

WHEN HARASSMENT AT WORK IS HARASSMENT AT CHURCH:
HOSTILE WORK ENVIRONMENTS AND THE MINISTERIAL
EXCEPTION

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Abstract. Sexual harassment and harassment on the basis of race, national origin, disability, and age are unlawful workplace practices; what does that mean when one's workplace is a church? This article explores the ministerial exception's application to hostile work environment claims. Can ministerial employees bring harassment claims against their religious employers? Put differently, can religious organizations harass their ministerial employees with impunity and without fear of legal recourse? Respecting both First Amendment interests and individual rights, this article appraises and takes seriously the constitutional purpose and necessity of the ministerial exception. Recognizing that importance, this article nevertheless rejects a categorical ban on ministerial employees' hostile work environment claims. Instead, it proposes a case-by-case analysis of ministerial employees' hostile work environment claims, granting all employees possible protection from harassment, regardless of who employs them. Religious freedom need not close the courthouse doors on hundreds of thousands of employees. Religious freedom and speculative First Amendment problems need not, and should not, undermine employees' rights to dignified workplaces and protection from workplace harassment.

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INTRODUCTION

“Ministerial employee of a religious organization” evokes an image of a niche category: an imam at a mosque, a pastor at a church, a rabbi at a synagogue. Despite the tailored category that the term insinuates, the reality is much broader. Ministerial employees might be nurses, social workers, math teachers, lawyers, communications personnel, music directors, and camp counselors.¹ A 19-year-old college student spending the summer working as a counselor at their childhood camp does not evoke an image of a ministerial employee of a religious organization; that does not mean they aren’t one.

Ministerial employees of religious organizations stand in a unique position. While employees of secular organizations are protected by a wide array of anti-discrimination laws, these “ministers” – the camp counselor, social worker, and math teacher referenced above – are unprotected. In 2012 the Supreme Court first recognized the “ministerial exception.”² The ministerial exception protects religious organizations from lawsuits alleging discrimination in the hiring and firing of ministers. This constitutional exception holds that religious organizations must be free from state interference when selecting their ministers.

Whether religious organizations *should* be able to discriminate when hiring their ministers – the merits of the ministerial exception itself – has been debated for decades.³ This article asks a different, but related question: Can ministerial employees bring harassment claims against their religious employers? Alternatively, can religious organizations harass their ministerial employees without legal consequences? The answer is clear and imperative. Ministerial employees can bring harassment claims against their religious employers; religious organizations are not free to harass their employees with impunity with no possibility of legal recourse.

In recent years, Supreme Court jurisprudence has grown exceedingly protective of religious organizations.⁴ Drawing on this trajectory, some scholars and advocates have argued that ministerial employees must be categorically barred from bringing hostile work environment claims against their religious employers.⁵ The First Amendment, however, does not require a categorical exclusion of

¹ See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2082 (2020) (Sotomayor, J., dissenting).

² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173 (2012).

³ See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination By Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996); Marci A. Hamilton, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005); Ira C. Lupa & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265 (2017).

⁴ See, e.g., *Hosanna-Tabor*, 565 U.S. 171 (recognizing the ministerial exception); *Morrissey-Berru*, 140 S.Ct. 2049 (applying the ministerial exception to lay teachers). Benefits to religious organizations that were once questioned as potential Establishment Clause problems are now mandated under the Free Exercise Clause. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the constitutionality of and permitting indirect aid to religious schools) with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017) (holding that excluding religious organizations from playground grants, even with the permissible goal of avoiding religious establishment, was a free exercise problem) and *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020) (holding that the Free Exercise clause requires state financial assistance to parochial schools at the same level as other private schools).

⁵ See, e.g., Brief for the State of Indiana, et al. as Amici Curiae Supporting Petition for Reh’g En Banc, at 5, 6, *Demkovich v. St. Andrew’s the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142) (reasoning that broader religious

ministerial employees' hostile work environment claims. Moreover, a categorical exception would be catastrophic, undermining hundreds of thousands of employees' rights to dignified workplaces free from severe or pervasive harassment.⁶ Sexual harassment, and harassment of all kinds – on the basis of race, age, disability, or national origin – is endemic in the United States⁷ and causes egregious and preventable harm. Ministerial employees' hostile work environment claims against their religious employers *need not* be categorically barred and *should not* be categorically barred.

Upholding employees' rights in the face of unlawful harassment and also protecting religious organizations' religious freedom is possible. To do so, ministerial employees' hostile work environment claims must be analyzed on a case-by-case basis. Some cases will, undoubtedly, interfere with a church's choice in who communicates their faith or otherwise undermine protected church autonomy. In such situations, the First Amendment mandates that the case not go forward. In other cases, a hostile work environment claim may completely fail to implicate a church's choice in their minister, the church-minister relationship, or church autonomy. A case-by-case analysis respects both individual rights and religious freedom. Case-by-case analysis is a modest approach that affords appropriate deference and respect to religious organizations' religious exercise; it is not at odds with the Court's protective doctrinal trend. This approach allows the courts to embrace a protective jurisprudence without devastating the rights of, and imposing irremediable harm on, hundreds of thousands of employees.

Part I addresses existing law around the ministerial exception's application to hostile work environment claims. In particular, Part I looks to the Supreme Court's and lower federal courts' development of the ministerial exception and the Supreme Court's development of hostile work environment jurisprudence. Part I then surveys both federal and state court decisions analyzing the ministerial exception as it applies to ministerial employees' hostile work environment claims. Part II addresses the history of the ministerial exception.

Grounded in the preceding law and history, Part III argues that the ministerial exception should not categorically apply to ministerial employees' hostile work environment claims against their religious employers. To make this argument, Part III first posits that hostile work environment claims fall outside the scope of the ministerial exception's purpose. From there, Part III demonstrates why a

autonomy principles, such as protecting churches' rights to supervise and control ministers, shall be upheld when considering how to apply the ministerial exception). *See also* Laycock, *supra* note 3, at 1392 (criticizing case-by-case analysis as inadequately protective of church autonomy).

⁶ *See Morrissey-Berru*, 140 S.Ct. at 2082 (Sotomayor, J., dissenting) (citing Brief for Virginia et al. as Amici Curiae 33, n. 25); Brief for Prof. Leslie C. Griffin et al. as Amici Curiae Supporting Respondents, at 7–9, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-533). Religious organizations and advocates are also taking steps to increase the number and expand the category of employees covered by the ministerial exception, implying that this number will only grow. *See, e.g.*, McGuireWoods, U.S. Supreme Court Broadens Ministerial Exemption to Employment Discrimination Claims (July 10, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/7/us-supreme-court-broadens-ministerial-exemption-employment-discrimination-claims>[perma.cc/YRG7-FCXU] (providing religious organizations with tips on how to get their employees covered under the ministerial exception); Mark Dance, Four Key Areas for Protecting Your Ministry From Lawsuits, FACTS & TRENDS (Aug. 27, 2015), <https://factsandtrends.net/2015/08/27/four-keys-areas-for-protecting-your-ministry-from-lawsuits>[perma.cc/S6BD-PXPF]; First Liberty, Religious Liberty Protection Kit for Christian Schools 34, 36 (2016), https://firstliberty.org/wp-content/uploads/2016/10/RLA_CHRISTIAN_SCHOOLS.pdf[perma.cc/7SEZ-H8AR].

⁷ *See All Charges Alleging Harassment (Charges filed with EEOC) FY 2010-2020*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/statistics/all-charges-alleging-harassment-charges-filed-eeoc-fy-2010-fy-2020>[perma.cc/6JK7-UHN5] (last visited Mar. 26, 2021) (showing that over 26,000 harassment allegations were filed under all statutes each year from 2010 to 2018, including sexual harassment charges).

civil court's analysis of a hostile work environment claim against a religious employer does not categorically violate the First Amendment. Finally, Part III concludes by promoting a case-by-case analysis as the most constitutionally sound approach forward. Part IV offers a brief conclusion.

