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Andrew Paul White
Chicago-Kent, awhite27@kentlaw.iit.edu

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WORKPLACE HARASSMENT SUITS BY MINISTERS AGAINST RELIGIOUS INSTITUTIONS: IS THE SEVENTH CIRCUIT'S CATEGORICAL BAR CONSTITUTIONALLY REQUIRED OR MORE THAN NECESSARY?

ANDREW PAUL WHITE*

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INTRODUCTION

A 2016 headline from the CHICAGO TRIBUNE reads "Church Employee Fired Over Same-Sex Marriage Sues Chicago Archdiocese."[1] At first glance, it appears that the church was legally in the wrong. After all, it was only in 2021 that the U.S. Supreme Court held that Title VII protects workers against discrimination on the basis of their sexual orientation.[2] However, upon closer inspection, the question becomes murkier. In contrast with Title VII, the source of workplace discrimination claims,[3] the Religion Clauses of the First Amendment protect the religious liberty of the religious institution: "Congress shall make no law respecting an establishment of religion,

* J.D. candidate, May 2022, Chicago-Kent College of Law, Illinois Institute of Technology; M.S.L., 2019, Northwestern Pritzker School of Law; B.S. in French & Francophone Studies and Cellular & Molecular Biology, 2018, University of Michigan.

[1] Chicago Tribune Staff, *Church Employee Fired Over Same-Sex Marriage Sues Chicago Archdiocese*, CHI. TRIBUNE (March 8, 2016 11:15 AM), https://www.chicagotribune.com/news/breaking/ct–gay–man–sues–catholic–church–met–20160307–story.html.

[2] Bostock v. Clayton Cty., Ga. 140 S. Ct. 1731, 1754 (2020)

[3] 42 U.S.C. § 20003-2 *et. seq.* (1991).

or prohibiting the free exercise thereof."[4] The Catholic Church, at least according to its official canon, disapproves of gay marriage.[5] A clash may easily emerge between the right of a gay minister to be free of discrimination at his workplace and the right of a Catholic parish-employer to respect its own religious beliefs.

Enter Mr. Demkovich. Mr. Demkovich was fired from his position as choir director and organist at St. Andrew the Apostle Parish in Calumet City, Illinois.[6] He alleged that his firing was the direct result of his engagement and subsequent marriage to a man (now his husband).[7] The case was immediately dismissed by the District Court for the Northern District of Illinois.[8] The Supreme Court recently held that ministers cannot bring employment actions for their hiring or firing because the First Amendment protects the religious liberty of religious institutions to choose who ministers to their flock.[9] However, the question was left open by the Supreme Court as to whether ministers could sue other ministers for hostile work environment claims.[10] Therefore, Mr. Demkovich repackaged and re-brought his suit: rather than alleging employment

[4] U.S. CONST. amend. I cl. 1.

[5] *See* Catechism 2396, *Catechism of the Catholic Church*, U.S. CONF. BISHOPS, *available online at* https://www.usccb.org/sites/default/files/flipbooks/catechism/578/ (last accessed Dec. 3, 2021) ("Among the sins gravely contrary to chastity are . . . homosexual practice.").

[6] Demkovich v. St. Andrew the Apostle Par. Calumet City, 3 F.4th 968 (7th Cir. 2021)

[7] *Id.* at 973–74.

[8] Demkovich v. St. Andrew the Apostle Par., Calumet City, 2017 WL 4339817 (N.D. Ill. Aug. 31, 2018).

[9] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[10] *Hosanna-Tabor*, 565 U.S. at 196 ("Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

discrimination as a result of his firing, he alleged instead a hostile work environment claim due to the invidious harassment he experienced at the hands of the Reverend Dada, also a minister of the parish.[11]

The Seventh Circuit's answer to that open question, after the dust settled,[12] was a flat no.[13] The Seventh Circuit sitting en banc held in *Demkovich v. St. Andrew the Apostle Parish, Calumet City* that, as a categorical matter, hostile work environment suits brought by ministers are barred under the ministerial exception in the same way that the ministerial exception bars suits related to the hiring and firing of ministers.[14] This means that if a minister is the subject of invidious discrimination at the hands of another minister, whether it be because of his or her race, sex, sexual orientation, gender identity, disability, or any other protected characteristic, he or she lacks the ability to bring suit. The major arguments endorsed by the Seventh Circuit concern the court's hesitance to intrude into the realm of religious doctrine by staying out of it altogether. However, a case-by-case, middle-ground approach that is sensitive to the Free Exercise and Establishment Clause issues raised in employment suits by and between ministers was properly executed by the District Court and should have been adopted by the Seventh Circuit sitting en banc.

This Comment advocates for a case-by-case approach to the ministerial exception in workplace harassment suits, rather than a categorical bar of the claims altogether. A case-by-case analysis protects the individual right of workers to be free from workplace harassment while still respecting religious institutions'[15] right to

[11] *Demkovich*, 3 F.4th at 973–74.

[12] The protracted litigation had no less than two District Court orders, a three–judge panel opinion of the Seventh Circuit, and a rehearing en banc. *See Demkovich*, 3 F.4th at 982.

[13] *Id.* at 985.

[14] *Id.*

[15] As used in this Comment, "religious institution" and "church" are interchangeable because the main actor in this case was the St. Andrew the Apostle Parish of the Catholic Church. In other contexts, another title for a religious institution may be more appropriate.

religious liberty. Accordingly, Part I will recount the history of the ministerial exception. As it stands, two recent U.S. Supreme Court cases dictate the contours of the ministerial exception to employment discrimination suits. Understanding how the Religion Clauses operate in these two cases will better refract how religious liberty is discussed in the Seventh Circuit. Part II will trace the twin threads of the Free Exercise Clause and the Establishment Clause through each level of appeal of *Demkovich v. St. Andrew the Apostle Parish, Calumet City*. Part III will analyze the decision of the Seventh Circuit by discussing the decisions of other Courts of Appeals and the conflicting dialogue between the majority and the dissenting opinions in the Seventh Circuit's rehearing en banc. Ultimately, this Comment will conclude that the case-by-case analysis performed by the U.S. District Court for the Northern District of Illinois is the approach the Seventh Circuit should have adopted in a confusing and sometimes counterintuitive area of the law.

PART I
THE MINISTERIAL EXCEPTION

The ministerial exception is a judicially created doctrine of Constitutional law that broadly insulates religious institutions from employment–related suits[16] brought against them by their ministers.[17] The authority for the exception is derived from the Religion Clauses of the First Amendment[18]: if the government were allowed to instruct religious institutions to retain or fire their ministers, the Free Exercise

[16] *See Demkovich*, 3 F.4th at 982.

[17] *See generally* Demkovich v. St. Andrew the Apostle Par. Calumet City, 3 F.4th 968 (7th Cir. 2021).

[18] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 194 (2012) ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").

Clause would be violated.[19] And, depending on the level to which the government investigated and made judgements about a religious institution's teachings or ideologies, both the procedural[20] and substantive[21] entanglement proscriptions of the Establishment Clause would be violated.

Important to an understanding of the operation of the ministerial exception is an understanding of the different claims available under both Title VII and the Americans with Disabilities Act. In general, the Seventh Circuit treats the ADA cause of action for employment discrimination in the same way it treats Title VII.[22] To successfully plead a wrongful termination based on a protected characteristic of Title VII, a plaintiff must prove that his or her employer discharged the employee because of the employee's "race, color, religion, sex, or national origin."[23] This protection was extended to sexual orientation in *Bostock v. Clayton County*.[24]

In contrast to the wrongful termination claim, to succeed on a hostile work environment claim, a plaintiff must prove four elements: "(1) unwelcome harassment; (2) based on a protected characteristic; (3) that was so pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) a basis for employer liability."[25] While the two claims are different, the analysis still is conducted under a theory of liability predicated on the

[19] *Id.* at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

[20] *See Demkovich*, 3 F.4th at 982–83.

[21] *Hosanna-Tabor*, 565 U.S. at 182–83.

[22] *See Demkovich*, 3 F.4th at 977.

[23] 140 S. Ct. 1731, 1738 (2020) ("[I]t is 'unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *quoting* 42 U.S.C. § 20000e-2(a)(1) (1991)).

[24] *Id.* at 1754.

[25] *Demkovich*, 3 F.4th at 977, *citing* Howard v. Cook Cnty. Sheriff's Off., 989 F.3d 587, 600 (7th Cir. 2021).

employment relationship between, for instance, a religious institution and that religious institution's ministers.[26]

It seems from the Supreme Court cases concerning the ministerial exception in the Title VII wrongful termination context that the phrase which invites the Religion Clause issue in wrongful termination suits is "because of."[27] The Seventh Circuit appears to believe that the companion issue in hostile work environment claims is the third element concerning the "alter[ing of] the conditions of employment and create a hostile or abusive working environment" as a result of the "unwelcome harassment [ ] based on a protected characteristic."[28] As for the ADA, the Seventh Circuit has assumed that employment claims operate in much the same way under the ADA as they do in the Title VII context.[29]

Having established the nature of employment claims, the trump to such claims in the context of a minister suing a religious institution is the ministerial exception. The ministerial exception is a Constitutional bulwark that protects the First Amendment rights of religious employers in the face of federal employment legislation by generally immunizing them from suit.[30] In expanding the Title VII definition of "sex" to include sexual orientation and transgender rights in *Bostock versus Clayton County, Georgia*, the Supreme Court noted that the ministerial exception is one way that "the First Amendment can bar the application of employment discrimination laws 'to claims

[26] *See id.* at 977–78 (Section B concerns the analysis of employment claims).

[27] 42 U.S.C. § 2000, *et. seq*; *see also* Our Lady of Guadalupe, 140 S. Ct. at 2072 (Sotomayor, J., dissenting) ("When it applies, the [ministerial] exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices [citation omitted].").

[28] *See Demkovich*, 3 F.4th at 977, *citing* Howard v. Cook Cnty. Sheriff's Off., 989 F.3d 587, 600 (7th Cir. 2021).

[29] *See id.*

[30] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188–90 (2012) (discussing the Free Exercise Clause).

concerning the employment relationship between a religious institution and its ministers.'"[31]

The ministerial exception as it is understood at the time of *Demkovich* has not existed in Supreme Court jurisprudence all that long.[32] To avoid offending either of the Religion Clauses when a religious institution is sued by one of its ministers, every U.S. Court of Appeals has implemented a version of the ministerial exception to bar suits by ministers against churches that concern tangible employment actions,[33] with the first case describing the ministerial exception coming out of the Fifth Circuit in 1972.[34] While every circuit of the U.S. Courts of Appeals had eventually recognized the ministerial exception,[35] the U.S. Supreme Court in 2012 acknowledged and endorsed it in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*[36] and later expanded it in *Our Lady of Guadeloupe v. Morrissey-Berru* in 2020.[37] However, even though the Court promulgated a uniform standard for the ministerial exception, U.S. Courts of Appeals have quibbled about scope of the ministerial exception.[38] Some, including the Seventh Circuit, have broadened the

[31] Bostock v. Clayton County, Ga. 140 S. Ct. 1731, 1754 (2020) *quoting Hosanna-Tabor*, 565 U.S. at 188.

