ct. at 2049. Consequently, the Seventh Circuit's en banc decision in *Demkovich II* was argued against a different background than its predecessor.

160. *Id*. at 977–78 (cautioning that judicial involvement in Demkovich's case would "depart from *Hosanna-Tabor* and *Our Lady of Guadalupe* and threaten the independence of religious organizations 'in a way that the First Amendment does not allow.'") (citing *Our Lady of Guadalupe*, 140 S. Ct. at 2069).

161. *See e.g. Starkey*, 2021 U.S. Dist. LEXIS 158254 at *2 (barring elementary teacher's claim of hostile work environment relating to her sexual orientation); Fitzgerald v. Roncalli High Sch., 2021 U.S. Dist. LEXIS 194411 at *5 (S.D. Ind. Sep. 30, 2021) (recognizing that "in light of the Seventh Circuit's ruling in *Demkovich v. St. Andrew the Apostle Par., Calumet City,* 3 F.4th 968 (7th Cir. 2021), all of Fitzgerald's claims will be barred if the ministerial exception applies.").

162. *Demkovich II*, 3 F.4th 968, 985 (Hamilton, J., dissenting).

163. *Id.* at 987–90.

164. *Id*. at 985 (characterizing this as the "more cautious" approach).

III. ANALYSIS

To decipher the Seventh Circuit's decision to bar all of Demkovich's claims, this section examines the analytical framework under which Demkovich's claims were adjudicated. First, this section lays out the federal circuit split on whether hostile work environment claims brought by a ministerial employee are categorically barred under the ministerial exception.[165] Then, this section shares different perspectives on whether hostile work environment claims are unique employment disputes that warrant further consideration by the courts. Finally, this section considers whether hostile work environment claims are like other civil disputes in a way that would permit courts to inquire into their merits without raising religious liberty concerns.

A. Federal Circuit Split

Notably, before the Seventh Circuit considered Demkovich's case, "[o]nly two courts of appeals ha[d] addressed whether hostile work environment claims brought by a minister are barred by the ministerial exception [and t]he courts have come to opposite conclusions."[166] On one hand, the Tenth Circuit applied a categorical bar to all hostile work environment claims brought by a ministerial employee.[167] On the other hand, the Ninth Circuit used a case-by-case balancing approach to determine whether a hostile work environment claim brought by a ministerial employee can proceed.[168] The Sixth Circuit has since had the opportunity to weigh in on this issue, yet declined to do so.[169]

1. The Tenth Circuit Approach: A Categorical Bar

The Seventh Circuit en banc majority joined the Tenth Circuit in finding that that the ministerial exception bars all Title VII claims, including those for hostile work environment.[170] In 2007, Monica Skrzypczak, the director of the Department of Religious Formation for the Roman Catholic Diocese of Tulsa, filed suit against the Diocese, alleging

165. *Compare Skrzypczak*, 611 F.3d at 1245–46 (holding that the ministerial exception categorically bars all hostile work environment claims), *with* Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (holding that the court should engage in a case-by-case analysis before deciding whether to apply the ministerial exception).

166. *Demkovich*, 343 F. Supp. 3d at 783.

167. *See Skrzypczak*, 611 F.3d at 1245–46.

168. *See Bollard*, 196 F.3d at 947 (9th Cir. 1999).

169. Middleton v. United Church of Christ Bd., 2021 U.S. App. LEXIS 34852 *10 (6th Cir. 2021) (acknowledging the circuit split on whether the ministerial exception categorically bars courts from considering a minister's hostile-work-environment claims). The Sixth Circuit declined to address the merits of this debate because the Plaintiff did not state a sufficient claim for hostile work environment on its face. *Id*.

170. *Skrzypczak*, 611 F.3d at 1245–46.

gender discrimination and a hostile work environment.[171] Because Skrzypczak's job responsibilities "furthered the core spiritual mission of the Diocese," the court had no issue finding that she was a minister for the purposes of the exception.[172] Skrzypczak argued that even though she qualified as a minister, her Title VII claim for hostile work environment should not be barred because it did not involve a protected employment decision.[173] The Tenth Circuit flatly rejected this argument, concluding that "any Title VII action brought against a church by one of its ministers will improperly interfere with the church . . . ."[174] The Tenth Circuit's decision effectively prevents any employee from stating a Title VII claim against a religious organization, regardless of whether or not the claimed discrimination has any relationship to the religious organization's tenets.[175]

2. The Ninth Circuit Approach: A Case-by-Case Analysis

The Ninth Circuit utilizes an entirely different approach when determining whether to apply the ministerial exception to hostile work environment claims.[176] Instead of applying a categorical bar, the Ninth Circuit conducts a case-by-case analysis to determine whether religious liberty is truly at issue.[177] If a plaintiff's claim is determined to involve

171. *Id*. at 1241.

172. *Id*. at 1244. Among other things, the Diocese presented the following evidence regarding Skrzypczk's ministerial duties: her religious job title, her job description that included religious duties, employment application statements that indicated her personal religious beliefs, a list of the multiple religious courses that she taught at the Diocese's Pastoral Studies Institute, the Institute's mission statement to "provide a solid foundation in Catholic theology to educate, nourish, strengthen, and renew the Catholic faith", and an affidavit from a Bishop describing her religious role at the Institute and as the director of the Department of Religious formation. *Id*. at 1243. Skrzypczk attempted to rebut this evidence with three affidavits that concluded her duties were purely administrative. *Id*. at 1244. In light of this evidence—particularly the multiple religious courses taught by Skrzypczak and the religious nature of her job title and description—the Tenth Circuit found that the Diocese met their burden of showing that Skrzypczak's position was "important to the spiritual and pastoral mission of the [Diocese]." *Id*. (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).

173. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004) (permitting a ministerial employee to bring a hostile work environment claim relating to sexual harassment when no religious justification is offered by the religious employer).

174. *Skrzypczk*, 611 F.3d at 1246.

175. *See, e.g.*, Koenke v. Saint Joseph's Univ., 2021 U.S. Dist. LEXIS 3576 at *12 (E.D. Pa. 2021) (dismissing all claims brought by an Assistant Director for Music and Worship at a private Catholic University); Lishu Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803, 806 (D.S.C. 2018) (dismissing all claims brought by a full-time faculty member at Columbia International University, a "multi-denominational Christian institution of higher education.").

176. *See* Alcazar v. Corp. of Catholic Archbishop of Seattle, 2006 U.S. Dist. LEXIS 92708 at *9 (W.D. Wash. Dec. 21, 2006) (addressing whether the ministerial exception bars a claim for hostile work environment).