PART I: EXISTING STATE OF THE LAW

To grapple with the ministerial exception's application to hostile work environment claims, we must first explore two distinct areas of law: 1) the ministerial exception and 2) hostile work environment claims. This part discusses each topic in turn, before looking to the interaction therein.

A. Ministerial Exception

The ministerial exception is a judicially created constitutional exception to employment discrimination laws.⁸ Title VII prohibits discrimination in employment on the basis of race, color, religion, sex and national origin.⁹ Other applicable laws, like the ADEA and ADA, prohibit discrimination in employment on the basis of age or disability.¹⁰ The ministerial exception is an affirmative defense to a claim of discrimination in hiring or firing in violation of such statutes.¹¹ When a ministerial employee brings a claim against their religious employer alleging discrimination, the religious defendant can argue that the claim is barred by the ministerial exception.

The ministerial exception is grounded in the principle of church autonomy.¹² The church autonomy doctrine stems from both the Free Exercise and Establishment Clauses of the First Amendment.¹³ The church autonomy doctrine, broadly construed, aims to protect a church's "religious doctrine, polity, and practice" from state interference.¹⁴ While there are significant limits to the church autonomy doctrine, the ministerial exception's protection of a church's choice of ministers sits comfortably within a church's right to autonomy.¹⁵

⁸ See *Hosanna-Tabor*, 565 U.S. at 188. Although initially conceived as an exception to Title VII, see *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), the ministerial exception now applies to several anti-discrimination laws. See, e.g., *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020) (applying the ministerial exception to an ADA case); *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (applying the ministerial exception to an ADEA case).

⁹ 42 U.S.C. § 2000e-2(a)(1).

¹⁰ 29 U.S.C. § 623(a); 42 U.S.C. § 12112(a).

¹¹ *Hosanna-Tabor*, 565 U.S. at 195 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

¹² See, e.g., Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 STAN. J. C.R. & C.L. 89, 92 (2015) ("[T]he ministerial exception is a subcategory of the ecclesiastical abstention or church autonomy doctrine.").

¹³ See, e.g., 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, 307–08 (2015) ("The exception derives from the First Amendment's Free Exercise and Establishment Clauses and is grounded on the principle of church autonomy.").

¹⁴ *Jones v. Wolf*, 443 U.S. 595, 603 (1979). The church autonomy doctrine has also been construed as prohibiting "civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." *Bryce v. Episcopal Church in the Diocese of Co.*, 289 F.3d 648, 655 (10th Cir. 2002) (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116–17 (1952)).

¹⁵ See, e.g., Joshua D. Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2025 (2007) ("The church autonomy cases, although susceptible to multiple interpretations . . .

The first court to recognize the ministerial exception was the Fifth Circuit in *McClure v. Salvation Army*.¹⁶ When *McClure* was decided, a theory of sexual harassment as discrimination cognizable under Title VII was still years away.¹⁷ The *McClure* court, as will be true for the majority of courts discussed herein, was focused exclusively on discrimination in tangible employment actions: they discussed employment decisions like hiring, firing, salary increases, and demotions.¹⁸ Between *McClure* and the Supreme Court decision in *Hosanna-Tabor* in 2012,¹⁹ the circuit courts uniformly adopted the ministerial exception.²⁰ In those intervening years, the lower courts applied the ministerial exception to a wide array of circumstances: cases brought under Title VII,²¹ the ADA,²² the ADEA,²³ and common law tort and contract claims.²⁴

In *Hosanna-Tabor*, Cheryl Perich, the employee whose termination was in question, was a “called” teacher at the Hosanna-Tabor Evangelical Lutheran Church and School.²⁵ Perich taught both secular and religious subjects, led her students in prayer, and occasionally led chapel services. Perich was not an ordained minister. After a period of disability leave, Perich attempted to return to work. When the school principal opposed her return and, later, requested Perich’s resignation, Perich brought a claim to the EEOC, asserting that she was being discriminated against on the basis of her disability.²⁶ Upon her termination, Perich also asserted retaliation for complaining about discrimination, in violation of the Americans with Disabilities Act.²⁷

The Supreme Court, like all of the circuit courts before it, recognized the ministerial

included ministerial employment decisions as one aspect of church autonomy.”).

¹⁶ *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 107, 109 (2002) (stating that *McClure* was the first ministerial exception case).

¹⁷ Ira C. Lupu, Robert W. Tuttle, *#metoo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 269 (2019) (explaining that sexual harassment was not recognized by the Court as sex discrimination until the 1980s).

¹⁸ *See generally McClure*, 460 F.2d 553.

¹⁹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

²⁰ *Id.* at 188 (“Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment”). *See, e.g.*, *Combs v. Cent. Tex. Ann. Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991).

²¹ *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (finding that a priest could not bring a Title VII racial discrimination claim); *Petruska v. Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006) (holding that a chaplain could not bring a Title VII sex discrimination claim).

²² *See, e.g.*, *Werft v. Desert Sw. Ann. Conf. of United Methodist Church*, 377 F.3d 1099, 1104-05 (9th Cir. 2004) (applying the ministerial exception to a minister’s ADA reasonable accommodation claim).

²³ *See, e.g.*, *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (finding that a music director could not bring an ADEA claim).

²⁴ *See, e.g.*, *Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654 (2d Cir. 2009) (applying the ministerial exception to dismiss a rabbi’s breach of contract claim).

²⁵ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 178 (2012).

²⁶ *Id.* at 179.

²⁷ *Id.* at 180.

exception.²⁸ The Court clarified that the exception is an affirmative defense, not a jurisdictional bar,²⁹ and held that both religion clauses of the First Amendment prohibited Perich's claim from going forward.³⁰ The Court stated that "[t]he case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit."³¹

More recently, the Supreme Court has again addressed the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.³² *Morrissey-Berru* combined two lower court appeals. The first case stemmed from a Catholic school teacher, who alleged that she was demoted and her contract was not renewed because of her age, in violation of the ADEA.³³ The second case stemmed from another Catholic school teacher, who alleged that she was discharged when she requested an accommodation to receive cancer treatment, in violation of the ADA.³⁴ The Court held that the terminated teachers were ministers for purposes of the ministerial exception and attempted to clarify how courts may determine if an employee qualifies as a minister for purposes of the exception.³⁵ Put simply, the Court stated that "[w]hat matters, at bottom, is what an employee does."³⁶ This broad "minister" definition was discussed in depth in Justice Sotomayor's dissent:

Pause, for a moment, on the Court's conclusion: Even if the teachers were not Catholic, and even if they were forbidden to participate in the church's sacramental worship, they would nonetheless be "ministers" of the Catholic faith simply because of their supervisory role over students in a religious school. That stretches the law and logic past their breaking points. . . . [S]ources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, inhouse lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets. . . . So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.³⁷

²⁸ *Id.* at 188 ("We agree that there is such a ministerial exception.").

²⁹ *Id.* at 195 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

³⁰ *Id.* at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

³¹ *Id.* at 196.

³² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020).

³³ *Id.* at 2058.

³⁴ *Id.* at 2059.

³⁵ *Id.* at 2063–64.

³⁶ *Id.* at 2064.

³⁷ *Id.* at 2081–82 (Sotomayor, J., dissenting) (internal citations omitted).