[32] The Supreme Court first recognized the ministerial exception in 2012 in the *Hosanna-Tabor* opinion. 565 U.S. at 188 ("We agree [with the Courts of Appeals] that there is such a ministerial exception.").

[33] *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (collecting cases).

[34] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

[35] *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (collecting cases).

[36] 565 U.S. 171 (2012).

[37] 140 S. Ct. 2049 (2020).

[38] *Compare* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1243–46 (10th Cir. 2010) (holding ministerial exception categorically applies to hostile work environment claims) *with* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945–50 (9th Cir. 1999) (holding ministerial exception does not apply categorically to hostile work environment claims).

ministerial exception to include claims not originally swept under the hiring and firing scope established by *Hosanna-Tabor*.[39]

This Part first will explore two U.S. Supreme Court cases bearing directly on the ministerial exception. First up for analysis is *Hosanna-Tabor*, which officially recognized the ministerial exception,[40] and second is *Our Lady of Guadalupe*, which significantly expanded the sweep of the exception by expanding the definition of who qualifies as a "minister."[41] Next, this Part will explore the three justifications of the ministerial exception: first, the history of religious rights in the founding period, and second, the twin threads of the Free Exercise Clause and the Establishment Clause.

The Current Formulation of the Ministerial Exception

As it stands today, the Supreme Court has noted that the ministerial exception categorically bars workplace discrimination suits related to hiring and firing brought by ministers against their religious employers.[42] In *Hosanna-Tabor*,[43] Chief Justice Roberts, speaking for the unanimous court, explicitly noted that even though the two Religious Clauses "'often exert conflicting pressures' . . . [b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[44]

The conflict in *Hosanna-Tabor* centered on the decision by the Hosanna-Tabor Evangelical Lutheran Church and School to fire one of its employees, Cheryl Perich.[45] Ms. Perich was a teacher in the

[39] *Demkovich*, 3 F.4th at 984 (holding ministerial exception categorically applies to hostile work environment claims).

[40] *See* comment, *supra*, at note 32.

[41] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020)

[42] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012)

[43] *Id.* at 188.

[44] *Id.* at 180 (2012) (quoting Cutter v. Wilkinson, 544 U.S. 709, 719 (2005)).

[45] *Id.* at 178–79.

church's associated parochial school.[46] More importantly, she was a "called" teacher: in the Hosanna-Tabor school, teachers were divided into two categories: "called" and "lay."[47] Called teachers were given the title "Minister of Religion, Commissioned."[48] Lay teachers, on the other hand, did not have this added religious distinction.[49] While the two types of teachers taught substantially the same secular material, called teachers were prioritized in the school's hiring.[50] Called teachers and lay teachers both led their students in religious activities. For example, Ms. Perich brought her students to chapel, which she led twice a year; she taught religion classes four days a week; and she led her students in prayer and other "devotional exercises" daily.[51]

Ms. Perich developed narcolepsy and took a disability leave.[52] Upon her attempted return, however, the school effectively fired her by eliminating her position, and the congregation voted to offer her a "peaceful release" from her "call."[53] Ms. Perich refused the peaceful release and instead brought suit under the Americans with Disabilities Act through the Equal Employment Opportunity Commission.[54] The church claimed a religious exemption in asserting the ministerial exception: notably, "[a]ccording to the Church, Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[55]

The crux of the issue, as the Court interpreted it, was whether requiring a religious institution to hire or fire a minister would run

[46] *Id.*
[47] *Id.*
[48] *Id.* at 177.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 177.
[52] *Id.* at 178–79.
[53] *Id.* at 178.
[54] *Id.* at 179–80.
[55] *Id.* at 180.

afoul of either the Establishment Clause or the Free Exercise Clause.[56] The Court answered yes: "[s]uch action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[57]

First, forcing a religious institution to hire or fire a minister, or punishing a church who fails to comply with a court order to that effect, would violate the Free Exercise clause by infringing on the church's Constitutional right to "shape its own faith and mission through its appointments."[58] Second, forcing a church to hire or fire its ministers would also violate the Establishment Clause because "determin[ing] which individuals will minister" is the prerogative of the religious organization[59]; the Establishment Clause "prohibits government involvement in such ecclesiastical decisions."[60]

Applying the ministerial exception to Hosanna-Tabor, the Court held that Ms. Perich could not bring suit against the church for her termination.[61] The Court focused on four main criteria in determining that Ms. Perich was a minister[62] and ultimately held that she was; therefore, the church could invoke the ministerial exception.[63] In adopting the ministerial exception for religious ministers, the Court explicitly noted that it had not yet recognized the

[56] *Id.* at 179–80

[57] *Id.* at 188

[58] *Id.*

[59] *Id.* at 189.

[60] *Id.*

[61] *Id.* at 190.

[62] *Id.* at 191–92. First, the church held Ms. Perich "out as a minister, with a role distinct from that of most of its members." *Id.* at 191. Second, "her title as a minister reflected a significant degree of religious training followed by a formal process of commissioning." *Id.* Third, she "held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms." *Id.* Fourth, her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192.

[63] *Id.* at 190.

ministerial exception for employment discrimination claims, but acknowledged the tradition in the courts of appeals.[64]

As of the holding in *Hosanna-Tabor*, the ministerial exception only applied to suits concerning the hiring or firing of "ministers" by their religious institutions.[65] The Court later clarified and expanded those four factors in *Our Lady of Guadalupe v. Morrissey-Berru*, in which the Court opted for a broader interpretation of the word "minister."[66]

In fact, *Our Lady of Guadalupe v. Morrissey-Berru* is only the second case the Supreme Court has decided with respect to the ministerial exception.[67] In 2020, the Court held that Ms. Morrissey-Berru, a school teacher in a Catholic school, was a minister[68] and therefore her federal age discrimination claims against the Catholic school she worked for could not proceed under the ministerial exception.[69] Both *Hosanna-Tabor* and *Our Lady of Guadalupe* involved schoolteachers in religious schools that were held to be ministers.[70] The difference between them, though, is the level to which the teachers were involved in religious instruction.[71] In *Hosanna-Tabor*, the teacher was a "called" teacher and was given instruction in

[64] "Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964 [citation], and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188 (citations omitted).

[65] *See id.*

[66] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065–69 (2020).

[67] *See id.* at 2055.

[68] *Id.* at 2066.

[69] *Id.* at 2069.

[70] *See id.* at 2056; *see also Hosanna-Tabor*, 565 U.S. at 178.

[71] *Compare Our Lady of Guadalupe*, 140 S. Ct. at 2056, *with Hosanna-Tabor*, 565 U.S. at 178.

religious pedagogy.[72] In the case of *Our Lady*, the teacher was not labeled a "minister" nor did she hold herself out as a minister.[73] Further, she had limited religious training.[74] The Court, speaking through Justice Alito, held that she was a minister nonetheless.[75] The Court used the same rubric of the Religion Clauses to determine that, even though the teacher was slightly removed from the position in *Hosanna-Tabor*, the church still "expressly saw [her] as playing a vital part in carrying out the mission of the church."[76] Rather than focus on titles of employees, the Court focused on what the employee actually does.[77] Because Ms. Morrissey-Berru taught some religion classes as part of her role as teacher, she was therefore a minister for purposes of the ministerial exception because she "performed vital religious duties" through her "[e]ducating and forming students in the Catholic faith."[78]

The takeaway from *Our Lady of Guadalupe* is the expansion of the scope of which employees qualify as "ministers."[79] Courts have generally held that music directors,[80] as well as teachers[81] and youth

[72] *See Hosanna-Tabor*, 565 U.S. at 177. ("The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements . . . "Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran.").

[73] *Our Lady of Guadalupe*, 140 S. Ct. at 2058.

[74] *Id.*

[75] *Id.* at 2066.

[76] *Id.*

[77] Justice Alito specifically noted that in determining whether a religious employee is a ministerial one, "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064.

[78] *Id.* at 2064, 2066.

[79] *Id.* at 2069; *see also* Thomas Johnson II & Tanya Warnke, *The U.S. Supreme Court Expands the Ministerial Exception*, JDSUPRA (July 15, 2020), https://www.jdsupra.com/legalnews/the–u–s–supreme–court–expands–the–96963/.

[80] *See, e.g.*, E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d, 795, 801 (4th Cir. 2000).

group leaders[82] in religious institutions, are ministers. However, employees are not designated "ministers" merely by their employment in a religious institution: courts have held that secretarial staff[83] and janitorial staff[84] who are not central to the "spiritual and pastoral mission" of the religious institution[85] of religion are not ministers for the purpose of the ministerial exception.

Historical Justification of the Ministerial Exception

Both modern Supreme Court decisions which concern the ministerial exception, *Hosanna-Tabor* and *Our Lady of Guadalupe*, extensively recount the history of the Religion Clauses to explain how the ministerial exception furthers the purpose of the First Amendment.[86] Further, other historical events surrounding the ratification of the Bill of Rights helped the Court contextualize the broad deference that the federal government has given to ecclesiastical decision makers.[87] Those decision makers are afforded great latitude to decide matters of ecclesiastical concern, both concerning matters of

[81] *See, e.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2069; *Hosanna-Tabor*, 565 U.S. at 196.

[82] Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829, 835 (6th Cir. 2015).

[83] E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982) ("We conclude simply that [the plaintiff's] position, even during the period of her broadest duties, did not fulfill the function of a minister, nor was her employment at [the religious press] the type of critically sensitive position within the church that McClure sought to protect.").

[84] Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701, 710 (D. Md. 2013) ("In this case, even though [synagogue] is a religious institution, it is plain that the Plaintiff is not one of its ministers.").

[85] *See id.* at 710, *quoting Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 801.

[86] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 186–86 (2012) (explaining history of religion clauses); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061–63 (2020) (same).