177. *See, e.g.*, *Bollard*, 196 F.3d at 940; *Elvig*, 375 F.3d at 951.

purely secular issues, the claim is able to survive.[178] Thus, this approach addresses concerns of excessive entanglement between church and state while simultaneously ensuring anti-discrimination safeguards are in place.[179]

The case of John Bollard is a clear example of this balance.[180] In 1988, John Bollard served as a novice of the Society of Jesus, an order of Roman Catholic priests commonly known as Jesuits.[181] As a novice, Bollard underwent an extensive training process with the goal of becoming an ordained priest.[182] Bollard is undoubtedly the exact type of employee the ministerial exception was intended to cover.[183] In his suit against the religious entity who employed him, Bollard alleged that he was sexually harassed by his superiors who made unwanted sexual advances and engaged in inappropriate and unwelcomed sexual discussions.[184] The Ninth Circuit reasoned that because the Jesuit order offered no religious justification for the harassment, there was no risk of excessive entanglement if his suit was allowed to proceed.[185] Thus, Bollard's claims were not barred by the ministerial exception, despite his clear role as a minister.[186]

3. The Seventh Circuit Joins the Tenth in Adopting a Categorical Bar

When deciding *Demkovich II*, the Seventh Circuit acknowledged both approaches employed by the federal courts regarding whether the ministerial exception covers hostile work environment claims.[187] As

178. *See Alcazar*, 2006 U.S. Dist. LEXIS 92708 at *13.

179. See Morgan Nelson, *Discussing Demkovich: An Analysis of Why and How the Supreme Court Should Reconsider the Expansion of the Ministerial Exception*, 54 TEX. TECH L. REV. 825, 840 (2022) (agreeing that "a two-prong balancing test… protect[s] ministerial employees while preserving the freedom of religious entities.").

180. *Bollard*, 196 F.3d at 944.

181. *Id.*

182. See generally James Martin, S.J., Novice? Regent? Scholastic? A guide to Jesuit Formation (and Lingo), AMERICA: THE JESUIT REVIEW (Aug. 11, 2013), www.americamagazine.org/faith/2013/08/11/novice-regent-scholastic-guide-jesuit-formation-and-lingo [perma.cc/EK9K-K2QR] (expounding on the lengthy formation process required for novices to become ordained).

183. See Katherine Bell, *The Ministerial Exception: Rethinking the Third Circuit's Approach to Ministerial Discrimination*, 46 U. LOUISVILLE L. REV. 753, 756 (2008) (confirming that "the ministerial exception is derived from the Religion Clauses of the First Amendment to protect the relationship between the church and clergy.").

184. *Bollard*, 196 F.3d at 944. Bollard initially reported his harassment to superiors in the Jesuit order, but no action was taken. Id. Ultimately, the harassment was so severe that Bollard left the Jesuit order before taking vows to become a priest. *Id.*

185. *Id.* at 947 (noting that because no religious justification was offered, there is "no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine.").

186. *Id.* at 948 (pointing out that a "generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws.").

187. *Demkovich II*, 3 F.4th at 985 (characterizing their decision as "remov[ing] any

discussed above, the Seventh Circuit adopted the absolutist approach utilized by the Tenth Circuit and imposed a categorical bar.[188] Per the Seventh Circuit's own reasoning, such an adoption was consistent with its own precedent regarding the application of the exception, along with the Supreme Court's "unanimous endorsement" in *Hosanna-Tabor*.[189]

The dissent disagreed whole-heartedly.[190] The dissenting opinion characterized Demkovich's hostile work environment claim as "fall[ing] squarely into the area that *Hosanna-Tabor* expressly declined to reach."[191] According to the dissenters, "the majority's rule draws an odd, arbitrary line" that "departs from a long practice of carefully balancing civil law and religious liberty."[192] Since the Seventh Circuit's decision to impose an absolute bar, district courts have refused to hear the claims of several employees, including two guidance counselors who brought Title VII hostile work environment claims against their religious employers.[193]

B. Hostile Work Environment Claims as Unique Employment Disputes

In most cases where the ministerial exception is applied, a tangible employment action is being challenged.[194] Tangible employment actions require an official company act.[195] Hiring and firing decisions are the clearest examples.[196] It is generally accepted that the ministerial exception should apply to tangible employment actions because the

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doubt as to where we stand" on the application of the ministerial exception).

188. *Id*. at 983–85 (mentioning several Seventh Circuit decisions pre-dating *Our Lady of Guadalupe* that dismissed claims through the application of the ministerial exception). *But see Demkovich I*, 973 F.3d at 721 ("In so holding, we join the Ninth Circuit and depart from the Tenth.") (internal citations omitted).

189. *Demkovich II*, 3 F.4th at 985.

190. *Id.* at 985 (Hamilton J., dissenting) ("By focusing too much on religious liberty and too little on counterarguments and other interests, the majority opinion takes our circuit's law beyond necessary protection of religious liberty.").

191. *Id.* at 986 (using language from *Hosanna-Tabor* to show that the Supreme Court intended the exception to apply only in situations of termination and "express[ed] no view on whether the exception bars other types of suits . . .") (citing *Hosanna-Tabor*, 565 U.S. at 196).

192. *Id.* at 988–93.

193. *Starkey*, 2021 U.S. Dist. LEXIS 158254 at *2; *Fitzgerald*, 2021 U.S. Dist. LEXIS 194411 at *5; *see Zaleuke*, 2021 U.S. Dist. LEXIS 214496, at *19 (dismissing Plaintiff's Title VII discrimination, retaliation, and harassment claim because the parties agreed that if the ministerial exception applies, it must apply to all claims).

194. Rockwell v. Roman Catholic Archdiocese, 2002 U.S. Dist. LEXIS 20992, at *1 (D.N.H. 2002) (dismissing claim relating to hiring decision); Fratello v. Archdiocese of N.Y., 863 F.3d 190, 192 (2d Cir. 2017) (dismissing claim relating to termination); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1300 (11th Cir. 2000) (applying the ministerial exception to a claim for constructive discharge).

195. Burlington Indus. v. Ellerth, 524 U.S. 742, 762 (1998).

196. *See* Vance v. Ball State Univ., 570 U.S. 421, 428 (2013) (defining a tangible employment action as "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.") (citing *Ellerth*, 524 U.S. at 761).

exception itself is rooted in the belief that churches should be free to select their own ministers.[197]

Hostile work environment claims, however, do not require an official, tangible act on behalf of the employer.[198] Rather, employers are liable when their own negligence is a cause of the harassment or if the supervisor subsequently takes tangible employment action against the employee.[199] Thus, individuals can prevail on a hostile work environment claim without showing that a tangible employment action was involved.[200] Advocates have used this distinction to argue that the ministerial exception should not apply to hostile work environment claims because they do not directly affect a religious entity's ability to select their own ministers.[201] For example, in the district court's *Demkovich* decision, the court held that his claims based on tangible employment actions, such as hiring and firing decisions, were categorically barred.[202] But, his claims based on intangible employment actions, such as discriminatory remarks and insult, were not.[203] Most courts, however, have been less than receptive to this argument, including the Seventh Circuit which ultimately reversed the district court's decision.[204] Still, the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*, seem to have left this question unanswered.[205]

1. Interpretations in Favor of Categorically Barring Hostile Work Environment Claims

On one hand, district courts have utilized the language in *Hosanna-*

197. *E.g.*, *Hosanna-Tabor*, 565 U.S. at 174 (affirming that "it is impermissible for the government to contradict a church's determination of who can act as its ministers.").

198. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).

199. *See* Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1593 (2000) (perceiving a historical difference between quid pro quo harassment claims—those that occur when the employee suffers an actual job detriment—and hostile work environment claims—when the employee suffers no job detriment).

200. *See, e.g.*, Steinberg v. Hoshijo, 88 Haw. 10, 19 (1998) (finding hostile work environment existed where a doctor subjected their employee to repeated, unwanted sexual contact which caused the employee to decide to leave).

201. *See, e.g.*, *Koenke*, 2021 U.S. Dist. LEXIS 3576, *7-12 (deconstructing a minister's argument that the ministerial exception should not apply to all claims she brought); *Demokivch I*, 973 F.3d at 727-730 (expounding on the unique, tortious nature of hostile work environment claims). From the Seventh Circuit's perspective, "[h]ostile environment claims arise under the same statutes, but they involve different elements and specially tailored rules for employer liability. These differences show that a religious employer does not need exemption from such claims to be able to 'select and control' its ministers." *Id*. at 727.

202. *Demkovich*, 343 F. Supp. 3d 772, 778–86.

203. *Id. See also Demkovich I*, 973 F.3d at 736 (permitting his hostile work environment claims to proceed).

204. *Koenke*, 2021 U.S. Dist. LEXIS 3576 at *9; *Demkovich II*, 3 F.4th at 985.

205. *See generally* Brandenburg v. Greek Orthodox Archdiocese of N. Am., 2021 U.S. Dist. LEXIS 102800 at *13 (S.D.N.Y. 2021) (introducing the Circuit split yet declining to take sides in the "spirited debate" because the issue was not adequately briefed).

Tabor and *Our Lady of Guadalupe* to argue that the Supreme Court intended the ministerial exception to apply to all aspects of the employment relationship, tangible and intangible.[206] When the Court was first tasked with recognizing and defining the exception, it agreed with the lower courts that the ministerial exception precludes Title VII and other employment discrimination laws from applying "to claims concerning the *employment* relationship between a religious institution and its ministers."[207] In *Our Lady of Guadalupe,* the Supreme Court further explained that under the ministerial exception, "courts are bound to stay out of *employment* disputes involving those holding certain important positions with churches and other religious institutions."[208] Because these Supreme Court decisions refer to employment decisions broadly, rather than distinguishing between tangible and intangible employment actions, district courts have assumed that the ministerial exception is intended to apply to all employment disputes.[209] Therefore, since hostile work environment claims are always brought in the context of employment, district courts have ruled that they must be absolutely banned under the ministerial exception.[210]

2. Interpretations Against Categorically Barring Hostile Work Environment Claims

On the other hand, individuals in favor of allowing hostile work environment claims to survive the ministerial exception have pointed out restrictive language used by the Supreme Court in *Hosanna-Tabor* and *Our Lady of Guadalupe*. First, in *Hosanna-Tabor*, the Court made sure to hold only that the ministerial exception bars a suit brought on behalf of a minister challenging the church's decision to fire her.[211] They "express[ed] no view on whether the exception bars other types of suits."[212] Utilizing this expressly narrow language, individuals can argue that *Hosanna-Tabor* purposefully left open the question of how the court should treat hostile work environment claims.[213]

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206. *Koenke*, 2021 U.S. Dist. LEXIS 3576 at *8 (asserting that "the Supreme Court expressly held 'the "ministerial exception" [applies] to *laws governing the employment relationship* between a religious institution and [ministerial] employees.'") (citing *Our Lady of Guadalupe*, 140 S. Ct. at 2055).

207. *Hosanna-Tabor*, 565 U.S. at 188 (emphasis added).

208. *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (emphasis added).

209. *Koenke*, 2021 U.S. Dist. LEXIS 3576 at *11–12 (holding the ministerial exception bars claims involving tangible and intangible employment actions).

210. *Id.* at *9 (noting that "[t]he Supreme Court has not cabined the ministerial exception to tangible or intangible employment actions, and it is not for this Court to create such an exception to binding precedent); *Id.* at *9 n.5 (underscoring that such an interpretation of the Supreme Court's precedent is supported by traditional canons of construction).

211. *Hosanna Tabor*, 565 U.S. at 196.

212. *Id.*

213. *Demkovich II*, 3 F.4th at 986 (Hamilton, J., dissenting) (announcing that "[b]ecause Demkovich's amended complaint addresses only his treatment by his supervisor while he was employed and does not challenge is firing or any other

Moreover, *Our Lady of Guadalupe* did little to address this question.[214] In *Our Lady of Guadalupe*, the majority emphasized that its decision did "not mean that religious institutions enjoy a general immunity from secular laws."[215] Instead, their autonomy is protected "with respect to internal management decisions that are essential to the institution's central mission."[216] Hostile work environment claims do not require the direct involvement of a managerial employee, let alone the involvement of an internal management decision.[217] Additionally, they were not explicitly barred by the Supreme Court.[218] Therefore, it can be argued that a categorical bar should not be employed by the lower courts.[219]

3. Hostile Work Environment Claims as Analogous to Other Civil Disputes

To further support the argument that claims for hostile work environment should not be categorically barred by the ministerial exception, advocates point out the well-accepted fact that the First Amendment does not absolutely shield religious organizations from all claims brought against them.[220] For example, ministerial employees can assert a breach of contract claim against the religious institution that employs them.[221] Churches can also be held liable for wrongs committed against parishioners.[222] In addition, priests and other ministerial

tangible employment action, it falls squarely into the area that *Hosanna-Tabor* expressly declined to reach.").

214. *Id.* at 986–87.

215. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

216. *Id.* (elucidating later that "a component of this autonomy is the selection of individuals who play certain key roles.").

217. *See Meritor*, 477 U.S. at 70–72 (surveying elements necessary to prove employer liability).

218. *See Hosanna-Tabor*, 565 U.S. at 171 (including no discussion about hostile work environment claims); *Our Lady of Guadalupe*, 140 S. Ct. at 2049 (including no discussion about hostile work environment claims).

219. *See, e.g.*, Kevin J. Murphy, *Administering the Ministerial Exception Post-Hosanna-Tabor: Why Contract Claims Should Not Be Barred,* 28 ND J. L. ETHICS & PUB. POL'Y 383, 386 (2014) (opining that the ministerial exception should not bar wrongful termination contract claims).

220. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (justifying that the Court's decision to reverse a conviction on freedom of religion grounds did not intend "even remotely to imply that, under the cloak of religion, person may, with impunity, commit frauds upon the public.").

221. Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 602 (Ky. 2014) (holding that a ministerial employee's breach of contract claim survives because the enforcement of the contractual arrangement did not pose concerns regarding government interference in the selection of ministers or any other matter of ecclesiastical concern).

222. Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 48 (Ill. App. Ct. 2011) (awarding over five million dollars in damages to a parishioner who was sexually abused by a priest for several years); *see generally* BISHOPACCOUNTABILITY.ORG, www.bishop-accountability.org [perma.cc/6JRK-LNMC] (last visited Aug. 31, 2022) (collecting information about sex abuse lawsuits against religious organizations).

employees are not immune from criminal prosecution.[223] Simply put, "our pluralistic society requires religious entities to abide by generally applicable laws."[224] Adopting a categorical bar for hostile work environment claims under the ministerial exception goes against this principle and puts religious organizations above the law, rather than in compliance.[225]

Moreover, courts are more than capable of treating hostile work environment claims like those for breach of contract or any tortious violation.[226] Hostile work environment claims undoubtedly involve a fact intensive inquiry.[227] Courts are asked to consider things such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[228] Though the inquiry will certainly pose some risk of burdening religious liberty when a religious employer is involved, the risk posed does not automatically outweigh the risk in other civil claims just because an employment statute is involved.[229] Because some hostile work environment claims can be resolved with either a purely secular inquiry or in a manner similar to other permissible civil actions brought against religious entities, it can be argued that the religious liberty risk associated with hostile work environment claims is not significant enough to warrant a categorical bar.[230]

Opponents to this line of reasoning once again cite the historical context in which the ministerial exception arose, as well as language employed by the Supreme Court to assert that hostile work environment claims are employment decisions covered by the exception.[231] In

223. *E.g.,* Alex Finnie & Andrea Torres, *Catholic Priest Sentenced to Nearly 8 Years in Prison in Miami-Dade*, LOCAL 10 NEWS (Feb. 17, 2022), www.local10.com/news/local/2022/02/17/catholic-priest-sentenced-to-nearly-8-years-in-prison-in-miami-dade/ [perma.cc/J8FU-KJMM] (reporting on a Catholic priest convicted of sexual battery).

224. *Our Lady of Guadalupe*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

225. *See generally* Corbin, *supra* note 20 (rebutting potential justifications for the broad immunity granted to religious organizations under the ministerial exception).

226. *Demkovich II*, 3 F.4th at 988 (Hamilton, J., dissenting) (treating concerns for protecting religious liberty with skepticism because "churches and their leaders are already accountable in civil courts for many similar sorts of claims . . . [r]eligious liberty still thrives.").

227. Jennifer D. McCollum, *Employers' Greatest Enemy: Second-Hand Evidence in Hostile Work Environment Claims*, 59 SMU L. REV. 1869, 1872–73 (2006) (discussing what is required for an actionable hostile work environment claim).

228. *Id.* at 1873 (citing *Harris*, 510 U.S. at 23).

229. *See Demkovich II*, 3 F.4th at 989 (Hamilton, J., dissenting). The dissent emphasized that "investigations into tort and criminal liability of supervisors and churches as institutions cannot avoid looking into a church's supervision and control of a ministerial employee." *Id*. It acknowledges that "delicate legal questions may arise," but ultimately concludes that the investigations should proceed. *Id*.

230. *Alcazar*, 2006 U.S. Dist. LEXIS 92708 at *9 ("[B]ecause the evaluation of a sexual harassment claim involves an entirely secular inquiry that does not intrude into areas concerning the doctrines of a religious organization, it is allowed.").

231. *See* discussion, *supra* Section III.B.

Hosanna-Tabor, the Court specifically declined to address actions brought "by employees alleging breach of contract or tortious conduct of their religious employers."[232] Courts have applied a strict textualist interpretation to the *Hosanna-Tabor* decision and found that contract-based and tort-based employment claims are the only types of suits where the application of the exception remains ambiguous.[233] Because there is no explicit indication that hostile work environment claims should be treated differently than other lawsuits, modern day courts continue to use the categorical bar that has been historically imposed.[234]

IV. PROPOSAL

Applying a categorical bar to all claims for hostile work environment brought by ministerial employees is inconsistent with our nation's history and values surrounding religious liberty and antidiscrimination law.[235] Instead of a categorical bar, district courts should allow a ministerial employee to rebut a religious employer's assertion that the ministerial exception bars their hostile work environment claim. Under this standard, if a plaintiff can show that an inquiry into their case would involve purely secular issues, their claim should proceed. This approach is necessary to protect the state's well-established interest in keeping antidiscrimination safeguards in place while also ensuring religious liberty is not threatened by state intrusion.

A. Categorical Bar is Irreconcilable with the Fundamental Purpose of the Exception

Absolutely prohibiting all claims of hostile work environment brought by ministerial employees is a deficient approach that drastically departs from the underpinnings of why the ministerial exception was created in the first place.[236] Freedom to select its own clergymen is undoubtedly a right that religious entities have enjoyed in this country.[237]

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232. *Hosanna-Tabor*, 565 U.S. at 196.

233. *Koenke*, 2021 U.S. Dist. LEXIS 3576 at *11 (rejecting plaintiff's argument that *Hosanna-Tabor* and *Our Lady of Guadalupe* left open the question of whether the exception applied to claims other than those explicitly litigated).

234. *Id.*; Preece v. Covenant Presbyterian Church, 2015 U.S. Dist. LEXIS 52751, *17–19 (D. Neb. 2015); *Alicea-Hernandez*, 320 F.3d at 703 (reiterating that "[t]he ministerial exception applies without regard to the type of claims being brought.").

235. *See* discussion, *supra* Part II (analyzing our nation's history of religious liberty and how it has become intertwined with employment law).

236. *See* discussion, *supra* Section II.C (positing that the ministerial exception was created out of two concerns: a historical need to have churches be free to select their own clergymen and a modern concern for avoiding excessive-entanglement issues).

237. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (finding that appointment of ministers is a "canonical act" that secular courts should stay out of); *see also Hosanna-Tabor*, 565 U.S. at 185 (collecting cases that "confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers.").

What these entities should not enjoy, however, is the right to harass and abuse those it employs.

1. Religious Liberty & Freedom to Select Ministers

The Supreme Court endorsed the ministerial exception because it was concerned with a religious entity being forced to accept or retain unwanted ministers.[238] Ministers are traditionally viewed as the kind of individuals who are directly involved in carrying out the religious mission of a particular organization.[239] Religious liberty principals grant religious organizations a large degree of freedom when carrying out their religious mission.[240] Thus, if churches were forced to hire or unable to fire someone who was directly carrying out their mission, this would undoubtedly conflict with religious liberty principles.[241] It follows that courts created the ministerial exception out of concern that forcing religious organizations to retain ministers against their will would directly impact an organization's religious operations in an unconstitutional manner.[242]

Notably, this historical concern still holds modern day applicability. For example, the Roman Catholic Church reserves some of its ministerial roles exclusively for men.[243] It is certainly unconstitutional for the state to interfere with this practice and mandate the Roman Catholic Church to ordain women as priests.[244] But should employees of the Church be able

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

Hosanna-Tabor, 565 U.S. at 173.

239. *See* Bell, *supra* note 183, at 758 (designating ministers as "the primary voice of the church…chosen to spread its religious doctrine to believers.").