In the short time since *Morrissey-Berru*, lower courts have applied the Court’s new guidance and brought Justice Sotomayor’s concerns to fruition. After looking at “what an employee does,” lower courts have determined that an increasing number and variety of employees constitute ministerial employees.³⁸

B. Hostile Work Environment Claims

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.³⁹ In 1986, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, first recognized that the creation of a hostile work environment based on protected grounds was actionable as discrimination under Title VII.⁴⁰ A hostile work environment is one that is “permeated with ‘discriminatory intimidation, ridicule, and insult’ that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁴¹ A hostile work environment claim must satisfy both objective and subjective elements:

the misconduct shown must be ‘severe or pervasive enough to create an objectively hostile or abusive work environment,’ and the victim must also subjectively perceive that environment to be abusive.⁴²

Under Title VII, an employer’s liability for sexual harassment can turn on the harasser’s employment position.⁴³ “If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.”⁴⁴ Where the harasser is a supervisor, however, the employer is strictly liable *if* “the supervisor’s harassment culminates in a tangible employment action.”⁴⁵ If no such action was taken, an employer is still liable *unless* the employer shows that (1) the employer exercised reasonable care to prevent and promptly correct harassing behavior and (2) the employee unreasonably failed to take advantage of the available remedies.⁴⁶

Hostile work environment claims allege no such tangible employment actions.⁴⁷ As a result,

³⁸ See, e.g., *Woods v. Seattle’s Union Gospel Mission*, 481 P.3d 1060, 1070 (Wash. 2021) (holding that whether a staff attorney at a religious organization is a “minister” is a question of fact); *Koenke v. Saint Joseph’s Univ.*, No. CV 19-4731, 2021 WL 75778 (E.D. Pa. Jan. 8, 2021) (holding that an Assistant Music Director at a Catholic University was a minister and that the ministerial exception therefore barred all of the plaintiff’s employment discrimination claims); *Menard v. Archdiocese of Bos.*, 152 N.E.3d 151 (Mass. App. Ct. 2020) (holding that a Music Director was a minister and thus barring her age and gender-based discrimination claims). *But see DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000 (2021) (holding that an associate professor of social work at a Christian liberal arts college was not a minister for purposes of the ministerial exception).

³⁹ 42 U.S.C. § 2000e-2(a)(1).

⁴⁰ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

⁴¹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 65, 67).

⁴² *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (quoting *Harris*, 510 U.S. at 21).

⁴³ *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (first citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); then citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

⁴⁷ *Ellerth*, 524 U.S. at 761, 763 (“A tangible employment action constitutes a significant change in employment status,

hostile work environment claims caused by supervisor harassment afford the defendant the above affirmative defense: The defendant must show that it exercised reasonable care to prevent and correct harassing behavior and the employee unreasonably failed to take advantage of the available remedies.⁴⁸ This defense is commonly called the Faragher-Ellerth affirmative defense.

While these cases were about hostile work environments created on the basis of sex, the doctrine and affirmative defense have been extended to hostile work environment claims based on other Title VII protected grounds.⁴⁹ Moreover, the doctrine has been extended to federal statutes other than Title VII that protect employees from discrimination based on age⁵⁰ and disability.⁵¹ Hostile work environment claims brought under these statutes follow the same doctrinal analysis.

C. The Ministerial Exception's Application to Hostile Work Environment Claims

The ministerial exception has been widely studied: The Supreme Court has ruled on the issue twice, lower court cases are abundant, and scholars have spent significant time and ink on the topic.⁵² So too have hostile work environment claims received significant, and warranted, attention.⁵³ The interaction between the ministerial exception and hostile work environment claims, however, remains widely unexamined.⁵⁴ The Supreme Court has not yet ruled on this issue,⁵⁵ and lower court cases remain

such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”); *Faragher*, 524 U.S. at 786.

⁴⁸ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

⁴⁹ *Vance*, 570 U.S. at 429 n.3 (citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n.9 (4th Cir. 2001)) (noting that several “federal courts of appeals have held that *Faragher* and *Ellerth* apply to other types of hostile environment claims,” and assuming without deciding that the affirmative defense applies to race-based hostile work environment claims).

⁵⁰ *See, e.g.*, *Stapp v. Curry Cty. Bd. Of Cty. Comm’rs*, 672 Fed. App’x 841, 846 (10th Cir. 2016) (holding that “the *Ellerth/Faragher* defense applies in [Age Discrimination in Employment Act] cases.”).

⁵¹ *See, e.g.*, *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999) (holding that a plaintiff alleging a violation of the Americans with Disabilities Act (ADA) must “follow the methodology already established in the parallel area of Title VII litigation,” including the *Faragher Ellerth* affirmative defense).

⁵² *See, e.g.*, *The Ministerial Exception to Title VII: The Case for A Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008); J. Gregory Grisham & Daniel Blomberg, *The Ministerial Exception After Hosanna-Tabor: Firmly Founded, Increasingly Refined*, 20 FEDERALIST SOC’Y REV. 80 (2019).

⁵³ *See, e.g.*, Christine Neagle, *An Analysis of the Applicability of Hostile Work Environment Liability to the ADA*, 3 U. PA. J. LAB. & EMP. L. 715 (2001); Margaret M. Gembala, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense of the Harassed Older Worker?*, 7 ELDER L.J. 341 (1999); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014 (2018).

⁵⁴ Several articles about the ministerial exception briefly discuss hostile work environment claims. *See e.g.*, Renee M. Williams, *The Ministerial Exception and Disability Discrimination Claims*, 2011 U. CHI. LEGAL F. 423, 436 (2011) (devoting a section to the topic); Belcove-Shalin, *supra* note 16. There is very little scholarship devoted entirely to the topic. *See generally* Lupu & Tuttle, *supra* note 17; Ryan W. Jaziri, *Fixing A Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719 (2011); Levinson, *supra* note 12.

⁵⁵ *See* Lupu & Tuttle, *supra* note 17, at 258 (“sexual harassment claims present a mixture of concerns sounding in both tort and contract. Unlike the typical ministerial exception case, which involves an adverse job action by the employer against a person in ministry, the questions raised by claims of pervasive and hostile work environment are not about the complainant’s fitness for the position. *Hosanna-Tabor* thus leaves wide open the question[.]”). In *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2011), *cert. denied*, 566 U.S. 937 (2012), the Supreme Court had the opportunity to weigh in on the issue but

limited in number.

The most recent appellate court case on the topic is *Demkovich v. St. Andrew the Apostle Parish, Calumet City*.⁵⁶ As of the time of writing, only the Seventh, Ninth, and Tenth Circuits had addressed this question directly.⁵⁷ Other than *Demkovich*, all federal appellate court decisions on the topic were decided prior to both *Morrissey-Berru* and *Hosanna-Tabor* and therefore lack the benefit of these Supreme Court precedents. A far greater number of federal district courts⁵⁸ and state appellate courts⁵⁹ have addressed this question. This section will look first at *Demkovich* before turning to Ninth and Tenth Circuit precedent. This section will also briefly address a few district court and state court decisions, to provide a full picture of existing law.

1. Seventh Circuit⁶⁰

In July 2021, the en banc Seventh Circuit held that a choir director's suit against his religious employer, claiming that he was harassed on the basis of his sexuality and disability, was barred by the ministerial exception.⁶¹ The procedural history leading up to that decision is worth considering.

In his initial complaint, Demkovich alleged that he was terminated from his position as choir director at St. Andrew's because of his disability and sexuality.⁶² The district court dismissed the case without prejudice,⁶³ giving Demkovich the opportunity to amend his complaint. In his amended complaint, Demkovich alleged that he had been subject to a hostile work environment on account of his disability and sexuality.⁶⁴ Demkovich claimed that his supervisor repeatedly and regularly humiliated

refrained from doing so.

⁵⁶ *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021).

⁵⁷ *Id.*; *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010). In *Rojas v. Catholic Diocese of Rochester*, the District Court for the Western District of New York held that the ministerial exception did not apply to a hostile work environment claim brought by a minister against her church. On appeal, the Second Circuit failed to directly address the ministerial exception's application to hostile work environment claims. *Rojas v. Roman Cath. Diocese of Rochester*, 660 F.3d 98 (2d Cir. 2011).

⁵⁸ *See, e.g., Smith v. Raleigh District of N.C. Conference of United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996 (D. Kan. 2004); *Bohnert v. Roman Cath. Archbishop of S.F.*, 136 F. Supp. 3d 1094 (N.D. Cal. 2015); *Middleton v. United Church of Christ Bd.*, 483 F. Supp. 3d 489 (N.D. Ohio 2020).