[87] *Hosanna-Tabor*, 565 U.S. at 182–88.

internal church governance and the selection and appointment of the churches' ministers. In addition, both decisions utilize the Court's Religion Clause jurisprudence to justify the broad contours of the ministerial exception.[88]

The Court in *Hosanna-Tabor* recounted three main historical backdrops against which the Religion Clauses were formed.[89] First, Chief Justice Roberts discusses the relationship between Puritans and the English Crown which led the Puritans to come to the new American continent.[90] The English Crown had previously instated laws such as the Uniformity Act of 1662 which "limited service as a minister to those who formally assented to prescribed tenets and pledged to follow the mode of worship set forth in the Book of Common Prayer. Any minister who refused to make that pledge was 'deprived of all his Spiritual Promotions.'"[91] The Court noted that the Puritans fled this nationally controlled church to establish a Quaker colony that enjoyed independence from the Church of England.[92]

The second vignette focused on the Southern colonists during the days of the Church of England.[93] The colonists desired to install their own ministers, while the Crown insisted that the Bishop of London was the only official that could appoint ministers in the Colonies.[94] Third, the Court focused on the landscape at the adoption of the First Amendment.[95] The evil which the Founding Generation sought to combat was the "possibility of a national church."[96] As Chief Justice John Roberts noted, "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured

[88] *See id*; *Our Lady of Guadalupe*, 140 S. Ct. at 2061–62.
[89] *See Hosanna-Tabor*, 565 U.S. at 182–85.
[90] *Id.* at 182.
[91] *Id.*, *citing* Act of Uniformity, 1662, 14 Car. 2, ch.4.
[92] *Id.* at 182
[93] *Id.* at 183
[94] *Id.*
[95] *Id.* at 183–184.
[96] *Id.* at 183

that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[97]

It is with this background that the Religion Clauses of the First Amendment were ratified.[98] Percolating among the Founding Generation was the abhorrence of the idea that the government should get involved with matters of church and state—particularly those matters which concerned the very autonomy of the church to shape its beliefs, like the appointment of ministers. Next, this Part will analyze the twin foundations of the ministerial exception: the Free Exercise Clause and the Establishment Clause.

Free Exercise Clause Justification of the Ministerial Exception

Both *Hosanna-Tabor* and *Our Lady of Guadalupe* relied heavily on the Free Exercise Clause to justify the Court's reluctance to interfere with the ministerial relationship.[99] The Free Exercise Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof."[100] The ministerial exception can therefore be viewed as a bulwark against governmental intrusion into the ability of religious institutions to choose their own ministers.[101] This theory of the ministerial exception as a bulwark prevails through much of the U.S. Courts of Appeals'[102] and the U.S. Supreme Court's jurisprudence.[103] The ability of a religious institution

[97] *Id.*

[98] *E.g.*, *id.*

[99] *Our Lady of Guadalupe*, 140 S. Ct. at 2067–69.; *Id.* at 188.

[100] U.S. CONST. amend. I. cl. i–ii.

[101] *See Hosanna-Tabor*, 565 U.S. at 188–90 (discussing the Free Exercise Clause).

[102] *E.g.*, Demkovich v. St. Andrew the Apostle Par. Calumet City, 3 F.4th 968, 985 (7th Cir. 2021).

[103] *See Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 188.

to decide who ministers to its faithful is just as important as the right to decide what a religious institution believes.[104]

Both modern Supreme Court decisions[105] make reference to other earlier cases concerning the "general principle of church autonomy," which includes "independence in matters of faith and doctrine and in closely linked matters of internal government."[106] First, the Court cites *Watson v. Jones*.[107] The Court declined to decide a dispute between two factions of a church over a parcel of property: the Court noted in *Watson*, and reaffirmed in *Hosanna-Tabor*, that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decision as final, and as binding on them."[108]

In addition, the Court cites *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*[109] as standing for the principle that matters of ecclesiastical governance are protected by the Free Exercise Clause.[110] In *Kedroff*, the Court held a New York State statute unconstitutional because the statute interfered with the ability

[104] *C.f. Hosanna-Tabor*, 565 U.S. at 188–89 ("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.").

[105] *See Our Lady of Guadalupe*, 140 S. Ct. at 2060; *id.* at 188.

[106] The Court originally discussed these three cases in tandem in *Hosanna-Tabor*. 565 U.S. at 185–88. The Court again mentioned these three cases in its discussion of *Our Lady of Guadalupe*. 140 S. Ct. at 2061 (citing *Hosanna-Tabor*, 565 U.S. at 185–88).

[107] 80 U.S. 679 (1872); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2061.

[108] *Hosanna-Tabor*, 565 U.S. at 185–86 quoting *Watson*, 80 U.S. at 727.

[109] 344 U.S. 94 (1952); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2061

[110] "Confronting the issue [of internal church governance] under the Constitution for the first time in *Kedroff*, the Court recognized that the [f]reedom to select the clergy, where no improper methods of choice are proven,' is 'part of the free exercise of religion' protected by the First Amendment against government interreference." *Hosanna-Tabor*, 565 U.S. at 185–87, *quoting Kedroff*, 344 U.S. at 116.

of the Russian Orthodox church to dictate who would use its cathedral in New York.[111] Finally, the Court cited *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, which the Court noting that the First Amendment allows religious institutions to organize their own rules and to adjudicate those rules themselves—with the understanding that federal or state courts will not encroach on their decision-making.[112]

Synthesizing the court's analysis, one major thrust of the ministerial exception flows from the Free Exercise right of religious institutions to determine their own faith and beliefs. The ministerial relationship, then, is an extension of a church's ability to choose which ministers they hire or fire. Logically, this makes sense: a church would not truly be independent of governmental reach if a minister could be forcibly reinstated by a court order.

Using the Court's analysis of early Free Exercise jurisprudence, it is clear that the upshot is that religious institutions have the ultimate ability to decide their beliefs,[113] how they exercise those beliefs,[114] and who should espouse those beliefs to a religious institutions' followers.[115] In parallel cases involving the Free Exercise clause, it is clear just how broad this protected zone is: generally, the ability to regulate a religious institution's internal religious activities is close to zero. However, with respect to the ministerial exception, the line will ultimately be drawn by the actual nature of internal religious decisions: for example, the ministerial exception does not apply to non-ministers because the terms of their employment are divorced from religious beliefs themselves.[116]

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[111] *Id.* at 186–87, quoting *Kedroff*, 344 U.S. at 115, 119.

[112] *Id.* at 186–87, citing Serbian E. Orthodox Diocese for U.S. of America & Canada v. Milivojevich, 426 U.S. 696.

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

[114] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

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

[116] *Demkovich*, 3 F.4th at 988 ("Defendants and all members of this court agree that employment discrimination laws may be enforced against churches on behalf of *non*–ministerial employees. Those employees may assert rights against churches

Establishment Clause Justification for the Ministerial Exception

Another justification for the ministerial exception is the Establishment Clause, which notes that "Congress shall make no law respecting an establishment of religion."[117] The Supreme Court has noted two ways that the Establishment Clause would be violated if the ministerial exception did not bar suits employment discrimination by ministers against their religious institution employers.[118] First, procedural entanglement: if courts were to encourage endless litigation and inquiry into a religious institution's actions, it could impermissibly chill the ability of the religious institution to practice its beliefs.[119] Second, substantive entanglement: if courts were to analyze issues of church belief, or allow those beliefs to be placed in front of a jury, the court would be passing judgment on the beliefs of a religious institution and thereby "establish[ing]" a court–approved view of religion.[120] Further, substantive entanglement could be present if the government appoints its own ministers or disapproves the appointment of other ministers.[121]

This Part established the two (or three, if one counts procedural and substantive entanglement concerns as two separate) threads that flow through the en banc opinion of the Seventh Circuit in *Demkovich v. St. Andrew the Apostle Parish, Calumet City*.[122] Part II will describe

for discrimination in hiring, firing, compensation, and every other aspect of the employment relationship, including hostile environment claims.") (Hamilton, J., dissenting).

[117] U.S. CONST. Amend. I

[118] *See* Lemon v. Kurtzman, 403 U.S. 602, 613–16 (1971) (third prong of lemon test being entanglement); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (entanglement concerns).

[119] *See Demkovich*, 3 F.4th at 982–83.

[120] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188–89 (2012).

[121] *Id.* at 182–83.

[122] *Demkovich*, 3 F.4th 968.

the winding procedural journey of the case, from the District Court[123] for the Northern District of Illinois to the en banc Seventh Circuit,[124] with attention paid to the courts' analysis of the religious freedom threads established in Part I.

PART II
DEMKOVICH V. ST. ANDREW THE APOSTLE PARISH

The procedural road to the Court of Appeals for the Seventh Circuit was winding: the case rolled through two U.S. District Court opinions, a three-judge panel of the Seventh Circuit, and was ultimately dismissed entirely by the Seventh Circuit sitting en banc. This Part will explore each level of appeal of in detail; nowhere better can the threads of the Establishment Clause and the Free Exercise Clause be analyzed than in the courts' own words.

The Facts of Demkovich

Mr. Sandor Demkovich was hired as the choir director, music director, and organist of St. Andrew the Apostle Catholic church in Calumet City, Illinois in September 2012.[125] In his role, Mr. Demkovich was responsible—subject to the ultimate approval of the head pastor, Reverend Jacek Dada[126]—for choosing the liturgical music to be played during the celebration of the mass.[127] Mr.

[123] Demkovich v. St. Andrew the Apostle Par., Calumet City, 2017 WL 4339817 (N.D. Ill. Aug. 31, 2018).

[124] *Demkovich*, 3 F.4th 968.

[125] Complaint at ¶¶ 8–9, Demkovich v. St. Andrew the Apostle Par. Calumet City, 343 F. Supp. 3d 772 (N.D. Ill. Sept. 30, 2018) (No. 19–2142). The procedural posture limited the Court of Appeals for the Seventh Circuit sitting en banc to the facts as alleged in the original Complaint filed by Mr. Demkovich. *Demkovich*, 3 F.4th at 974–75.

[126] *Id.* ¶ 10.