240. *See Church of Lukumi Babalue Aye*, 508 U.S. at 532-33 (delineating the fundamental protections of the Free Exercise Clause).

241. *See Demkovich I*, 973 F.3d at 727 (acknowledging that hiring and firing decisions clearly fall under the religious organization's right to "select and control" their ministers, which is what the ministerial exception aims to protect).

242. *McClure*, 460 F.2d at 558 (identifying ministers as "the chief instrument by which the church seeks to fulfill its purpose.").

243. Elisabetta Povoledo, *Pope Formalizes Women's Roles, but Priesthood Stays Out of Reach*, NY TIMES (Jan. 11, 2021), www.nytimes.com/2021/01/11/world/europe/pope-women.html [perma.cc/FC4H-5RXV] (emphasizing that although the Pope has recently expanded the roles that women are formally allowed to hold in the church, women are still barred from becoming deacons or priests).

244. *See, e.g.*, Rockwell v. Roman Catholic Archdiocese, 2002 U.S. Dist. LEXIS 14416 at *5–7 (D.N.H. 2002) (dismissing a female plaintiff's suit against the Catholic Church). Among other things, Ms. Rockwell alleged that the Catholic Church's policy of excluding

to harass their fellow female coworkers daily without state interference? The obvious answer is no.

Hostile work environment claims do not require religious employers to hire an employee.[245] They do not prevent a religious employer from firing an employee.[246] All hostile work environment claims do is allow employees to hold their employer accountable when the workplace is so full of "discriminatory intimidation, ridicule, and insult" to the point that it "alter[s] the conditions of the victim's employment and create[s] an abusive working environment."[247] Thus, hostile work environment claims are entirely different than the type of claims that the ministerial exception was designed to protect.[248]

2. Avoiding Other Excessive Entanglement Issues

The ministerial exception also grew from a generalized concern with excessive-entanglement issues.[249] Though a categorical bar on all hostile work environment claims brought by ministerial employees ensures that the judiciary will make absolutely no inquiry into how a religious organization operates, a categorical bar is not the only way to avoid excessive-entanglement issues. The separation of church and state does not mandate that the judiciary stay out of the operations of religious organizations entirely.[250] Indeed, courts conduct inquiries into the operations of a religiously affiliated organization all the time without violating the First Amendment.[251] These inquiries even occur in the

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women from priesthood discriminated against her on the basis of gender. *Id.* at *4. The court allowed her claim to survive preliminary review, however, it explained that "it is apparent that the complaint fails to state a cause of action as a result of the [ministerial] exception." *Id.* at *6 n.2.

245. *See generally Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, www.eeoc.gov/remedies-employment-discrimination [perma.cc/93BE-U895] (last accessed Sept. 9, 2022) (outlining potential remedies for employment discrimination claims).

246. *Id*. (listing compensatory or punitive damages as the only option).

247. *Harris*, 510 U.S. at 21 (citing *Meritor*, 477 U.S. at 65).

248. *See Demkovich I*, 973 F.3d at 730 ("Supervisors within religious organizations have no constitutionally protected individual rights under Hosanna—Tabor to abuse those employees they manage, whether or not they are motivated by their personal religious beliefs.").

249. *E.g.*, *McClure*, 460 F.2d at 560 (creating the ministerial exception out of the need for the separation of church and state).

250. *See generally* Robert Joseph Renaud and Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 68 (2008) (exploring the theological underpinnings behind the separation of church and state); Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 451 (2009) (contending that the separation of church and state does not mandate a ban on electioneering by churches).

251. *See generally, e.g.*, Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 35 (1st Cir. 2012) (settling a copyright issue between two monasteries); Ehrens v. Lutheran Church, 385 F.3d 232, 233 (2d Cir. 2004) (ruling on a sexual assault complaint filed against a retired minister); Church of Scientology v. Siegelman, 94

employment context.[252] Courts often bifurcate discovery in "ministerial" cases, which allows the parties to learn necessary information without overstepping religious boundaries.[253] If courts already regulate religious organizations in the employment context, they are more than capable of determining whether a hostile work environment claim brought by a ministerial employee poses a unique excessive entanglement issue.

Simply put, religious organizations have not, and should not, be held above the law solely because they have a religious affiliation.[254] Thus, courts should not be afraid to conduct an inquiry into the facts surrounding a ministerial employee's hostile work environment claim before determining that excessive-entanglement issues may warrant a dismissal.

3. Hostile Work Environment Claims Call for Further Inquiry by Courts

Hostile work environment claims do not present a religious liberty concern that warrants a categorical bar be imposed. They are no more invasive than any other type of claim that can be brought against religious organizations.[255] Additionally, hostile work environment claims address

F.R.D. 735, 736 (S.D.N.Y. 1982) (addressing church-initiated defamation lawsuit); Snyder v. Phelps, 580 F.3d 206, 226(4th Cir. 2009) (analyzing First Amendment challenges to a church's anti-homosexual speech); Church of Scientology v. Cazares, 638 F.2d 1272, 1277 (5th Cir. 1981) (granting standing to the church); General Conf. Corp. v. McGill, 617 F.3d 402, 412 (6th Cir. 2010) (dismissing a pastor's Free Exercise defense to a trademark lawsuit); Vision Church v. Vill. of Long Grove, 468 F.3d 975, 988 (7th Cir. 2006) (determining impact of zoning regulation); Scenic Holding, LLC v. New Bd. of Trs. of the Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656, 660 (8th Cir. 2007) (reviewing a foreclosure action); *In re* Roman Catholic Archbishop of Portland, 335 B.R. 815, 842 (Bankr. D. Or. 2005) (permitting deposition of priests to determine liability for sex abuse); Bistline v. Parker, 918 F.3d 849, 856 (10th Cir. 2019) (investigating plaintiff's claims against the church for forced child sex trafficking); Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1519 (11th Cir. 1993) (inspecting whether city tax laws unconstitutionally discriminated against religious organizations).

252. *See e.g.*, Sumner v. Simpson Univ., 238 Cal. Rptr. 3d. 207, 223 (Cal. Ct. App. 2018) (allowing a ministerial employee's breach of contract claim to proceed); Puri v. Khalsa, 844 F.3d 1152, 1168 (9th Cir. 2017) (permitting plaintiff's to seek injunctive and declaratory relief against their deceased father's employer); Herx v. Diocese of Fort Wayne-South Bend, Inc., 2015 U.S. Dist. LEXIS 28224 at *2 (N.D. Ind. 2015) (affirming jury's finding that the Diocese of Fort-Wayne South Bend violated Title VII when they fired an elementary school teacher for undergoing in vitro fertilization).

253. *Fitzgerald*, 2021 U.S. Dist. LEXIS 194411, at *3 (authorizing limited discovery to determine whether Plaintiff is a minister for the purpose of the exception).