⁵⁹ *See, e.g., Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991) (interpreting the Minnesota Constitution); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996); *Weaver v. African Methodist Episcopal Church*, 54 S.W.3d 575 (Mo. Ct. App. 2001); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002).

⁶⁰ This section will be discussing only *Demkovich*. The Seventh Circuit arguably addressed this question in *Alicea-Hernandez v. Cath. Bishop of Chi.* as well. *Alicea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003). Though the facts of that case included some harassment, the court was asked only whether a minister's claim that she was constructively discharged on the basis of age and gender was barred by the ministerial exception. Because the court was never asked, and subsequently never answered, the question raised in this article, this decision will not be discussed in depth.

⁶¹ *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021).

⁶² *Demkovich v. St. Andrew the Apostle Par.*, No. 1:16-cv-11576, 2017 WL 4339817, at *1 (N.D. Ill. Sept. 29, 2017).

⁶³ *Id.* at *7.

⁶⁴ *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 776 (N.D. Ill. 2018), *aff'd in part, rev'd in part sub nom. Demkovich v. St. Andrew the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020), *reh'g en banc granted, vacated* (Dec. 9, 2020) ("In contrast to the original complaint, which sought relief arising from the firing, he now seeks damages caused by the emotional

him based on his weight and his diabetes.⁶⁵ He also claimed that his supervisor regularly spoke of Demkovich's "fag wedding" and called him and his husband "bitches."⁶⁶

The District Court dismissed Demkovich's claims of discrimination on the basis of sexuality and allowed the discrimination on the basis of disability to go forward.⁶⁷ The court reasoned that because the church offered religious justification for the supervisor's sexuality-based harassment, allowing that claim to go forward would impermissibly entangle the court in religious questions.⁶⁸ The court held that the harassment because of Demkovich's diabetes did not pose a similar entanglement problem.⁶⁹ 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."⁷⁰

The defendants appealed, and the Seventh Circuit heard the case. The certified question before the court was:

[S]hould the constitutional exemption be extended to categorically bar all hostile environment discrimination claims by ministerial employees, even where there is no challenge to tangible employment actions like hiring and firing?⁷¹

The Seventh Circuit answered with a resounding "no."⁷² The alleged harassment was not necessary to control or supervise the ministerial employee. Because the harassment did not implicate the church's control or supervision, it did not fall within the ministerial exception.⁷³ The court explained that "[s]upervisors within religious organizations have no constitutionally protected individual rights under *Hosanna-Tabor* to abuse those employees they manage."⁷⁴ Neither the Free Exercise Clause nor Establishment Clause mandates categorical exception.⁷⁵ The defendants filed a motion for a rehearing

distress, mental anguish, and physical ailments he allegedly suffered from the hostile work environment.").

⁶⁵ *Id.* at 777 ("On the disability-discrimination claims, Demkovich alleges that he was frequently harassed because of his diabetes and a metabolic syndrome. Reverend Dada made harassing remarks about Demkovich's weight, often urging him to walk Dada's dog to lose weight, and telling Demkovich that he needed to lose weight because Dada did not want to preach at his funeral. Dada also repeatedly complained about the cost of keeping Demkovich on the parish's health and dental insurance plans because of his weight and diabetes. In 2012, when Demkovich declined a dinner invitation from Dada because he did not have his insulin with him, Dada asked if Demkovich was diabetic and told him that he needed to 'get his weight under control' to help eliminate his need for insulin.").

⁶⁶ *Id.* at 776–77.

⁶⁷ *Id.* at 776.

⁶⁸ *Id.* at 786–87.

⁶⁹ *Id.* at 788.

⁷⁰ *Id.* at 776.

⁷¹ *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 973 F.3d 718, 720 (7th Cir. 2020), *reh'g en banc granted*, *vacated* (Dec. 9, 2020).

⁷² *Id.* ("Our answer is no.").

⁷³ *Id.* at 729.

⁷⁴ *Id.* at 730.

⁷⁵ *Id.* at 732.

en banc that was granted in December 2020.⁷⁶ The Seventh Circuit decision was accordingly vacated and oral argument for the rehearing en banc took place remotely on February 9, 2021.⁷⁷

The en banc Seventh Circuit held that hostile work environment claims stemming from minister-on-minister harassment are categorically barred.⁷⁸ The court reasoned that the purpose of the ministerial exception is to protect the church-minister and minister-minister relationship.⁷⁹ Accordingly, religious supervision and interaction between ministers sits at the core of what the ministerial exception protects. The court continued that inquiry into the appropriateness of a minister's work environment, a necessary question in a hostile work environment claim, is necessarily a religious question.⁸⁰ Courts cannot answer religious questions; such claims are categorically barred from civil court adjudication and intrusion.

2. Ninth Circuit

In *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit considered whether the ministerial exception applied when a seminarian student – a minister for purposes of the exception – alleged a hostile work environment on the basis of sex in violation of Title VII.⁸¹ The court held that the “scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment.”⁸² Because the religious organization did not offer a religious justification for the hostile environment,⁸³ there is “no danger” that secular courts will be thrust into the “constitutionally untenable position” of answering “questions of religious faith or doctrine.”⁸⁴ The court buttressed its position by noting that the creation of a hostile work environment does not implicate the religious organization's choice of representatives,⁸⁵ a decision for which the court “would simply defer without

⁷⁶ *Demkovich v. St. Andrew the Apostle Par., Calumet City*, No. 19-2142 (7th Cir. Dec. 9, 2020) (order granting petition for rehearing en banc).

⁷⁷ *Id.*; *Demkovich v. St. Andrew the Apostle Par., Calumet City*, No. 19-2142 (7th Cir. Dec. 17, 2020) (notice of oral argument).

⁷⁸ *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 979 (7th Cir. 2021) (“Precluding hostile work environment claims arising from minister-on-minister harassment also fits within the doctrinal framework of the ministerial exception.”).

⁷⁹ *Id.* at 977–78 (discussing “a religious organization's constitutionally protected relationship with its ministers” and “a religious organization's independence in its ministerial relationships”). *See also id.* at 979 (stating that the relationship between ministers is a religious organization's “backbone”).

⁸⁰ *Id.* at 979 (“To render a legal judgment about Demkovich's work environment is to render a religious judgment about how ministers interact.”).

⁸¹ *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999).

⁸² *Id.* at 947.

⁸³ *Id.* (“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.”); *but see Jaziri, supra* note 54, at 746 (explaining that “*Bollard* and *Elvig* implicate that, if a church doctrinally justifies sexual harassment, it would be protected under the First Amendment”); *See discussion infra* Part III, Section B.

⁸⁴ *Bollard*, 196 F.3d at 947.

⁸⁵ *Id.* (“That Bollard has sued under an employment discrimination statute does not mean that the aspect of the church-minister employment relationship that warrants heightened constitutional protection—a church's freedom to choose its

further inquiry.⁸⁶ Turning to the Establishment Clause, the *Bollard* court held that the “limited nature of the inquiry, combined with the ability of the district court to control discovery,” suffices to prevent excessive entanglement with religion.⁸⁷ With no Free Exercise nor Establishment Clause problem, the Ninth Circuit allowed the claim to go forward.