[127] *Id.*

Demkovich is a gay man and has both diabetes and a metabolic disorder.[128]

Mr. Demkovich experienced harassment due to his sexuality and his bodily appearance during his employment at the Church.[129] As his wedding to his husband approached, Mr. Demkovich alleged that he was the subject of "sex- and sexual orientation animus,"[130] including the reference by Reverend Dada calling him and his partner of fourteen years "bitches."[131] One day, as the wedding approached, Reverend Dada asked Demkovich if he and his partner had plans to be married.[132]

As the date of his marriage approached, Demkovich allegedly experienced "increasingly hostile" behavior,[133] including the reference to the marriage ceremony as a "fag wedding."[134] Dada encouraged other individuals in the parish to confront Demkovich about his upcoming wedding.[135] Demkovich heard rumors that his position at the parish would be terminated due to his wedding.[136] Finally, the marriage took place on September 19, 2014,[137] and Reverend Dada asked for his resignation on September 22, 2014.[138] When Demkovich twice refused to resign, Dada fired him.[139] Dada reasoned that his firing was because Demkovich's "union is against the teachings of the Catholic church."[140]

[128] *Id.* ¶ 7.
[129] *Id.* ¶¶ 15–16.
[130] *Id.* ¶ 16.
[131] *Id.*
[132] *Id.* ¶ 17.
[133] *Id.* ¶ 18.
[134] *Id.* ¶ 22.
[135] *Id.* ¶¶ 19, 20, 23, 24.
[136] *Id.* ¶¶ 25, 26.
[137] *Id.* ¶ 27.
[138] *Id.* ¶ 28.
[139] *Id.* ¶ 33.
[140] *Id.*

In addition to the harassment about his sexual orientation and marital status, Demkovich also experienced harassment about his weight and disabilities.[141] For example, Reverend Dada would ask Demkovich to walk Dada's dog so he could, in the words of the complaint, "get some exercise in an effort to lose some weight."[142] Other types of comments noted in the complaint included Dada noting that Demkovich should lose weight so that Dada would not need to preside over Demkovich's funeral and that it was "cost prohibitive" to keep Demkovich on the Parish's health insurance plan due to Demkovich's weight and diabetes.[143]

District Court Proceedings

After his termination, Mr. Demkovich brought suit against both St. Andrew's Parish and the Archdiocese of Chicago,[144] the diocese of which St. Andrew's is a part.[145] Judge Edmond Chang of the U.S. District Court for the Eastern District of Illinois dismissed all counts of the first complaint without prejudice upon a motion by the Archdiocese.[146] Demkovich then amended and refiled the complaint[147]; the Archdiocese again filed a motion to dismiss, which

[141] *Id.* ¶ 35.

[142] *Id.*

[143] *Id.* ¶ 37.

[144] Demkovich also properly sought, and was granted, a "Right to Sue" letter from the Equal Employment Opportunity Commission. This letter gave Demkovich authorization to proceed with his suit in the U.S. District Court. *Id.* ¶ 3; *see also* Exhibit A, *id.* (exhibit containing E.E.O.C. right to sue letter in which E.E.O.C. declined to make any legal conclusions about the Diocese's compliance with the statute).

[145] *See id.* ¶ 6.

[146] Demkovich v. St. Andrew the Apostle Par., Calumet City, 2017 WL 4339817 (N.D. Ill. Aug. 31, 2018).

[147] Demkovich v. St. Andrew the Apostle Par. Calumet City, 343 F. Supp. 3d 772, 775–77 (N.D. Ill. Sept. 30, 2018).

the court granted with respect to the marital, sexual orientation, and sex claims, but denied with respect to the disability claims.[148]

Round 1: Dismissed Without Prejudice

In his first complaint, Mr. Demkovich alleged employment discrimination on sex, sexual orientation, and marital status under Title VII,[149] the Illinois Human Rights Act,[150] and the Cook County Human Rights Ordinance.[151] He also alleged employment discrimination based on disability under the Americans with Disabilities Act[152] and the Illinois Human Rights Act.[153] Specifically, he alleged employment discrimination claims based on his termination.[154]

This first complaint was dismissed on all counts by the U.S. District Court for the Northern District of Illinois[155] pursuant to the church's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[156] The church argued in its motion to dismiss that the ministerial exception applied because Demkovich performed "ministerial" duties as music director. Judge Edmond E. Chang held that Demkovich was a minister.[157] And, because

[148] *Id.* at 789.

[149] *Demkovich*, 2017 WL 4339817, * 1 (N.D. Ill. Aug. 31, 2018); *see also* Civil Rights Act, 42 U.S.C. § 2000, *et. seq* (1991).

[150] *Demkovich*, 2017 WL 4339817, * 1; *see also* Illinois Human Rights Act, 775 I.L.C.S. 5/2, *et. seq*.

[151] *Demkovich*, 2017 WL 4339817, * 1; *see also* Cook County Human Rights Ordinance, Sec. 42–30.

[152] *Demkovich*, 2017 WL 4339817, * 1; *see also* 42 U.S.C. § 12112 *et. seq* (2021).

[153] *Demkovich*, 2017 WL 4339817, * 1; *see also* Illinois Human Rights Act, 755 ILL. COMP. STAT. 5/2–102 (2020) *et seq*.

[154] *Demkovich*, 2017 WL 4339817, **1–2.

[155] *Id.*

[156] *Id.* * 1; *see also* Fed. R. Civ. P. 12 (b)(6).

[157] *Id.* * 3 ("the Court holds that Demkovich was a minister for the purposes of the ministerial exception"). Judge Chang's first memorandum opinion and order was

Demkovich himself had alleged facts sufficient to satisfy the definition of "minister,"[158] the ministerial exception applied.[159] The court dismissed all the claims, including the state and local ones.[160] Because Demkovich had not yet amended his complaint, pursuant to Federal Rule of Civil Procedure 15(a), the court noted that the dismissal was without prejudice and therefore he could amend and refile the complaint.[161]

Round 2: The Amended Complaint

Demkovich amended and refiled his complaint.[162] The second complaint repackaged all of the same information of the first complaint.[163] But, rather than alleging employment discrimination

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the only point at which the issue was raised of whether Demkovich was a "minister" within the meaning of both the Seventh Circuit's definition of minister, Alicea-Hernadez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003), and within the U.S. Supreme Court's definition of minister. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012). *Our Lady of Guadalupe* had not yet been decided—the District Court opinion came down in 2017 whereas *Our Lady of Guadalupe* was decided in 2020. 140 S. Ct. 2049 (2020).

[158] *Id.* * 5 ("Here, the applicability of the exception is ready for decision because, by stating in his complaint that he selected the music for each mass, Demkovich has presented all the facts necessary to decide the ministerial exception without discovery.").

[159] *Id.* at * 6.

[160] *Id.* at * 6 ("It is appropriate for this Court to dismiss [the local, state, and federal claims] because as a matter of *federal* constitutional law—not state law—the Archdiocese cannot be held liable for a firing in an employment discrimination case brought by their minister.") (emphasis in original).

[161] *Id.* at * 7 ("[T]he Court is skeptical that the allegation that prompted the ministerial exception's application can be fixed, but Rule 15(a) does generally require one shot at amendment."); *see also* Fed. R. Civ. Pro. 15(a).

[162] Demkovich v. St. Andrew the Apostle Parish, 343 F. Supp. 3d 772 (N.D. Ill. 2018).

[163] *Id.* at 776–77 ("Demkovich then filed an amended complaint, alleging much of the same discriminatory conduct, but modifying his claims to challenge the hostile work environment, rather than the firing itself."). The complaint did, in addition to changing from termination–related to workplace environment–related

based on his termination, Demkovich brought claims of employment discrimination based on the hostile work environment at the Parish.[164] Accordingly, rather than requesting reinstatement as he had in the first complaint,[165] Demkovich's requested pecuniary remedies flowed only from his time of employment: he requested monetary damages for the pain and suffering from the "discriminatory insults and remarks" he endured during his employment.[166]

The Church again filed a motion to dismiss both the Title VII claims and the ADA claims on the basis that the ministerial exception rendered the claims constitutionally infirm.[167] Interestingly, Judge Chang allowed the claims relating to disability discrimination to go forward while at the same time he dismissed the claims relating to discrimination on sex, sexual orientation, and marital status claims.[168]

The District Court reasoned that the ministerial exception was not a categorical bar on workplace discrimination claims brought by ministers against ministers, but rather the ministerial exception must be applied on a case-by-case basis.[169] By applying *Hosanna-Tabor* outright, the District Court noted that because Demkovich was a minister, he could not bring suit on the theory of his firing due to the

claims, changed the requested remedies from reinstatement and backpay to damages for emotional harm and suffering. *Id.* at 777.

[164] *Id.*

[165] Demkovich v. St. Andrew the Apostle Par., Calumet City, 2017 WL 4339817, * 2 (N.D. Ill. Aug. 31, 2018)

[166] Demkovich v. St. Andrew the Apostle Par. Calumet City, 343 F. Supp. 3d 772, 776 (N.D. Ill. Sept. 30, 2018)*, aff'd in part, rev'd in part and remanded, reh'g en banc granted, opinion vacated,* 973 F.3d 718 (7th Cir. 2020)*, on reh'g en banc,* 3 F.4th 968 (7th Cir. 2021)*, aff'd in part, rev'd in part and remanded.*

[167] *Id.*

[168] *Id.*

[169] *Id.* ("[T]he Court first holds that the ministerial exception does not categorically bar hostile work environment claims that do not seek relief for a tangible employment action. Instead, those types of claims (like the one presented here) must be evaluated on a case–by–case basis for excessive intrusion on the religious institution's First Amendment rights. Based on that analysis, the Archdiocese's motion is granted on the claims based on sex, sexual orientation, and marital status, but denied on the disability claims.").

implications of ecclesiastical control. However, the court noted that *Hosanna-Tabor* was not concerned with non-tangible employment actions, *e.g.* a hostile work environment. The District Court pointed to the language in *Hosanna-Tabor* explaining that the exception "ensures that the authority to *select and control who will minister* to the faithful—a matter strictly ecclesiastical—is the church's alone."[170] But, in the reasoning of the District Court, the Supreme Court left the door open to analyze hostile work environment claims before determining whether the ministerial exception should apply.[171]

Before reaching the substance of the ministerial exception affirmative defense, the District Court first summarily dealt with a Seventh Circuit case that the Church argued precluded Demkovich's claims. The Church argued that in *Alicea-Hernandez v. Catholic Bishop of Chicago*, the Seventh Circuit had already held that ministers could not bring any employment action claims against a church.[172] However, to the District Court, "[t]hat [was] an overbroad reading of the opinion."[173] The court noted that the application of the ministerial exception to intangible employment action claims brought by ministers against churches remained an "open question" in the circuit.[174] Ultimately, the District Court decided that if a minister brings a hostile work environment claim that "does not challenge a tangible employment action and does not pose excessive entanglement with the religious employer, then the ministerial exception should not apply."[175]

Under this rubric, the court granted the motion to dismiss the claims concerning Mr. Demkovich's sex, sexual orientation, and

[170] *Id.* at 778 *quoting* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 194–95 (2012) (cleaned up) (emphasis in original).

[171] *Id.* at 778–89.

[172] *Id.* at 779 ("The Archdiocese contends that in *Alicea–Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003), the Seventh Circuit held that any claim brought by a minister against a church is barred by the ministerial exception.").