254. *See Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes. . ." (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

255. *See* Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006) (barring Petruska's Title VII claim from proceeding under the ministerial exception yet allowing her breach of contract claim to proceed despite involving many similar facts); *see also*

far-reaching issues that warrant further inquiry by the court.[256] Inspired by the #MeToo movement, employees are more willing than ever to speak out on their experiences with sexual harassment in the workplace.[257] A woman who was sexually harassed by her male coworkers at a secular company can support a legal claim for hostile work environment by offering evidence of unwanted sexual advances she experienced, requests for sexual favors she received, and vulgar comments directed at her.[258] Her ability to prove these things does not change if she was instead employed by a religiously-affiliated organization.[259] If an employee who was sexually harassed can present evidence in a way that does not implicate the religious innerworkings of their employer, their claim should be able to proceed. Religious employers should not be able to get away with harassing their employees under the guise of religious liberty. Yet by applying a categorical bar to all hostile work environment claims brought by ministerial employees, courts are effectively allowing religious organizations to do just that.

It has recently been proposed that rather than a categorical bar, courts should engage in a general case-by-case analysis.[260] The first

additional examples *supra* note 251 (collecting cases of claims brought against religious organizations). *See generally* discussion *supra* Section III.C.

256. Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1058 (2018) (calling attention to the role the law plays in the "pandemic of sexual harassment" that is striking our country).

257. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NAT'L PUB. RADIO (Feb. 21, 2018), www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [perma.cc/T9TF-UKXQ]. Prior to 2017, there was little data collected on the prevalence of sexual harassment across the nation *Id.* The #MeToo movement is often credited with breaking the silence around sexual harassment and making it more acceptable for women to speak up when being harassed. *Id*. According to an online survey launched in 2018, 38% of women report experiencing sexual harassment in the workplace. *Id.*

258. *See, e.g.*, EEOC v. Caterpillar Inc., 503 F. Supp. 2d 995, 1005-1011 (N.D. Ill. 2007) (permitting a female employee's claim for hostile work environment where a male security guard constantly made comments of a sexual nature to her, repeatedly asked her to have sex with him and, after multiple rejections, told her that he would be allowed to rape her in Romania).

259. In *EEOC v. Caterpillar Inc.*, the employer was Caterpillar Inc., a private company. *Id*. at 998. The employee, Virginia Early, worked as a fabrication specialist on the first shift at a Caterpillar plant. *Id.* at 1005. She alleged that she was sexually harassed by a security guard who she had interactions with at various locations in the plant. *Id*. Central to the court's analysis was the content of the security guard's remarks, how frequently they were made, how they made Early feel, and whether Early reported the conduct. *Id.* at 1007–11. None of these factors would have changed had Early worked as a guidance counselor at a religious school and had several encounters of the same nature with the same security guard. *Compare with Starkey*, 2021 U.S. Dist. LEXIS 158254 at *2 (barring a hostile work environment claim brought by a guidance counselor because she qualified as a ministerial employee).

260. 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, 14 (2021); Andrew White, *Religion in Law: Workplace Harassment Suits By Ministers Against Religious Institutions: Is The Seventh Circuit's Categorical Bar Constitutionally Required Or More Than Necessary?,* 17 SEVENTH CIR. REV. 213, 248 (2021); *see also*

argument is that the court's analysis of a hostile work environment claim brought by a ministerial employee does not categorically violate the First Amendment.[261] The next assertion is that a case-by-case analysis of hostile work environment claims is "the only constitutionally sound approach" moving forward.[262] Though a case-by-case analysis "protects religious organizations' religious liberty and meets constitutional demands," it leaves open several questions around how a ministerial employee can actually prove that adjudicating their claim does not implicate a religious organization's First Amendment right.[263] Treating the ministerial exception as a rebuttable presumption is a more sound approach, as it provides a clear, standardized framework for courts to use when analyzing hostile work environment claims brought by employees of religious organizations.[264]

B. The Ministerial Exception as a Rebuttable Presumption

The ministerial exception currently operates as an affirmative defense.[265] The party seeking to raise an affirmative defense has the burden of proving it.[266] Once proven, it bars the plaintiff's claim from proceeding, even if the plaintiff can prove their claim on its face.[267]

A rebuttable presumption, on the other hand, is "a presumption that is conclusive until evidence sufficient to rebut its conclusion is introduced, at which time the presumption ceases to provide any weight

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Winnie Johnson, *A Balancing Act: Hostile Work Environment and Harassment Claims by Ministerial Employees*, 96 TUL. L. REV. 193 (proposing the application of a two-element test).

261. Casper, *supra* note 260, at 28–48. Casper frames the purposes of the ministerial exception into two categories: "Selection and Control" and "Church-Minister Relationship." *Id.* at 29–30. Selection and Control refers to the desire expressed in *Hosanna-Tabor* to give churches the "authority to select and control who will minister the faith." *Id.* at 29 (citing *Hosanna-Tabor*, 565 U.S. at 194–195). Church-Minister Relationship refers to the broad notion that religious organizations should be free from judicial interference. *Id*. at 30.

262. *Id*. at 48–50.

263. *Id.* at 50.

264. *See* discussion *infra* Sections IV.B–I.VC.

265. *Hosanna-Tabor*, 565 U.S. at 195 n.4 ("We conclude that the [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."). *See* DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000, 1009 (Mass. 2021) (noting that because the ministerial exception operates as an affirmative defense, all forms of discrimination claims can be barred). In *DeWeese-Boyd,* the Plaintiff alleged that she was discriminatorily fired due to her gender and LGBTQ+ status. *Id.* at 1003. The Massachusetts Supreme Court explained that "[i]f the ministerial exception applies, even if such allegations are true, the religious institution will be free to discriminate on those bases." *Id* at 1009. The Court acknowledges that "[t]he same would be true for racial discrimination or discrimination on the basis of national origin." *Id*.

266. *Affirmative Defense*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).

267. Nathan Pysno, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 Vand. L. Rev. 1633, 1635 (2011) (debating the proper pleading standard for affirmative defenses).

beyond the weight inherent in the evidence from which the presumption first arose."[268] Rebuttable presumptions can be overcome by providing clear and convincing evidence that the presumption does not apply to the present circumstances.[269] Moreover, the presumption does not serve as evidence itself.[270] Instead, presumptions merely serve as "a procedural device to aid the judge in allocating the burden of producing evidence."[271] In essence, rebuttable presumptions aim to assist "reasoning and argumentation," while still leaving open further inquiry on the matter assumed.[272] Critically, they give courts the opportunity to hear evidence from both sides and the discretion to rule as they see fit.

In the context of the ministerial exception, religious liberty protections should only entitle employers to a rebuttable presumption that hostile work environment claims brought by ministerial employees will raise issues of religious concern. This approach affords religious employers certain protections and permits employees to move forward with viable claims of harassment. If a ministerial employee can provide clear and convincing evidence that their specific hostile work environment claim does not raise religious liberty issues, the court should allow their claim to proceed. A procedural analysis of how the rebuttable presumption can operate follows.