In 2004, the Ninth Circuit reiterated its position in *Elvig v. Calvin Presbyterian Church*.⁸⁸ There, the court dismissed claims alleging a tangible employment action as impermissible under the First Amendment,⁸⁹ but held that hostile work environment claims that were not connected to the tangible employment decisions could go forward.⁹⁰ The court stated that “insulating the Church’s employment decisions does not foreclose Elvig from holding the Church vicariously liable for the alleged sexual harassment itself, which is not a protected employment decision.”⁹¹ The Ninth Circuit reasoned that redress for impermissible harassment was possible without “attaching liability to ministerial employment decisions protected by the First Amendment.”⁹² The court held that 1) demonstrating that the plaintiff was harassed and 2) showing that the harassment was sufficiently severe to alter the terms or conditions of employment both involved only permissible, secular inquiry.⁹³

The *Elvig* court also addressed the contention that the reasonableness prong of the Faragher-Ellerth affirmative defense, as applied to a religious employer, would violate the First Amendment.⁹⁴ The court, holding that the affirmative defense does not categorically violate the First Amendment, explained that the “reasonableness component . . . evaluates an employer’s *actions* in responding to sexual harassment rather than the motivations for that response . . . In short, the issue is what the Church *did*.”⁹⁵ This, the court continued, can be subjected to entirely secular — and constitutional — legal analysis.⁹⁶

3. Tenth Circuit

In *Skrzypczak v. Roman Catholic Diocese of Tulsa*, the Tenth Circuit held that allowing hostile work environment claims by ministers against their religious employers would violate the First Amendment.⁹⁷ The court held that hostile work environment claims “implicate a church’s spiritual functions,” and allowing such claims “may . . . involve gross substantive and procedural entanglement

representatives—is present.”).

⁸⁶ *Id.*

⁸⁷ *Id.* at 950.

⁸⁸ *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004).

⁸⁹ *Id.* at 958.

⁹⁰ *Id.* at 962 (“[P]laintiffs who suffer tangible employment actions but cannot connect those actions to harassment may nonetheless recover for the harassment itself if their employers cannot satisfy the Ellerth/ Faragher affirmative defense.”).

⁹¹ *Id.* See also *id.* at 963 (“[D]ecisions to engage in and permit harassment are insufficient to trigger the ministerial exception.”).

⁹² *Id.* at 953.

⁹³ *Id.* at 959.

⁹⁴ *Id.* at 963–64.

⁹⁵ *Id.* at 963 (emphasis in original).

⁹⁶ *Id.* at 963–64.

⁹⁷ *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010).

with the Church’s core functions, its polity, and its autonomy.”⁹⁸ Such excessive entanglement with religion would violate the Establishment Clause.⁹⁹ The court continued that allowing such claims would also violate the Free Exercise Clause because it would “infringe on a church’s ‘right to select, manage, and discipline [its] clergy free from government control and scrutiny’ by influencing it to employ ministers that lower its exposure to liability rather than” ministers who further its religious goals.¹⁰⁰

4. District Courts¹⁰¹

In *Dolquist v. Heartland Presbytery*, the District Court for the District of Kansas held that an ordained minister’s sexual harassment claim against her religious employer did not violate the First Amendment.¹⁰² The court noted that it would only need to inquire into “the nature and severity of the alleged harassment, whether defendant knew of the harassment and whether defendant adequately responded to such notice.”¹⁰³ None of these questions, the court continued, involved the “defendant’s right to select clergy or decide matters of church government, faith and doctrine.”¹⁰⁴ The court further held that allowing hostile work environment claims “will result in no greater entanglement in church affairs” than cases in which parishioners sue a church for the negligent supervision of ministers who engaged in sexual misconduct,¹⁰⁵ or cases in which non-ministers sue for sexual harassment.¹⁰⁶ Both such cases are permissible under the Establishment Clause, thus ministers’ hostile work environment claims are also permissible.¹⁰⁷

In *Rojas v. Roman Catholic Diocese of Rochester*, the District Court for the Western District of New

⁹⁸ *Id.* (quoting *Elvig*, 375 F.3d at 976 (Trott, J., dissenting)).

⁹⁹ *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“[W]e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”).

¹⁰⁰ *Skrzypczak*, 611 F.3d at 1245 (quoting *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 803 (9th Cir.2005) (order denying petition for rehearing) (Kleinfeld, J., dissenting)).

¹⁰¹ This section does not provide a complete picture of all district court decisions touching on the application of the ministerial exception to hostile work environment claims. This section does, however, present selected district court decisions to afford a more robust vision of the current jurisprudence around this issue. The selected cases demonstrate common arguments on either side of the issue and serve as examples of the relatively few federal district court cases on the topic.

¹⁰² *Dolquist v. Heartland Presbytery*, 342 F.Supp.2d 996, 1007 (D. Kansas 2004).

¹⁰³ *Id.* (citing *Ammon v. Baron Auto. Group*, 270 F.Supp.2d 1293, 1306–09 (D. Kan. 2003)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Smith v. Raleigh District of N.C. Conf. of United Methodist*, 63 F.Supp.2d 694, 710–18 (E.D.N.C. 1999) (“Because plaintiff’s claims present secular, rather than ecclesiastical, disputes, the court can resolve the claims by reference to neutral principles of law.”). *See also Malicki v. Doe*, 814 So.2d 347, 360–65 (Fla. 2002) (holding that “the Free Exercise Clause is not implicated in this case because the conduct sought to be regulated . . . is not rooted in religious belief”).

¹⁰⁷ *See, e.g., Shawna Meyer Eikenberry*, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 290–91 (1998) (citing *Smith v. O’Connell*, 986 F.Supp. 73, 79 (D.R.I. 1997) (stating “the well-established principal that neutral laws of general application do not violate the First Amendment simply because they have the incidental effect of burdening a particular religious practice.”); *See also, Jessica R. Vartanian*, Note, *Confessions of the Church: Discriminatory Practices By Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U.TOLL.REV. 1049, 1066 (2009) (“Allowing sexual-abuse claims while precluding sexual-harassment claims based on the ministerial exception would lead to an absurd result.”); *Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church*, 63 F. Supp. 2d 694, 705, 710 (E.D.N.C. 1999) (holding that a non-minister’s hostile work environment suit was not barred by the First Amendment).

York held that there is no *per se* bar prohibiting a ministerial employee from bringing a hostile work environment claim against their religious employer.¹⁰⁸ The court relied on a case-by-case inquiry and found that the court could adequately control discovery to prevent excessive entanglement.¹⁰⁹ In contrast, in *Preece v. Covenant Presbyterian Church*, the District Court for the District of Nebraska held that a ministerial employee's hostile work environment claim did violate the First Amendment.¹¹⁰ The court held that the church's alleged harassment implicated "internal church decision and management, rather than the outward physical acts of one pastor."¹¹¹ Relying on the Supreme Court's distinction between outward physical acts – like ingesting peyote – and internal church decisions,¹¹² the court found that reviewing the sexual harassment claim would excessively entangle a secular court with religion.¹¹³

In *Koenke v. Saint Joseph's University*,¹¹⁴ one of the few cases decided with the benefit of both *Hosanna-Tabor* and *Morrissey-Berru*, the court held that "hostile work environment claims are employment discrimination claims, and Title VII and Title IX are federal statutes governing, *inter alia*, employment relationships. Consequently, hostile work environment claims, particularly those brought pursuant to Title VII or Title IX, clearly fall within the scope of cases banned by the ministerial exception."¹¹⁵ The *Koenke* court, relying on *Morrissey-Berru*, held that hostile work environment claims are *categorically* barred.¹¹⁶

5. State Courts¹¹⁷

In *Black v. Snyder*, the Minnesota high court allowed a minister to proceed with sexual harassment claims¹¹⁸ against her religious employer, holding that neither the First Amendment nor the Minnesota Constitution barred such claims.¹¹⁹ The court held that sexual harassment claims, even those

¹⁰⁸ *Rojas v. Roman Cath. Diocese of Rochester*, 557 F. Supp. 2d 387, 399 (W.D.N.Y. 2008) (holding that "there is no evidence to support Defendant's argument that consideration of Plaintiff's hostile environment claims would necessarily involve entanglement with religious doctrine," and that "there is no *per se* rule" preventing such suits) (emphasis in original).

¹⁰⁹ *Id.*

¹¹⁰ *Preece v. Covenant Presbyterian Church*, 2015 WL 1826231, at *19 (D. Neb. April 22, 2015).