[173] *Id.* at 779.

[174] *Id.* at 781.

[175] *Id.* at 785.

marital status claims,[176] but did not dismiss the claims concerning Mr. Demkovich's disability.[177] First, with respect to the hostile environment claims, the court held that litigating the claims would "excessively entangle the government in religion."[178] The church offered a religious justification for the derogatory remarks: "they 'reflect the pastor's opposition, in accord with Catholic doctrine, to same sex marriage.'"[179] It therefore noted that the inquiry must stop there in accordance with the demands of First Amendment.[180] The court also noted a few other entanglement concerns, including the procedural entanglement attending the long discovery period and the concern that the same–sex marriage issue would be litigated in other ways throughout the case—including the motive Reverend Dada possessed when he made the remarks and the amount to which he subscribed to the church's teaching. All of these concerns led the court to dismiss the claims relating to Mr. Demkovich's sex, sexual orientation, and marital claims.[181]

But, with respect to the disability claims,[182] the court held that the First Amendment did not bar Mr. Demkovich's claims. The church did not offer a religious explanation for the comments directed at Mr. Demkovich's weight—rather, the church argued that Reverend Dada's comments concerning Mr. Demkovich's weight "reflect[ed]

[176] *Id.* at 786–87.

[177] *Id.* at 787–89.

[178] *Id.* at 786.

[179] *Id.* (citation to litigation document omitted).

[180] *Id.* at 786 ("This official opposition weighs as an excessive–entanglement concern in this case, because the harassing statements and conduct are motivated by an official Church position (or at least the Archdiocese would defend the case on those grounds). Of course, regulating how the official opposition is expressed is not as directly intrusive as outright punishing the Church for holding that position (which a federal court cannot do). But it comes close, and must weigh in favor of barring the claim under the Religion Clauses.") (citations omitted).

[181] *Id.* at 787.

[182] The District Court noted that courts in the Seventh Circuit assume that the Americans with Disabilities Act permits hostile work environment claims. *Id.* at 787, *citing* Shott v. Rush Univ. Med. Ctr., 652 Fed. Appx. 455, 458 (7th Cir. 2016).

the pastor's subjective views and/or evaluation of [Mr. Demkovich's] fitness for his position as a minister."[183] Because the disability claim did not implicate religious justification and therefore would not entangle the court with religious doctrines, the court allowed the disability hostile work environment claims to proceed.[184]

Panel of the Seventh Circuit

With the permission of the District Court, the church filed an interlocutory appeal to the Seventh Circuit, certifying an answer to the question: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?"[185] A three-judge panel of the Seventh Circuit, comprised of Judges Flaum, Rovner, and Hamilton,[186] answered the question in the negative and reversed the District Court's dismissal of the sex, sexual orientation, and marital hostile work environment claims.[187] Judge Hamilton authored and was joined in the majority opinion by Judge Rovner; Judge Flaum filed a dissenting opinion.[188]

The majority judges traced similar steps as the District Court judges. After reviewing *Hosanna-Tabor*, the court aligned the question presented with the aims of the Free Exercise Clause and the Establishment Clause. As stated in *Hosanna* and restated by Judge Hamilton, "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape

[183] *Id.* at 788, *citing* Defendant's Reply Brief at ¶ 5.

[184] *See id.* at 788.

[185] Demkovich v. St. Andrew the Apostle Par. Calumet City, 793 F.3d 718 (7th Cir. 2020) *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

[186] *Id.* at 719.

[187] *Id.* at 720–21.

[188] *Id.* at 719–20, 736.

its own faith and mission through its appointments."[189] And, "[a]ccording 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."[190] Ultimately, the three-judge panel held that the ministerial exception did not apply at all: Mr. Demkovich could bring his disability claim and his sex and sexual orientation claims.[191]

Seventh Circuit Sitting En Banc

After the decision of the three-judge panel, the church sought a rehearing en banc.[192] The court granted the rehearing and ultimately vacated the three-judge panel opinion.[193] At the end of the day, the Seventh Circuit sitting en banc held that the ministerial exception categorically applies to hostile work environment claims brought by ministers against their religious employers.[194] Therefore, the Seventh Circuit sitting en banc instructed the lower court to dismiss all of Mr. Demkovich's hostile work environment claims, including the sex, sexual orientation, and marital status claims as well as the disability claim.[195]

[189] *Id.* at 722 *citing* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012)

[190] *Id.* at 722, *quoting Hosanna-Tabor*, 565 U.S. at 188–89.

[191] *Id.* at 735–36.

[192] Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 974–75 (7th Cir. 2021).

[193] *Id.*

[194] *Id.* at 985 ("The First Amendment ministerial exception protects a religious organization's employment relationship with its ministers, from hiring to firing and the supervising in between. Adjudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship. It would also result in civil intrusion upon, and excessive entanglement with, the religious realm, departing from the teachings of Hosanna-Tabor and Our Lady of Guadalupe. Therefore, the ministerial exception precludes Demkovich's hostile work environment claims against the church.")

[195] *Id.* at 985.

To reach its conclusion that the ministerial exception categorically bars hostile work environment claims in the same way it does tangible employment actions including hiring and firing, the majority opinion pulled on the threads outlined by the Supreme Court in *Hosanna-Tabor* and *Our Lady*.[196] The court stated two "principles" gleaned from the two guiding Supreme Court cases: first, though the cases were centered on termination, the rationale of the two guiding cases is not limited to termination—rather, the rationale relates to the "entire employment relationship, including hiring, firing, and supervising in between."[197] Second, the court noted "we cannot lose sight of the harms—civil intrusion and excessive entanglement—that the ministerial exception prevents."[198]

The focus of the court on the relationship between two ministers boiled down to parts A and B.[199] The court held that adjudicating that relationship would, first, intrude on the church's "constitutionally protected relationship with its ministers,"[200] and second, "cause civil intrusion into, and excessive entanglement with, the religious sphere."[201]

Ministerial Exception through *Hosanna-Tabor* and *Our Lady of Guadalupe*

Much of the court's opinion with respect to the relationship between ministers focused on differentiating the role and workplace environment of ministers from non–ministers.[202] The court noted that

[196] *See id.* at 975–78.

[197] *Id.* at 976–77, *citing Our Lady of Guadalupe*, 140 S. Ct. at 2060–61 [the court uses *id.* here but is unclear where the page is]; *Hosanna-Tabor*, 565 U.S. at 194–96.

[198] *Id.* at 977 *citing Our Lady of Guadalupe*, 140 S. Ct. at 2060–61; *Hosanna-Tabor*, 565 U.S. at 187–89.

[199] *See id.* at 977–83 (Parts A and B, respectively. Part C discusses other applications of the ministerial exception within the Seventh Circuit.

[200] *See id.* at 978.

[201] *Id.*

[202] See *id.* at 978.

if Mr. Demkovich's challenge succeeded, the court would be saying that his working conditions in the "ministerial work environment 'were so pervaded by discrimination that the terms and conditions of [his] employment were altered."[203] This pronouncement, the court said, would run counter to the purpose of the ministerial exception as outlined in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[204] The ministerial relationship, because of its religious nature, is different than other types of employment relationships.[205] Because the religious liberty right at stake is the right of the church to determine which ministers preach its beliefs, so follows the right to control how those ministers preach its beliefs.[206] And, because "ministers and nonministers are different in kind, the First Amendment requires that their hostile work environment claims be treated differently."[207]

Ultimately, the court differentiates in multiple ways ministerial employees from non–ministerial employees. The ultimate takeaway for the court with respect to intruding on an ecclesiastical sphere is that "to render a legal judgment about Demkovich's work environment is to render a religious judgment about how ministers interact."[208] Further, in distinguishing itself from the dissent, the court noted that it is not condoning harassment in religious contexts.[209] Rather, the entire point of the ministerial exception is to preclude the intrusion of the government into a religious sphere that comes with deciding where ministerial supervision turns into ministerial harassment.[210]

According to the majority, its formulation of a ministerial exception that categorically bars hostile work environment claims fits

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[203] *See id. quoting* Vance v. Ball State Univ., 570 U.S. 421, 427 (2013).

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See id.* The court also referenced the uniquely religious nature of Mr. Demkovich's employment: in no other context, the court says, would Mr. Demkovich be required to play the organ or assist in the celebration of the Mass. Only a religious employer could institute that type of work requirement. *Id.*

[208] *Id.* at 979, *citing* McCarthy v. Fuller, 714 F.3d 971, 976 (7th Cir. 2013).

[209] *Id.*

[210] *Id.*

within the framework of *Our Lady of Guadalupe* because the supervision of a church's ministers "is as much a 'component' of its autonomy as 'is the selection of the individuals who play certain key roles.'"[211] Importantly, the court noted that its conception of the ministerial exception protects a religious institution's right to select and control its ministers from the beginning, middle and end. "It would be incongruous if the independence of religious organizations mattered only at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment)."[212]

Finally, with respect to the church autonomy issue, the court underscored the Supreme Court's holding in *Hosanna-Tabor*: the purpose of the ministerial exception does not just insulate churches from religiously motivated conduct, but rather it is concerned with reducing the government's involvement with "internal church decision[s] that affect[ ] the faith and mission of the church itself."[213] Therefore, a religious organization should not and does not need to give religious justification for its termination claims for those claims to be barred under the ministerial exception—and the same is true, the Seventh Circuit reasoned, for hostile work environment claims.[214]

After its discussion of the importance of allowing the internal self-governance of the church, the court then moved to an analysis of the Free Exercise Clause and Establishment Clause entanglement concerns endemic in the scrutiny of hostile work environment claims in the ministerial context.[215]

Free Exercise Clause

[211] *Id.* at 989, *quoting Our Lady of Guadalupe*, 140 S. Ct. at 2060.

[212] *Id. citing Our Lady of Guadalupe*, 140 S. Ct. at 2060 (relying on the Supreme Court's use of the word "supervise" in addition to select and remove ministers "without interference by secular authorities"); *Hosanna-Tabor*, 565 U.S. at 194–95 (focusing on the word "select and *control*") (emphasis added by court).

[213] *Id.* at 980 *quoting Hosanna-Tabor*, 565 U.S. at 190.