First, for the ministerial exception to apply, religious employers must still be required to show that an employee is a minister for the purposes of the exception.[273] As the law stands now, this is the only thing that a religious employer is required to show.[274] Additionally, the Supreme Court has given lower courts an incredible amount of discretion when determining who qualifies as a ministerial employee.[275] Following *Our Lady of Guadalupe*, religious employers have had few issues proving that individuals who hold seemingly secular roles are in fact ministerial employees.[276] Moving forward, religious employers should continue to be

268. *Rebuttable Presumption*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).

269. *Cf.* In re Marriage of Asta, 2016 Ill. App. 2d. 150160 ¶ 16 (articulating how rebuttable presumptions operate in the family law context).

270. *See* W.E. Shipley, *Effect of Presumption as Evidence or Upon Burden of Proof, Where Controverting Evidence Is Introduced*, 5 A.L.R.3d 19, *2 (2022).

271. *Id*. (discussing Thayer, Preliminary Treatise on Evidence, VIII & IX); *see also* Francis H. Bohlen*, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof,* 68 U. PA. L. REV. 307 (1920).

272. Jacob A. Stein & Glenn A. Mitchell, 4 ADMINISTRATIVE LAW § 24.01 (2021).

273. *Our Lady of Guadalupe*, 140 S. Ct. at 2063 (stating that "what matters at bottom, is what an employee does.").

274. *See* Allison R. Ferraris, *The Expansive Scope of the Ministerial Exception After Our Lady of Guadalupe School v. Morrissey-Berru*, 62 B.C. L. REV. E. SUPP. II. 280, 281 (2021) (laying out how the exception operates by barring an employee's otherwise viable discrimination claim if the employee qualifies as a minister for purposes of the exception).

275. *Our Lady of Guadalupe*, 140 S. Ct. at 2063 (admitting that a variety of factors may apply when determining if an employee is indeed a ministerial employee).

276. *Starkey*, 2021 U.S. Dist. LEXIS 158254 (guidance counselor); *Demkovich II*, 3 F.4th at 968 (teacher); *Koenke*, 2021 U.S. Dist. LEXIS 3576 (music director); Cox v. Bishop Eng. High Sch., 2020 S.C. C.P. LEXIS 4872 (teacher). *But see DeWeese-Boyd*, 163

required to show that the employee's role is one that is ministerial in nature, as this is a reasonable requirement to impose on religious employers and follows the precedent set forth in *Our Lady of Guadalupe*.[277]

If the religious employer can successfully show that the employee is a minister for the purposes of the exception, the court can presume that the ministerial exception is applicable. Still, the plaintiff must be given the opportunity to rebut the exception's application. Thus, rather than acting as an affirmative defense, the ministerial exception should operate as a rebuttable presumption.[278]

After it is determined that the plaintiff is a ministerial employee, the burden will shift to the plaintiff to produce enough evidence to show that issues of excessive entanglement will not arise when adjudicating their hostile work environment claim.[279] This approach recognizes the value our nation places on religious freedom while ensuring equal opportunity exists for all. It simultaneously grants religious organizations a reasonable amount of freedom to carry out their mission as they see fit while still allowing employees to bring cognizable claims for hostile work environment. If a plaintiff can show that their individual claim does not implicate religious liberty concerns that warrant the application of the exception, courts should allow their claim to proceed.

C. How a Plaintiff can Rebut the Application of the Ministerial Exception

A plaintiff can rebut the application of the exception in a variety of ways. Notably, this rebuttal may mirror how the employer proved that the plaintiff is a ministerial employee in the first place.[280] A plaintiff can

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N.E.3d at 1002 (rejecting a private Christian liberal arts college argument that an associate professor of social work was a ministerial employee).

277. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064 (looking squarely at "what an employee does" to determine whether they are a minister for the purposes of the exception).

278. *Cf.* Aimee Fukuchi, *A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law,* 52 B.C. L. REV. 289, 310 (2011) (comparing affirmative defenses and rebuttable presumptions in the criminal context). Affirmative defenses "place the burden on the [defendant] to come forward with exculpatory facts" while presumptions "allow one fact to be inferred by evidence of another" and permit a party to "produce evidence sufficient to invalidate the presumption." *Id*. at 312.

279. *See* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitor: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U.L. REV. 447, 486 (2013) (unraveling the *McDonnell Douglas* framework). The *McDonnell Douglas* framework refers to an analysis often utilized in the adjudication of employment discrimination claims. *Id.* at 450; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, a plaintiff "enjoys a rebuttable presumption of discrimination" if they are able to "satisfy the burden of production of a prima facie case." Corbett, *supra* at 486.

280. *See, e.g.*, *Hosanna Tabor*, 565 U.S. at 191–94 (analyzing the employee's job title, job contract, duties, and training); Fisher v. Archdiocese of Cincinnati, 6 N.E.3d 1254, P4–P7 (Ohio Ct. App. 2014) (utilizing provisions in the employee handbook and

highlight any secular duties they undertook to show that they do not carry out the employer's core spiritual mission. They can also present evidence to argue that all other actors involved in their allegations are not directly involved with the employer's core spiritual mission. Allegations of minister-on-minister harassment may pose more of an excessive entanglement risk compared to allegations of harassment by a secular employee.[281] Still, religious employers should not be completely insulated from claims because the religious entity themselves claimed that two ministers were involved.[282] Courts should consider all of a plaintiff's duties, along with the duties and responsibilities of others involved in the claim, before deciding to bar a plaintiff's claim due to excessive entanglement issues.

A plaintiff should also be afforded an opportunity to show the court that the alleged harassment has absolutely nothing to do with their employer's religious mission. Likewise, the religious employer can inform the court whether they intend to offer a religious justification for the alleged harassment.[283] Understandably, courts want to avoid ruling on the merits of religious beliefs.[284] However, inquiring as to whether a religious justification was offered for the harassment would not require the court to make such a ruling. All the court needs to consider at this stage is whether the employer has offered a religious justification for the alleged harassment and discrimination, not whether that justification is compelling.[285] Additionally, offering a religious justification is neither required nor dispositive. Thus, the religious employer is afforded

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faith-based training received to find that the employee was a minister).

281. *See Demkovich II*, 3 F.4th at 978. *But see Demkovich I*, 973 F. 3d at 734 ("We are not persuaded that the risk of substantive entanglement is so great that this case or all such cases must be dismissed without further inquiry or discovery.").

282. *See generally* Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM. L. REV. 193, 212-215 (1999) (looking at how the relationship between a plaintiff and church impacts the breadth of ecclesiastical abstention, a doctrine somewhat similar to that of the ministerial exception).

283. *See generally* Billard v. Charlotte Catholic High Sch., 2021 U.S. Dist. LEXIS 167418, at *2 (W.D.N.C. 2021) (accepting that "religious and philosophical objections to gay marriage are protected views and, in some instances, protected forms of expressions."). The desire to protect religious beliefs, particularly religious objections to same-sex marriage, should not be treated as an absolute justification for discrimination. *Id.* (making clear that "[t]he laws and the Constitution can, and in some instances must, protect [gay persons and gay couples] in their exercise in civil and employment rights."). *See also Masterpiece Cakeshop*, 138 S. Ct. at 1727 (declaring that "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").