¹¹¹ *Id.* at *7.

¹¹² *Id.* at *6 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)) ("[T]he [Hosanna-Tabor] Court contrasted the employment discrimination suit with cases involving law violations 'of only outward physical acts'. . . . [T]he Court noted 'a church's selection of its ministers is unlike an individual's ingestion of peyote [because the employment relationship] concerns government interference with an internal church decision that affects the faith and mission of the church itself.'").

¹¹³ *Preece*, 2015 WL at *7.

¹¹⁴ *Koenke v. Saint Joseph's Univ.*, 2021 WL 75778 (E.D. Pa. Jan. 8, 2021).

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* ("The Supreme Court has not cabined the ministerial exception to tangible or intangible employment actions, and it is not for this Court to create such an exception to binding precedent.")

¹¹⁷ Like above, this section is not a comprehensive survey of all state court decisions on this topic. Cases were selected based on their influence in the literature and on other cases, their unique approaches to the topic, and their additions to the jurisprudential picture.

¹¹⁸ Note that the sexual harassment claims in this case were based on state causes of action. *Black v. Snyder*, 471 N.W. 2d 715, 718 (Minn. Ct. App. 1991).

¹¹⁹ *Id.*

brought by ministers, pose “no greater conflict with the church’s disciplinary authority than that presented in cases enforcing child abuse laws.”¹²⁰ The court continued that the sexual harassment claim would not involve “scrutiny of church doctrine, interfere in matters of an inherently ecclesiastical nature, or infringe upon the church’s religious practice,” so there was no constitutional bar.¹²¹ The Colorado Supreme Court relied on *Black* in similarly holding that a hostile work environment claim “might [survive] a First Amendment bar.”¹²² The Maryland high court also relied on *Black* to permit a sexual harassment claim by a ministerial employee.¹²³

In *McKelvey v. Pierce*, the New Jersey Supreme Court held that a minister is not categorically barred from bringing a sexual harassment suit against his church.¹²⁴ The *McKelvey* court went a step further, recognizing that immunizing religious organizations from such suits “may actually support the establishment of religion,” by excepting, and thereby helping to promote, religion.¹²⁵ The court concluded that such immunization would, accordingly, pose a First Amendment problem.

Contrary to the above, in *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, the Supreme Judicial Court of Massachusetts applied the ministerial exception to a hostile work environment claim.¹²⁶ The court noted, however, that the parties had “not argued that the ministerial exception applies differently – or does not apply at all – to claims of harassment.”¹²⁷ Because the issue was not raised or briefed, the court would “not decide whether the ministerial exception applies to harassment claims.”¹²⁸

PART II: HISTORY

The history of the Religion Clauses is fraught and highly contentious.¹²⁹ Consequently, the

¹²⁰ *Id.* (citing *State v. Motherwell*, 788 P.2d 1066, 1073–74 (1990)).

¹²¹ *Id.* at 721.

¹²² *Van Osdol v. Vogt*, 908 P.2d 1122 n.11 (Colo. 1996). *See also id.* at 1135 (Mullarkey, J., concurring) (holding that a hostile work environment “analysis does not require inquiry into intrinsically ecclesiastical concerns as would be the case if a court examined minister hiring and discharge decision-making . . . Evaluation of whether a hostile work environment exists does not impinge on core religious beliefs such that either the free exercise of religion is affected or there is threat of excessive governmental entanglement. The First Amendment defense to a claim based on a hostile work environment caused by sexual harassment must fail.”).

¹²³ *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2011).

¹²⁴ *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002). Although these were state law claims, the court stated that the case “differs from a Title VII action in form, although the underlying wrongful conduct is alleged to be the same. Clearly, as in a Title VII case, *McKelvey* can attempt to prove that he was sexually harassed by defendants, resulting in his leaving the seminary before he could be considered for ordination.” *Id.* at 858.

¹²⁵ *Id.* at 857 (citing Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 75 (2001)). *See also Prince of Peace*, 28 A.3d at 1184 (“Declining to impose neutral and otherwise applicable tort or contract obligations on religious institutions and ministers may actually support the establishment of religion, because to do so effectively creates an exception for, and may thereby help promote, religion.”).

¹²⁶ *Temple Emanuel of Newton v. Mass. Comm’n Against Discrimination*, 975 N.E.2d 433 (Mass 2012).

¹²⁷ *Id.* at 444 n.10.

¹²⁸ *Id.* (citing *Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574, 582–583, 766 N.E.2d 820 (2002)). *See also Menard v. Archdiocese of Boston*, 98 Mass. App. Ct. 144 (July 29, 2020).

¹²⁹ *See generally* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause*

history of the church autonomy doctrine and, by extension, the ministerial exception, is similarly contentious.¹³⁰ An authoritative history is beyond the scope of this article. This part, however, briefly spells out two dominant theories of the history of the relevant doctrine, as articulated in *Hosanna-Tabor* and subsequent commentary therein.

In *Hosanna-Tabor*, Chief Justice Roberts, writing for the court, posited a history of the Religion Clauses of the First Amendment.¹³¹ In his account, the Chief Justice spoke of the Church of England's extensive control over religion. He explained that the early Puritan colonists were fleeing England in hopes of "elect[ing] their own ministers and establish[ing] their own modes of worship."¹³² The Religion Clauses were drafted with this strongly held hope in mind; the Religion Clauses aimed to effectuate that goal.¹³³ The Chief Justice buttressed this understanding of history with a letter from then-Secretary of State James Madison, writing to a Catholic bishop.¹³⁴ Responding to the bishop's request for the President's "sentiments" regarding the selection of religious leaders,¹³⁵ Madison wrote, in relevant part:

[A]s the case is entirely ecclesiastical, it is deemed most congenial with the scrupulous policy of the Constitution in guarding against a political interference with religious affairs, to decline the explanations which you have thought might enable you to accommodate the better, the execution of your trust, to the public advantage.¹³⁶

In 1806, it was self-evident to Madison that the Constitution forbade the government from interfering with purely ecclesiastical matters, intruding into religious affairs, or weighing in on ministerial selection.¹³⁷ It was this historical picture that justified the Court's recognition of the

Cases, 85 OR. L. REV. 563 (2006) (reviewing the conflicting use of history in the Supreme Court's religion clause jurisprudence); Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006).

¹³⁰ Compare *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–84 (2012) with Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 989 (2013); Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4 (1961).

¹³¹ *Hosanna-Tabor*, 565 U.S. at 182–184.

¹³² *Id.* at 182 (citing T. Curry, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 3 (1986)); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990).

¹³³ *Hosanna-Tabor*, 565 U.S. at 184 ("By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. 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.")

¹³⁴ *Id.* (citing Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63–64 (1909)).

¹³⁵ Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63–64 (1909) ("I have had the honor to receive and lay before the President your letter of the 17th. inst; inclosing a duplicate of the Commission which places under your care the Roman Catholic Church at New Orleans, and requesting the sentiments of the Executive on certain discretionary points affecting the selection of the functionaries to be named by you.")

¹³⁶ *Id.*

¹³⁷ *See id.*

ministerial exception in *Hosanna-Tabor*.

An alternative view of the Religion Clauses holds that their historical goal was to protect individual freedom of religion from institutional intrusion.¹³⁸ Worded differently, this view holds that the Religion Clauses were not primarily concerned with protecting the power of religious institutions; their concern was toleration and individual religious freedom.¹³⁹ The argument continues that, if the Religion Clauses protect individual religious freedom, interpreting them to protect “religious institutions’ rights against their members” is incoherent.¹⁴⁰ A broad ministerial exception protects religious institutions at the expense of religious individuals; that is dissonant with the history of the Religion Clauses of the First Amendment.

These oversimplified accounts are but two of many views of the history of the Religion Clauses.¹⁴¹ Both accounts respond directly to the question of whether the ministerial exception follows from the history and purpose of the Clauses. Moreover, both accounts are plausible. Part III will dive deeper into the purpose of the ministerial exception with these historical pictures in mind.