[214] *Id.*

[215] *See id.*

The court restated the "litany"[216] of Free Exercise Clause issues that hostile work environment claims by ministers against ministers raise.[217] Courts would need to intrude on the "realm" of the church in order to judge the relationship between the ministers because the "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."[218] Fear of liability due to workplace environment claims might force a church to behave differently than its religious mission[219]—and, returning to the elements of a hostile work environment claim, adjudicating whether discrimination "pervaded" a workplace necessarily would require "intrusion into a religious thicket"[220] The Seventh Circuit summarily stated that "[t]he First Amendment outlaws such intrusion."[221]

Further, interfering with the internal governance of a church is something that the government simply must not do.[222] The court noted the difficulties of inquiring into the manner in which Reverend Dada was controlling the conduct of Mr. Demkovich as a part of his religious duties as past and what part of his conduct was discriminatory.[223] "How is a court to determine discipline from discrimination? Or advice from animus?"[224] Such questions, the court opined, are unanswerable without intruding on the church's Free Exercise rights.[225]

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[216] *Id.*

[217] *Id.*

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

[219] Query whether this is actually true.

[220] *Demkovich*, 3 F.4th at 980, *citing Milviojevich*, 426 U.S. at 719.

[221] *Id.*, *citing* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

[222] *Id.*, *quoting* Korte v. Sebelius, 735 F.3d 654, 678 (7th Cir. 2013) ("civil authorities have no say over matters of religious governance").

[223] *Id.*

[224] *Id.*, citing *Hosanna-Tabor*, 565 U.S. at 205.

[225] *Id.* at 981. The court discusses this problem in the Free Exercise context, but I think it might be better discussed in the Establishment Clause context of entanglement.

Establishment Clause

The court also analyzed the Establishment Clause justifications for invoking a categorical ministerial exception to hostile work environment claims. While the level of entanglement that violates the Establishment Clause must be "excessive," the court still was convinced that hostile work environment claims categorically must involve "government action . . . involv[ing] 'intrusive government participation in, supervision of, or inquiry into religious affairs.'"[226] Ultimately, to the en banc panel, the nature of hostile work environment claims would result in "endless inquiries"[227] of whether individual acts were harassment or based on church doctrine.[228]

In addition, the majority further discussed the inability of secular courts to resolve religious questions.[229] While the court pulled the thread that "[i]nteraction between church and state is inevitable,"[230] the court noted that far less entanglement has been considered by the Supreme Court to be impermissible entanglement.[231] Further, procedural entanglement is another concern. The court even pointed out the nature of Mr. Demkovich's lawsuit as evidence of the procedural entanglement concern—the case comprised two District

[226] *Id.* at 981 *citing* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 995 (7th Cir. 2006) (quoting United States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000)).

[227] *Id.*, *citing* Alicea-Hernadez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003) ("A hostile work environment claim based on the relationship between ministers 'would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus.").

[228] *Id.* The court also used some language concerning the impropriety of a judge or jury resolving such claims.

[229] *Id.*

[230] *Id.* at 982 *quoting* Agostini v. Felton, 521 U.S. 203, 233 (1997).

[231] *Id.* One example the court used was public schools allowing prayer before football games. *Id.*, *citing* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301–30 (2000).

Court decisions and orders, two motions to dismiss, a panel hearing, an interlocutory appeal, and finally an en banc rehearing.[232]

Further, if the ministerial exception did not apply to the church, the court said that the next best affirmative defense the church could allege would be one emerging from employment caselaw: namely, that the employer, in this case the church, "exercised reasonable care to prevent and correct promptly" the problematic behavior, and that Demkovich "unreasonably failed to take advantage" of those preventative measures.[233] By engaging in that inquiry, "'every step' that the church took (or failed to take)" would be closely examined[234] This inquiry drags the court into an area it cannot go by virtue of the First Amendment.[235]

Further, the majority acknowledged that churches are not immune from suit or from regulation in general.[236] Some regulations, like fire inspections and Fair Labor Standards, are permissible.[237] The same is true for criminal and tort law—there is generally no immunity for crimes or torts committed by ministers.[238] Therefore, while the ministerial exception, in the eyes of the court, extends to hostile work environment claims, other types of claims relating to the same conduct "may be independently actionable, as the protection of the ministerial exception inures to the religious organizations, not to the individuals within them."[239]

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[232] *Id.* ("But like the Fourth Circuit, we worry about a "protracted legal process pitting church and state as adversaries." [citation] This case's history shows the prejudicial effects of incremental litigation: two motions to dismiss, two subsequent decisions and orders, the beginnings of discovery, an interlocutory appeal, a panel opinion, and now en banc rehearing.") (citation omitted).

[233] *See id.* at 983, *quoting* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)

[234] *See id., quoting* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 973 (9th Cir. 2004).

[235] *See id.*

[236] *Id.* at 982.

[237] *Id.*

[238] *Id.*

[239] *Id.*

This, it seems, is the heart of the issue decided by the majority. If a minister commits a tort, that tort is not a direct result of that protected ministerial relationship.[240] However, in the employment context, that employment claim goes directly to the heart of the beliefs of the church. Though the court acknowledged that employment discrimination statutes "serve 'undoubtedly important' societal interests,"[241] even the process of inquiring into the competing interests between employment law statutes "may impinge on rights guaranteed by the Religion Clauses."[242] Therefore, the ministerial exception prevailed—which translated to, in the eyes of the majority, the ministerial exception precluding all hostile work environment claims.[243]

To round out its analysis, the majority opinion analyzed several ministerial exception cases within the Seventh Circuit[244] as well as those ministerial exception cases in the Ninth[245] and Tenth[246] circuits that concern hostile work environment claims.

The court responded[247] to the dissent's argument that the "neutral, secular principles of law" theory should apply as it does in cases that concern "property, contract, tax, and tort cases."[248] However, the court noted that precedent[249] to that effect only concerned outward "outward physical acts," while the ministerial exception line of cases concerned matters of internal church governance.[250]

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[240] *Id.* at 983.

[241] *Id.*, *quoting Hosanna-Tabor*, 565 U.S. at 196

[242] *Id.*, *citing* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979).

[243] *See id.* at 985.

[244] *Id.* at 983–85

[245] *See infra* at Part III.B.

[246] *See infra* at Part III.B.

[247] *Demkovich*, 3 F.4th at 980.

[248] *Id.* at 980 (*quoting* Hamilton, J., dissenting, at *id.* at 993).

[249] *See id.* at 980, *citing* Emp. Div., Dept. of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990).

[250] *Id.*

The ultimate holding of the Seventh Circuit sitting en banc precluded, as a categorical matter, ministers from bringing hostile work environment claims against their religious institution employers and against other ministers.[251] The ultimate takeaway from *Demkovich* is that ministers are now precluded from bringing any hostile work environment claim against their religious institution employers, no matter the level of severity and no matter the level to which the offensive conduct is intertwined with religion.[252]

PART III : ANALYSIS

Reading *Demkovich* in tandem with the principles outlined in *Our Lady of Guadalupe* and *Hosanna-Tabor* render the decision unsurprising.[253] However, the question remains whether the sweeping decision was constitutionally required. Each of the following sections of this Part, *infra*, will further probe the Seventh Circuit's decision: was it merely permitted by or indeed required by the Religion Clauses? What can one make of the negative externalities of the decision?

What the Constitution Requires Versus What It Permits: A Case for Case-by-Case Analyses

In reading *Hosanna-Tabor* and *Our Lady of Guadalupe*, the decision of the Seventh Circuit seems to agree with what the

[251] *Id*. at 985 ("The First Amendment ministerial exception protects a religious organization's employment relationship with its ministers, from hiring to firing and the supervising in between. Adjudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship.").

[252] *See id.*

[253] While *Hosanna-Tabor* specifically declines to apply its reasoning to employment claims other than wrongful termination claims, the door was left open, not closed. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.").

Constitution permits.[254] However, it is not clear that the First Amendment *requires* a total bar to workplace harassment claims in the same way that wrongful termination suits are barred.[255] While it is clear from the Supreme Court's precedent that the ministerial exception is required in every hiring and firing context,[256] it is not clear that the ministerial exception is required in every hostile work environment context.[257] The hiring and firing of a minister directly intrudes into the ecclesiastical zone into which the government must not intrude (Free Exercise), and the inquiry into the firing (and the subsequent investigations of the animating forces behind it) ultimately will entangle courts with religion in an impermissible manner (Establishment Clause).[258] Therefore, in the hiring and firing context, the decision of the court makes complete sense—it must totally be the prerogative of the church to decide who shall minister to their flock.[259]

However, the concerns are less in the hostile work environment claim. First, the remedies are different[260]: rather than asking for reinstatement, the remedy is pecuniary damages for the harms caused

[254] *See generally id.*; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (both cases stating the importance of the ministerial exception and the breadth of its reach).

[255] *See Hosanna-Tabor*, 565 U.S. at 196 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.")

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

[257] *See Demkovich*, 3 F.4th at 985–96 (Hamilton, J., dissenting); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); *see also Hosanna-Tabor*, 565 U.S. at 196.

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

[259] *See id.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2069; *see also* Bostock v. Clayton County, Georgia 140 S. Ct. 1731 (2020).

[260] *Compare* Demkovich v. St. Andrew the Apostle Par. Calumet City, 343 F. Supp. 3d 772, 776 (N.D. Ill. Sept. 30, 2018), *aff'd in part, rev'd in part and remanded, reh'g en banc granted, opinion vacated*, 973 F.3d 718 (7th Cir. 2020*), on reh'g en banc,* 3 F.4th 968 (7th Cir. 2021), *aff'd in part, rev'd in part and remanded with* Demkovich v. St. Andrew the Apostle Par., Calumet City, 2017 WL 4339817, *2 (N.D. Ill. Aug. 31, 2018) (note the difference between remedies requested in employment discrimination claims and hostile work environment claims).

during employment.[261] Therefore, the concern the court had in the en banc opinion vis à vis the Free Exercise clause's prohibition on requiring the hiring or punishing the firing of a minister is different in kind between wrongful termination and hostile work environment claims. Second, as discussed *supra* at Part I, the twin justifications for a robust application of the ministerial exception come from the Religion Clauses.[262] However, as the District Court pointed out in reference to the harassment on the basis of disability Mr. Demkovich experienced, there was no discernible religious issue at stake.[263] This is reminiscent of the Ninth Circuit case in which the court held that a Jesuit novice, who was the victim of sexual harassment by a superior, was not precluded under the ministerial exception from filing a Title VII claim against Jesuit order.[264] The Jesuit order itself condemned the action[265]—and it appears that the same is true for the comments Reverend Dada made about Mr. Demkovich's weight: the Church itself did not claim the comments as religiously motivated.[266] Issues that do not touch on religious principles, even though the actors may be ministers, should still be subject to claims of workplace harassment. According to the District Court, the only proper way to properly take

[261] *See Demkovich*, 343 F. Supp. at 776 (N.D. Ill. Sept. 30, 2018), *aff'd in part, rev'd in part and remanded, reh'g en banc granted, opinion vacated*, 973 F.3d 718 (7th Cir. 2020*), on reh'g en banc,* 3 F.4th 968 (7th Cir. 2021), *aff'd in part, rev'd in part and remanded*.