284. United States v. Lee, 455 U.S. at 263 n.2 (Stevens J., concurring) (specifying that "the risk that governmental approval of some [religions] and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

285. *See* Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1057 (2009) (advocating that "even when a church proffers a religious justification to refute a plaintiff's secular claim, continued adjudication does not automatically run afoul of the First Amendment.").

absolute discretion as to whether they want to provide the court with a justification.

In the case of Demkovich, the beloved choir director, treating the ministerial exception as a rebuttable presumption may have made a significant difference in the adjudication of his case.[286] The Seventh Circuit's inquiry into Demkovich's claims stopped once it was determined that Demkovich was a ministerial employee and that the Seventh Circuit categorically bars all hostile work environment claims brought by ministerial employees.[287] Had Demkovich been given the opportunity to show that his claim involved sufficiently secular issues, his claims may have survived the church's motion to dismiss.[288] Demkovich could have provided details about the harassment he was subjected to, submitted affidavits from other employees who witnessed him being harassed, and produced other kinds of evidence to argue that adjudicating his claim would not raise excessive entanglement concerns.[289] The church could have then offered their religious justification for the alleged harassment or furnished other evidence to bolster the presumption that the ministerial exception barred all claims.[290] Once all of these steps were taken under the rebuttable presumption approach, the court would finally be best suited to make a well-informed decision regarding whether Demkovich's disability-based or sexual orientation-based claim should survive the church's motion to dismiss.

In the end, when determining whether a plaintiff has successfully rebutted the application of the exception, the court must look at whether the plaintiff can meet the prima facie elements required to prove their case without delving into serious areas of religious concerns.[291] To prevail

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286. *See* discussion *supra* Part III.

287. *Demkovich II*, 3 F.4th at 985 (dismissing Demkovich disability-based hostile work environment claims and sexual orientation-based hostile work environment claims).

288. *See, e.g.*, *Demkovich*, 343 F. Supp. 3d at 787–89 (permitting Demkovich's disability-based claim to survive because he adequately stated a claim for relief); *see also Demkovich I*, 973 F.3d at 736 (permitting both Demkovich's disability-based and his sexual orientation claim to survive).

289. *Demkovich*, 343 F. Supp. 3d at 787. Demkovich's Amended Complaint included several instances of harassment for which the church did not offer a religious justification. *Id.* at 788-789. These allegations include but are not limited to: being repeatedly told to exercise and lose weight by his supervisor, being told his weight made it cost prohibitive for the parish to include him in insurance plans, being told by his supervisor to "get his weight under control" to eliminate his need for insulin, and otherwise being humiliated and belittled to the point that his physical and mental health suffered. *Id*. at 789.

290. *Id.* at 786 (noting that the Archdiocese offered a religious justification for some of the alleged derogatory remarks). In the eyes of the district court, a religious justification weighed in favor of finding that an excessive-entanglement concern existed, however, it was not the sole factor considered. *Id*. Other factors included Demkovich's status as a minister and potential burdens that could be encountered in the discovery process. *Id.* at 786-787. The Seventh Circuit later found that even if a religious justification is offered, that does not necessarily mean issues of excessive entanglement are implicated. *Demkovich I*, 973 F.2d at 733-736.

291. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (pointing

on a claim for hostile work environment under Title VII, a plaintiff must show that: (1) the employee belonged to a protected class, (2) the employee was the subject of unwanted harassment, (3) the harassment complained of was based on their protected class, and (4) the harassment was sufficiently severe to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment.[292] Proving membership of a protected class will almost never implicate religious concerns.[293] Accordingly, the court should focus on whether the employee has presented enough evidence to show that they can meet the remaining three elements without implicating religious concerns. Courts should look at the totality of the circumstances, including evidence offered by both the religious employer as well as evidence offered by the employee, before determining that the exception should apply to a claim. This approach gives a reasonable amount of deference to religious organizations while ensuring ministerial employees have a fair opportunity to litigate their hostile work environment claims in court.

D. Policy Interest at Stake

Though the concept of the ministerial exception is not problematic in theory, the application of the exception has completely eroded the rights of individuals who are employed by religious organizations. In light of *Hosanna-Tabor* and *Our Lady of Guadalupe*, employees with a large number of secular duties now qualify as a minister for the purposes of the exception.[294] As the law stands now, these ministerial employees are unable to bring any Title VII claims against their employers. They have no way to hold their employers accountable for discriminatory and harassing conduct. Under the guise of religious freedom, religious employers are free to discriminate and harass as they see fit. Given the current trend towards expanding antidiscrimination protections and a

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out that "the burden of a prima facie case of disparate treatment is not onerous."). The Court also emphasized that "the prima facie case serves an important function in litigation." *Id.* They reasoned:

> the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.

Id. at 254 (citing Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)).

292. Sara L. Johnson, *When Is a Work Environment Intimidating, Hostile, or Offensive, so as to Constitute Sexual Harassment in Violation of Title VII of Civil Rights Act of 1964, as amended (42 U.S.C.A §§ 2000e et seq.)*, 78 A.L.R FED. 252, 2 (1986).

293. Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e-2(a). Protected classes under Title VII include race, color, religion, sex, and national origin. *Id*. *See* Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 31-32 (2011) (making evident that using a categorical bar needs to be abandoned if discrimination is to ever be eradicated).

294. *Our Lady of Guadalupe*, 140 S. Ct. at 2049; *Hosanna-Tabor*, 565 U.S. at 171.

general state interest in ensuring a safe workplace, allowing religious employers to be entirely exempt from Title VII suits does not make sense from a policy perspective.[295] Thus, courts need to look beyond the status of an employee before dismissing their claims to ensure that anti-discrimination safeguards are upheld.

V. CONCLUSION

Since its inception, the ministerial exception has immunized religious employers from otherwise valid Title VII suits. It has allowed religious organizations to manipulate their First Amendment freedoms in a way that puts them above the law. Because of the ministerial exception, countless employees who have been harassed and discriminated against do not get their day in court. This practice is a grave miscarriage of justice and cannot continue. Treating the ministerial exception as a rebuttable presumption is the best way to ensure that courts can properly balance historical religious liberty concerns with the ever-increasing need to ensure anti-discrimination safeguards are in place. Adopting this approach will allow employees who are discriminated against and harassed to seek justice and hold their abusive employers accountable. It will also protect a religious organization's right to operate in accordance with their sincerely held religious beliefs. Most of all, it is an inquiry that our justice system is more than capable of conducting. Treating the ministerial exception as a rebuttable presumption and permitting employees to show that their claims are secular is a necessary first step in piercing the ministerial exception and holding religious organizations accountable under law.

295. *See Bostock*, 140 S. Ct. 1731 (expanding Title VII to cover discrimination based on sexual orientation); Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and The First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 253 (2019) (concluding that "the First Amendment's Religion Clauses should not bar either compensatory or punitive damage claims for pervasive, hostile environments based on sex.").