PART III: THE MINISTERIAL EXCEPTION SHOULD NOT CATEGORICALLY BAR MINISTERIAL EMPLOYEES’ HOSTILE WORK ENVIRONMENT CLAIMS AGAINST THEIR RELIGIOUS EMPLOYERS.

This part will argue, first, that the purpose of the ministerial exception fails to cover hostile work environment claims. Although the purpose of the exception is disputed, hostile work environment claims are outside the scope of both probable purposes. Because the goal of the exception fails to cover such claims, they must not be categorically excepted. This part will then turn to whether a court’s analysis of a ministerial employee’s hostile work environment claim would itself violate the First Amendment. Looking to both the Free Exercise and Establishment Clauses, this part will argue that court analysis does not categorically violate the First Amendment. Because hostile work environment claims are essentially tortious and can be analyzed using neutral principles of law, civil court adjudication does not necessarily violate the First Amendment. Case-by-case analysis is the only constitutionally sound path forward.

A. Hostile work environment claims do not implicate the purpose of the ministerial exception.

There are two frequently cited purposes of the ministerial exception. The first possible

¹³⁸ See, e.g., Griffin, *supra* note 130, at 989; Kurland, *supra* note 130, at 1,4 (“Limited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people.”).

¹³⁹ See, e.g., Griffin, *supra* note 130, at 989 (quoting Gordon S. Wood, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, 576 (2009); Frank Lambert, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 180* (2003)) (“The American Revolution broke many of the intimate ties that had traditionally linked religion and government . . . and turned religion into a voluntary affair, a matter of individual free choice.’ Americans of that era ‘believed that the individual, not the state or the church, should decide matters of faith.’ Thus, [a] . . . lesson of English and American history is that courts should not select a legal rule that automatically favors powerful institutions over individuals as the ministerial exception does.”).

¹⁴⁰ *Id.*

¹⁴¹ See generally Hall, *supra* note 129 (reviewing the many views of history in the Supreme Court’s religion clause jurisprudence).

purpose stems from *Hosanna-Tabor* directly. In *Hosanna-Tabor*, the Court stated that the purpose of the exception is to ensure that the “authority to select and control who will minister the faith – a matter ‘strictly ecclesiastical,’ – is the church’s alone.”¹⁴² We will call this first purpose “Selection and Control.”¹⁴³ Both of the First Amendment’s Religion Clauses protect a church’s authority to independently select and control who will communicate the faith.¹⁴⁴ Under the Selection and Control view, the ministerial exception is a narrow exception to laws otherwise applicable to religious employers, and thus must be tailored to this constitutional restriction.¹⁴⁵ Tangible employment actions fall within this purpose.¹⁴⁶ The Court in *Morrissey-Berru* used slightly different language, stating that the ministerial exception was recognized to preserve a religious organization’s authority to “select, supervise, and if necessary, remove a minister without interference by secular authorities.”¹⁴⁷ Based on the language of the two Supreme Court cases addressing the ministerial exception, the Selection and Control purpose can alternatively be called “Selection and Supervision.” In practice, the language of “control” vs. “supervision” has been used interchangeably and has not significantly altered courts’ or scholars’ understanding of the ministerial exception.¹⁴⁸ This part will similarly utilize both terms.

We will call the second possible purpose the “Church-Minister Relationship” view. This view

¹⁴² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952)).

¹⁴³ *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 621 (Ky. 2014) (“In the future, when faced with making a determination of whether the ministerial exception should apply, trial courts should focus on the purpose of the ministerial exception: to allow a religious institution, free of government intervention, to exercise its right to choose who will play an integral role in the presentation of its tenets. If the elements of the presented claim do not result in governmental violation of this purpose, the claim should proceed.”); *see also Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (“That Bollard has sued under an employment discrimination statute does not mean that the aspect of the church-minister employment relationship that warrants heightened constitutional protection—a church’s freedom to choose its representatives—is present. The Free Exercise Clause rationale for protecting a church’s personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant.”).

¹⁴⁴ *See, e.g., Lupu & Tuttle, supra note 17*, at 287.

¹⁴⁵ *See, e.g., Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (“[T]he scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment.”); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 n.8 (3d Cir. 2006) (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)) (“[A] narrow exception to prevent the unconstitutional enforcement of Title VII is the proper remedy.”).

¹⁴⁶ *See Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 990 (7th Cir. 2021) (Hamilton, J., dissenting) (“To answer whether this additional immunity from hostile environment claims is *necessary*, we should start with powers that are undisputed: the powers churches already have to select and control their ministers, free of constraints from employment discrimination and other laws. Hiring, firing, promoting, retiring, transferring—these are decisions that employers, including religious organizations, make to select those who carry out their work. The latent power to take such actions offers other tools for control. Further control is available through many other tangible employment actions, including decisions about compensation, benefits, working conditions, resources available to do the job, training, support from other staff and volunteers, and so on.”).

¹⁴⁷ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020).

¹⁴⁸ *See Demkovich*, 973 F.3d at 720, 727–731 (relying on both the *Hosanna-Tabor* and *Morrissey-Berru* language); *Koenke v. Saint Joseph’s Univ.*, 2021 WL 75778 (E.D. Pa. Jan. 8, 2021) (discussing both “control” and “supervision” without differentiating the terms). The definition of “control” is broader than the definition of “supervision.” *See Control*, MERRIAM WEBSTER DICTIONARY (11th ed. 2003); *Supervision*, MERRIAM WEBSTER DICTIONARY (11th ed. 2003). The Court used the term “supervision” in the later case, *Morrissey-Berru*, implying a weaker form of oversight. This article nonetheless contends with both “supervision,” and the stronger term, “control.”

holds that the “primary purpose of the ministerial exception is to protect religious organizations from interference with the church-minister relationship, which is at the very core of religious freedom.”¹⁴⁹ In *Morrissey-Berru*, the Court explained that the protection of a church’s authority to select, supervise, and remove a minister is grounded in the “general principle of church autonomy.”¹⁵⁰ That general principle protects “independence in matters of faith and doctrine and in closely linked matters of internal government.”¹⁵¹ The Church-Minister Relationship view holds that the ministerial exception is a broad protection of the church-minister relationship because that relationship is core to a church’s autonomy and internal ecclesiastic governance.

The Selection and Control view of the ministerial exception is on firmer ground than the Church-Minister Relationship view. In *Hosanna-Tabor*, the Court held *only* that the ministerial exception bars an “employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.”¹⁵² The Court “express[ed] 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.”¹⁵³ The inaccuracy of the Church-Minister Relationship view is demonstrated by the claims a ministerial employee *can* constitutionally bring against their religious employer. A minister can sue under many common law torts.¹⁵⁴ Some permissible tort claims, however, seem to implicate the church-minister relationship. If protecting that relationship is the core purpose underscoring the ministerial exception, why would such ministerial tort claims be permitted but Title VII claims barred? This distinction can be explained only by the Selection and Control view: Tort claims do not categorically implicate the selection and control of ministerial employees, whereas discrimination in hiring claims necessarily implicate selection and control. If the ministerial exception protected the church-minister

¹⁴⁹ Appellant’s Reply Brief at 2, *Demkovich v. St. Andrew the Apostle Par.*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012)). *See also* *Demkovich v. St. Andrew the Apostle Par.*, Calumet City, 3 F.4th 968, 977–78 (7th Cir. 2021); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1978–79 (2007) (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 *COLUM. L. REV.* 1373, 1403 (1981)) (explaining Laycock’s analogous view of the purpose of the exception).

¹⁵⁰ *Morrissey-Berru*, 140 S.Ct. at 2061.

¹⁵¹ *Id.*

¹⁵² *Hosanna-Tabor*, 565 U.S. at 196.