[262] *See supra* at Part I.

[263] *Demkovich*, 343 F. Supp. 3d at 787–89 *aff'd in part, rev'd in part and remanded, reh'g en banc granted, opinion vacated*, 973 F.3d 718 (7th Cir. 2020*), on reh'g en banc,* 3 F.4th 968 (7th Cir. 2021), *aff'd in part, rev'd in part and remanded*.

[264] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944–46 (9th Cir. 1999).

[265] *Id.* at 947.

[266] *See Demkovich*, 343 F. Supp. 3d at 787–88 *aff'd in part, rev'd in part and remanded, reh'g en banc granted, opinion vacated*, 973 F.3d 718 (7th Cir. 2020*), on reh'g en banc,* 3 F.4th 968 (7th Cir. 2021), *aff'd in part, rev'd in part and remanded*. ("Here, the Archdiocese offers no religious explanation for the alleged disability discrimination. The Archdiocese justifies the comments as "reflect[ing] the pastor's subjective views and/or evaluation of Plaintiff's fitness for his position as a minister.").

account for these non-religious claims brought by ministers is to use a case-by-case analysis, rather than a categorical bar.

Accordingly, a better approach for the en banc panel to take would have been to adopt the reasoning of the District Court.[267] Rather than categorically bar hostile work environment claims because of the potential of entanglement between the government and religion,[268] the District Court assessed whether the Supreme Court's formulation of the ministerial exception necessarily includes hostile work environment claims.[269] To do that, District Court charted the spectrum of employment claims that could be swept under the umbrella of the ministerial exception.[270] On the one end, the court reasoned, the Supreme Court has definitely held that it is the complete prerogative of religious institutions to select and retain their ministers.[271] In addition, other tangible employment actions, though they have not been discussed by the Supreme Court, have been viewed by other circuits as covered by the ministerial exception.[272] Tangible employment actions involving ministers include denial of promotions,[273] reassignments to different and inaccessible churches,[274] salary reduction,[275] and denial of tenure at a religious university.[276]

[267] *Id.*

[268] *See id.* at 789.

[269] *Id.* at 778–789.

[270] *See id.* at 780–84.

[271] *Id.* at 780–81 ("Supreme Court has made clear that the selection or retention of a minister is completely off–limits to the courts. *Hosanna-Tabor*, 565 U.S. at 194–96. The choice of who will minister to the congregation is absolutely protected by the First Amendment. *Id.* at 194–95.").

[272] *Id.* at 781, collecting cases of other circuits re tangible employment actions.

[273] *See id.* at 781, *citing* Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 184, 187 (7th Cir. 1994).

[274] *See id.*, *citing* Gellington v. Christian Methodist Episcopal Church, 21 203 F.3d 1299, 1301, 1304 (11th Cir. 2000).

[275] *See id.*, *citing* McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

And, because "when a tangible employment action is challenged by a minister, the minister is asking a court to directly regulate the minister's *employment status*, which steps directly on the church's governance of the minister *as a minister*."[277] Though tangible employment actions are do not need to be the hiring or firing of a minister *per se*, tangible employment actions are barred by the ministerial exception.[278]

In counterpoint, the District Court gestured to the opposite end of the spectrum where there is no First Amendment issue: employment claims by non–ministers against religious institutions that do not concern religious beliefs or doctrines.[279] A non-minister might still be unsuccessful with their claim if the harassing conduct is motivated by religion[280]—but the difference between cases brought by non-ministerial employees that are precluded by the First Amendment and claims that are insulated by the ministerial exception is that the ministerial exception bars examination of the religious motive, whereas the non–ministers claims are examined for motive.[281]

[276] *See id.*, *citing* E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455, 457 (D.C. Cir. 1996) (concerning minister's denial of tenure at Catholic University of America).

[277] *Id.*

[278] "Those claims, although not directly challenging a selection or retention of a minister, still intrude on a church's internal governance of its minister's employment duties." Therefore, the claims are barred by the ministerial exception. *Id.* at 782.

[279] *Id.*

[280] *Id.* ("But when the religious employer offers a religious justification for the challenged conduct, then—generally speaking—the First Amendment protects against the claim, so long as the employer proves that the religious motive is the actual motive.").

[281] *Id.* Further, the ministerial exception prohibits courts from requiring a religious justification to invoke it. *See Hosanna-Tabor*, 565 U.S. at 194–95 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," *Kedroff*, 344 U.S., at 119, is the church's alone.").

Ultimately, the District Court decided that if a minister brings a hostile work environment claim that "does not challenge a tangible employment action and does not pose excessive entanglement with the religious employer, then the ministerial exception should not apply."[282] The approach of the District Court better balances the right of harassed individual employees who happen to be ministers with the right of the religious institution.

Further, the District Court's approach is sensitive enough to the free exercise and entanglement concerns that necessarily attend the analysis of a decision made by a religious employer. The en banc panel did not agree: it noted that "the Court declared in *Hosanna-Tabor*, 'the First Amendment has struck the balance for us.'"[283] This statement by the court, while punchy, does not accurately capture the nuance of a hostile work environment claim, nor does it respond to the dissent's advocacy of a nuanced approach to the ministerial exception.

The dissent also endorsed the District Court's approach that differentiated between tangible employment actions and hostile work environment claims.[284] To support this type of analysis, the dissent pointed to the First Amendment as interpreted by *Bollard*, the Ninth Circuit case which endorsed a case-by-case analysis.[285] Rather than ask what could help churches, the dissent noted, the proper inquiry should be what is "*necessary* to comply with the First Amendment."[286]

A hostile work environment claim by definition cannot instruct a church as to who they must or must not hire or fire.[287] Therefore, the Free Exercise Clause is not implicated in the same way in a hostile work environment claim as it is in a wrongful termination claim.[288] In

[282] *Id.* at 785.

[283] *Demkovich*, 3 F.4th at 983 *quoting Hosanna-Tabor*, 565 U.S. at 196.

[284] *Id.* at 989 (Hamilton, J., dissenting) ("The line between tangible employment actions and hostile environment fits the purposes of the ministerial exception.").

[285] *Id.* (Hamilton, J., dissenting).

[286] *Id.* (Hamilton, J., dissenting) *citing Bollard*, 196 F.3d at 947.

[287] *See* the elements of Title VII claim as discussed *supra* at Part I.

[288] The dissenting opinion noted that actions that are "necessary for control" of ministerial employees fit within tangible employment discrimination claims and

addition, by invoking the ministerial exception a religious institution will not automatically be free of any entanglement with the courts. This fear of entanglement by the en banc panel seemed to motivate much of its opinion. However, as one scholar notes in the case comment *An Exercise in Futility: Does the Intent Required to Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, the irony is of course that the church will be subject to procedural entanglement with the court before the ministerial exception is even applied.[289] The dissent also reminds that the standard for substantive entanglement is that only "excessive" entanglement violates the First Amendment, and that entanglement must be "inevitable."[290] Even a third-rail[291] and extremely deferential approach that treats any issue remotely related to religion as barred by the ministerial exception would be better than a categorical bar. Indeed, to even reach the point of the application of the categorical bar, some threshold inquiry must take place to determine that an employee falls within the "minister" category. A

therefore rightfully fall under the categorical ministerial exception. However, "[h]ostile environment claims, which are essentially tortious in nature, are by definition based on actions that are not necessary for effective supervision of employees." *Demkovich*, 3 F.4th at 990 (Hamilton, J., dissenting).

[289] In the context of defining who is a minister, the Comment notes: "The ministerial exception thus shifts the focus of litigation from a genuine analysis of First Amendment concerns to a semantic argument—or worse, a religious judgment—about the nature of the employee's role in the religious organization." William S. Stickman IV, Comment, *An Exercise in Futility: Does the Inquiry Required to Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, 43 DUQ. L. REV. 285, 297–98 (2005).

[290] *Demkovich*, 3 F.4th at 993 (Hamilton, J., dissenting) ("The more difficult problems arise here in terms of potential substantive entanglement. Again, though, we need to keep in mind that some entanglement is "inevitable" and that only "excessive" entanglement violates the First Amendment. Courts have managed potential entanglement problems in church litigation across a range of subjects, from contracts and property disputes to employment disputes, torts, and church elections and schisms.") (citation omitted).

[291] "Third rail" meaning that any issue that remotely involves religion is like the third electrified rail on the Chicago Transit Authority: as soon as one touches it, one must retreat, and fast.

case–by–case approach must be extremely sensitive to religious issues, but it need not be a categorical bar to satisfy the Constitution.

Case-By-Case in Other Circuits Appears to Be Working Fine

Both the Ninth and the Tenth Circuits were cited in the Seventh Circuit's en banc opinion as having confronted the issue of hostile work environment claims in the ministerial context[292]: those two Circuits took diverging viewpoints on whether a categorical bar or a case–by–case analysis is called for.[293] The Seventh Circuit adopted the approach taken by the Tenth Circuit but departed from the Ninth Circuit.[294]

The Ninth Circuit opted to use a case-by-case analysis for ministerial exception claims. In *Bollard v. California Province of the Society of Jesus*, a Jesuit novice alleged hostile work environment claims due to his sexual harassment by his superiors in the Jesuit order.[295] The Ninth Circuit allowed his claim to go through because the twin justifications of the Religion Clauses were not at issue in the case.[296]

First, the Free Exercise Clause was sufficiently not at issue in *Bollard*. Because the question raised about the Jesuit's sexual harassment did not impact the "Jesuit order's choice of representative," there was no free exercise concern.[297] Further

[292] *Id.* at 984–85.

[293] *See id.* at 984.

[294] *Id.*

[295] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944–45, 950 (9th Cir. 1999).

[296] *Id.*

[297] *Id.* at 947 ("Moreover, this is not a case about the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry. Bollard does not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action. On the contrary, according to the allegations in Bollard's complaint, the Jesuit order has enthusiastically encouraged Bollard's pursuit of the priesthood.") (citations omitted).

evidence of this was the fact that the Jesuit order itself condemned the harassment.[298]

Second, the Establishment Clause was sufficiently not at issue in *Bollard*. The procedural entanglement concern was not present because, as the dissenting judge noted in the en banc opinion, "[f]inding there would be no greater entanglement than in other private civil suits against a church, the Ninth Circuit found no constitutional barrier to the sexual harassment claim that did not challenge any tangible employment action."[299] As for substantive entanglement, the Ninth Circuit noted that for the same reasons that Free Exercise Clause concerns are not implicated in *Bollard*, neither are substantive entanglement concerns[300]: there was no issue with respect to the church's endorsement of the sexual harassment: it condemned it.[301] Therefore, the court would not be analyzing the Jesuit religious organization's viewpoints because all parties were in agreement about the conduct.[302]

The Ninth Circuit opinion demonstrated that it is possible for a case-by-case regime to take stock of the religious interests in an unobtrusive way.[303] In the oral argument before the Seventh Circuit sitting en banc, Judge Hamilton drilled straight to the heart of the issue in asking counsel for the church: "Is there any sign that religious liberty is less robust in the Ninth Circuit in these last twenty years

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[298] *Id.* at 947 ("In this case, as in the case of lay employees, the Free Exercise rationales supporting an exception to Title VII are missing. The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs. There is thus 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.").

[299] Demkovich, 3 F.4th at 988 (Hamilton, J., dissenting).

[300] *Bollard*, 196 F.3d at 949 ("But as we have explained above in discussing the Free Exercise Clause, such substantive concerns are absent from this case.").

[301] *Id.* at 947.

[302] *See id.*

[303] *See id.*; *see also* Demkovich, 3 F.4th at 986 (Hamilton, J., dissenting) ("[Ninth Circuit balancing approach a]llows churches ample power to select, control, and supervise their ministers while protecting employees from abuses that are not properly within the scope of anyone's employment.").

since that decision than the rest of the country?"[304] The church's counsel responded that he could not provide an empirical answer, but that the true effect would be the "chilling" of religious institutions from disciplining their pastors.[305] It appears, then, from the Ninth Circuit's treatment of the hostile work environment issue in the ministerial context, that courts are able to meaningfully and respectfully handle sensitive religious issues as they do often in other cases.[306]

Under a Categorical Approach the Harms Outweigh the Potential Benefits

Following from the idea that the Constitution does not necessarily require a categorical bar to workplace harassment claims, the query arises as to whether the harms of a categorical bar outweigh the benefits conferred upon religious liberty. As the dissent noted, the real negative externalities of the *Demkovich* decision seem to outweigh the possible positive ones.[307] All of this conduct, as evidenced by the dismissal of Mr. Demkovich's case, would not be reachable by ministerial plaintiffs.[308]

Mr. Demkovich was harassed while at his workplace with epithets that discriminated against him on the basis of his sex, sexual orientation, and disability. The Seventh Circuit's holding permitted the church to escape liability for conduct that would otherwise have been

[304] Recording of Oral Argument at 23:45, Demkovich v. St. Andrew the Apostle Par. Calumet City, 3 F.4th 968 (7th Cir. 2021) (No. No. 19–2142), available at https://media.ca7.uscourts.gov/sound/2021/ds.19-2142.19-2142_02_09_2021.mp3.

[305] *Id.* at 23:50 (counsel speaking).

[306] *See Demkovich*, 3 F.4th at 988 (Hamilton, J., dissenting) ("Churches and their leaders are already accountable in civil courts for many similar sorts of claims. Courts already navigate these waters with more attention to nuance and less reliance on absolute immunities. Religious liberty still thrives.").

[307] *Id.* at 994 (Hamilton, J., dissenting) (section entitled "Consequences and Stakes").

[308] *Id.* at 985.

attributed to the church had it not been a religious employer. An exchange between Judge Hamilton, Judge Rovner, and the counsel for the church during the oral argument before the en banc court is illuminating as to the thinking of the church[309]:

> **Counsel for Church:** "A court can't really sit in judgment of those words chosen [by a church to discipline its employees]"
> **Judge Hamilton:** "Words like—words like fags and bitches."
> **Counsel for Church:** "I'm not here to endorse those words, we condemn them. But by the same token a court should not be sitting in judgment of the words chosen. That's really the principle of the argument."
> **Judge Rovner:** "Not even those words? Not even those words?"
> **Counsel for Church:** "Not even those words . . . ."[310]

In his dissenting opinion, Judge Hamilton specifically outlined example cases of egregious harassment that would no longer have an employment law remedy under the Seventh Circuit's rule[311]: employees being subjected to racial epithets,[312] sexual abuse,[313] threats of physical violence,[314] racially based harassment,[315] and supervisors

[309] Recording of Oral Argument at 27:39–28:13, Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (No. 19–2142), *available at* https://media.ca7.uscourts.gov/sound/2021/ds.19–2142.19–2142_02_09_2021.mp3.

[310] *Id.*

[311] *Demkovich*, 3 F.4th at 994 (Hamilton, J., dissenting).

[312] *Id.* (Hamilton, J., dissenting) *citing* Gates v. Bd. of Educ., 916 F.3d 631, 637–39 (7th Cir. 2019).

[313] *Id.* (Hamilton, J., dissenting) *citing* Smith v. Rosebud Farm, Inc., 898 F.3d 747, 749–50 (7th Cir. 2018).

[314] *Id.* (Hamilton, J., dissenting) *citing Smith*, 898 F.3d at 749–50.

forcing their subordinates to view pornography.[316] Under the sweeping view of the categorical bar, ministers who are the victims of such types of discrimination will not have any access to bring employment–based litigation.[317]

Scholars have also considered the impact of the ministerial exception on other types of workplace related claims. One such example is whistleblower retaliation claims.[318] One scholar suggested that by applying the ministerial exception, there is a "strong presumption" that whistleblower suits would also be barred."[319] In a world where the exposure of sexual abuse of minors at the hands of religious leaders is increasingly commonplace, the broad impact of the categorical prohibition appears in starker relief.[320]

However, there appear to be some benefits to the approach that the en banc panel took. Guaranteeing religious freedom is a good thing. And so is having predictability in the law. While this Comment argues that the en banc opinion should have adopted the District Court's reasoning by using a case-by-case approach, rather than a categorical approach, to hostile work environment claims,[321] this Comment does not argue that the Seventh Circuit made a legal error in its determination that the ministerial exception bars. Rather, the Seventh Circuit did what it could with the existing Supreme Court

[315] *Id.* (Hamilton, J., dissenting), *citing* Porter v. Erie Foods Int'l, Inc., 576 F.3d 629, 635 (7th Cir. 2009); Cerros v. Steel Techs., Inc., 288 F.3d 1040, 1042–43 (7th Cir. 2002).

[316] *Id.* (Hamilton, J., dissenting) *citing* Brooms v. Regal Tube Co., 881 F.2d 412, 417 (7th Cir. 1989).

[317] *Id.* at 985 (Hamilton, J., dissenting).

[318] *See* Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U.L. REV. 303, 306 (2015).

[319] *See id.*

[320] *See, e.g.*, Aurelien Breeden, *Over 200,000 Minors Abused by Clergy in France Since 1950, Report Estimates*, N.Y. TIMES, https://www.nytimes.com/2021/10/05/world/europe/france-catholic-church-abuse.html (last updated Nov. 8, 2021).

[321] *See* discussion, *supra*, at Part III.1.

precedent that exists. The fact of the matter is that the ministerial exception in the Title VII context is exceedingly broad.[322] The court chose to err on the side of caution in the religious freedom context.[323] Undoubtedly, the freedom of religion impacts all—religious and not. The freedom to believe, or not believe, encourages freedom of thought. That same freedom of thought is the lifeblood of the American experiment. The right of churches and religious institutions to decide who their ministers are is, of course, inalienable. However, where religious institutions use constitutional rights as shelters to avoid responsibility for their ministers, well, that is a different beast entirely.

Other Ways Forward

One final note: the story of workplace harassment does not begin and end with Title VII and the Americans with Disabilities act. As discussed in Part I, the concern for ecclesiastical independence is not a blanket immunity for employees of churches to commit torts and crimes.[324] Further, contractual relationships generally appear to be enforceable against religious institutions, even where the parties are minister and church.[325] For practicing lawyers, the time spent bringing a hostile work environment or other type of employment claim blocked by the ministerial exception, at least until the U.S. Supreme

[322] *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[323] *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

[324] *See id.* at 982 ("And as far as we can tell, no court has held that the ministerial exception protects against criminal or personal tort liability. Nor do we. If a minister's allegations rise to those levels, they may be independently actionable, as the protection of the ministerial exception inures to the religious organizations, not to the individuals within them.").

[325] *See* Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U.L. REV. 303, 314 (2015) (see section I.A, "Breach of Contract Claims": "Both pre and *post–Hosanna-Tabor* courts have distinguished minister employment discrimination and retaliation suits from minister breach of contract suits under the First Amendment based on the voluntary principle.").

Court better clarifies its contours, might be better spent elsewhere. Possible locations include bulking up employment contracts between religious institutions and its employers or crafting tort suits that, even though they may retain the same character as an employment discrimination suit, might yield better results for the minister.[326]

CONCLUSION

The U.S. Court of Appeals for the Seventh Circuit concluded a marathon run of litigation comprising two U.S. District Court opinions, an interlocutory appeal and a decision by a three-judge panel of the Seventh Circuit that was overturned by the Seventh Circuit sitting en banc. The court erred on the side of religious liberty in its en banc decision concerning *Demkovich v. St. Andrew the Apostle Church, Calumet City*. By instituting a categorical bar on hostile workplace claims by ministers, the Seventh Circuit prioritized an idealized religious liberty while trusting other remedies such as tort and contract to protect the rights of ministerial workers.

Yes, religious liberty has lived to see another day in the Seventh Circuit by virtue of the categorical bar. However, as shown in the Ninth Circuit, a case-by-case analysis might have been just the ticket to protect religious liberty while also giving plaintiffs their day in court for non-religious-entangling employment issues. At the end of the day, the loser here was Mr. Demkovich. He endured humiliation and heartache at the hands of his employer with his claims of harassment being summarily dismissed. While a case-by-case analysis complicates the analysis of judges and lawyers, it would have at least allowed Mr. Demkovich to get past the 12(b)(6) stage. There is no easy balance to be struck where one side of the balance is an injured plaintiff and the other religious liberty. However, perhaps Chief

[326] *See Demkovich*, 3 F.4th at 988 (Hamilton, J., dissenting) ("[D]efendants and all members of this court agree that even ministerial employees may assert tort claims against supervising ministers and churches as institutions. On–the–job conduct that supports statutory claims for hostile environment discrimination may also amount to torts, including assault and battery (when abuse is physical) and intentional infliction of emotional distress.").

Justice Roberts was right: "the First Amendment has struck the balance for us."[327]

[327] *Hosanna-Tabor*, 565 U.S. at 196, quoted in *Demkovich*, 3 F.4th 968 at 983.