¹⁵³ *Id.*

¹⁵⁴ *See* *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346 (5th Cir. 2020) (allowing an executive director’s claims for intentional interference with business relationships, defamation, and intentional infliction of emotional distress to go forward); *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 254–55 (S.D.N.Y. 2014), *aff’d*, 578 F. App’x 24 (2d Cir. 2014) (analyzing a minister’s libel claim against his church); *Marshall v. Munro*, 845 P.2d 424, 428 (Alaska 1993) (allowing a minister’s tort claims of defamation and interference with contract to go forward); *Weaver v. Afr. Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 586 (Mo. Ct. App. 2001) (allowing a minister’s battery claim against her church). *See also* Carl H. Esbeck, *Tort Claims against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 *W.VA. L. REV.* 1, 76–77 (1986) (explaining that ministers’ tort claims are analyzed case-by-case, and asserting that “there can be little question that religious officers and organizations are liable in tort for assault, battery, false imprisonment, and the like”); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 *IND. L.J.* 981, 1013 (2013) (first quoting *Guerrier v. S. New England Conf. Ass’n of Seventh Day Adventists, Inc.*, No. CV085007824, 2009 WL 4282894, at *3 (Conn. Super. Ct. Nov. 12, 2009) (“[T]he ministerial exception ‘plainly [did] not create for religious institutions a charmed existence free from liability for their torts and upon their valid contracts.’”)); then quoting *Friedlander v. Port Jewish Ctr.*, 588 F. Supp. 2d 428, 431 (E.D.N.Y. 2008) (“[A] plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court.”).

relationship absolutely,¹⁵⁵ as the Church-Minister Relationship view posits, tort, contract, and other permissible claims would be similarly constitutionally problematic. By excluding those claims from the exception, the Court buttresses the view that the purpose of the exception is protecting a church's rights to select and control its ministers.

If absolute protection of the church-minister relationship were the purpose of the exception, several categories of claims brought by non-ministers – claims that do not violate the church autonomy doctrine¹⁵⁶ – would likely, and problematically, fall within the exception. The First Amendment does not categorically bar tort suits against the negligent religious employers of ministers who sexually abuse minors.¹⁵⁷ A civil court's inquiry into sexual abuse may implicate the relationship between the abusive minister and the church.¹⁵⁸ If the ministerial exception aims to protect that relationship above all else, such suits would fall into the exception. Even among scholars who support a strong ministerial exception that encompasses hostile work environment claims, few suggest that clergy sex abuse of minors would fall into the exception.¹⁵⁹ Child sex abuse cases do not fall into the ministerial exception because they do not implicate a church's selection and control of ministers: The purpose of the exception is the Selection and Control view, *not* the Church-Minister Relationship view.

Proponents of the Church-Minister Relationship view argue that Title VII claims, whether adverse employment actions or the creation of hostile work environments, are importantly distinct from common law torts.¹⁶⁰ The relevant distinction is that torts apply to everyone, while Title VII claims can only arise in the context of an employment relationship.¹⁶¹ This argument assumes a premise that it claims to refute. The argument goes as follows: Title VII claims are only available to ministerial employees because of their employment and are therefore not analogous to common law torts. Common law torts remain available to ministerial employees because they do not depend on the fact

¹⁵⁵ See Thomas C. Berg, *Ministers, Minimum Wages, and Church Autonomy*, 9 ENGAGE 135, 135 (2008) (explaining that when the ministerial exception applies, it is “absolute”); Lupu & Tuttle, *supra* note 3, at 1284 (“Within its boundaries concerning which employees are covered and the kinds of claims that are encompassed, the ministerial exception is fortress-like.”).

¹⁵⁶ See *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002) (collecting cases that illustrate this point). See generally Christopher J. Merken, *Recognizing Hosanna-Tabor's Limited Scope and Inapplicability to Clergy Sex Abuse Litigation*, 2020 ARK. L. NOTES 60 (2020) (discussing several cases in which courts held that litigation over clergy sex abuse, including suits against churches for negligent hiring, do not violate church autonomy).

¹⁵⁷ See, e.g., *Doe v. Corp. of Cath. Bishop of Yakima*, 957 F. Supp. 2d 1225, 1232 (E.D. Wash. 2013); *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997). See also Lupu & Tuttle, *supra* note 17, at 281; Corbin, *supra* note 149, at 2015–16.

¹⁵⁸ See Eikenberry, *supra* note 107, at 290.

¹⁵⁹ See Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 238 (2007) (citing Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1406 (1981)) (“[Laycock] admits two exceptions to autonomy when the issue is internal, to cases involving young children or bodily harm.”); John H. Mansfield, *A Tale of Two Organists: Suits Against Churches for Employment Discrimination and Sexual Abuse by Ministers*, 7 GEO. J.L. & PUB. POL'Y 237, 248 (2009). But see Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1115–17 (2003).

¹⁶⁰ See, e.g., Brief for Robert F. Cochran, et al. as Amici Curiae Supporting the Petition for Reh'g En Banc, at 4, *Demkovich v. St. Andrew's the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142); Mansfield, *supra* note 159, at 248.

¹⁶¹ Appellant's Reply Brief at 13, *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142) (“[E]mployment discrimination claims involving a minister can only arise by virtue of the ministerial relationship, which, by nature, can *only* involve ecclesiastical matters.”). The distinction between hostile work environment claims and tort claims will be discussed *infra* Part III, Section B(3).

of being a ministerial employee. Articulated a different way, this argument says that Title VII claims are available to ministers only because they were selected as a minister, and, therefore, Title VII claims fall within the ministerial exception. Common law torts remain available to ministers because they do not turn on whether an individual was selected as a minister or not. The argument, which purports to support the Church-Minister Relationship view, assumes that it is the selection of ministers that is protected, thus differentiating Title VII and common law torts. Protecting church selection, supervision, and control of employees is the purpose of the ministerial exception.

1. Selection and Control

If the Selection and Control or Selection and Supervision view is right, hostile work environments fall outside the purpose of the ministerial exception. The actions underlying hostile work environment claims are, by definition, not essential to the selection, supervision, or control of ministerial employees.¹⁶² The Supreme Court held that the creation of a hostile work environment often stems from the harassing supervisor or co-worker’s “personal motives, motives unrelated and even antithetical to the objectives of the employer.”¹⁶³ As such, “sexual harassment . . . is not conduct within the scope of employment.”¹⁶⁴

Compare a claim for a tangible employment action with one for a hostile work environment. In the case of tangible employment actions – say being fired or passed up for a promotion – the Court considers the adverse action an “official act of the enterprise.”¹⁶⁵ A supervisor can take a tangible employment action only because the employer has empowered them with the requisite authority. In contrast, a hostile work environment is “neither within the scope of [the harasser’s] employment, nor part of his apparent authority.”¹⁶⁶ The creation of hostile work environments, by definition, are not treated as the official act of the employer.¹⁶⁷ How can a harassing employee’s actions taken outside the scope of his employment implicate his employer’s selection, supervision, or control of other employees? How can harassment that is, by definition, *not* the act of the employer, be protected as the act of the employer? The ministerial exception protects a religious employer’s constitutional right to select, supervise and control their ministerial employees. A rogue employee’s harassment of another does not implicate an employer’s right to select, supervise, or control its ministers.

Since harassment falls outside the scope of employment, employers may only be liable under agency principles,¹⁶⁸ and under particular circumstances. Employers are only subject to liability for

¹⁶² Demkovich v. St. Andrew the Apostle Par., Calumet City, 973 F.3d 718, 727–28 (7th Cir. 2020), *reh’g en banc granted, opinion vacated* (Dec. 9, 2020) (first citing Burlington Indus. v. Ellerth, 524 U.S. 742, 756–57 (1998); then citing Faragher v. City of Boca Raton, 524 U.S. 775, 793–94 (1998)) (holding that hostile work environment claims use different standards to determine employer liability “precisely because the behavior that creates the hostile environment is *not* essential for management supervision and control of employees”); *see also id.* at 728–29 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)) (“*Harris* teaches that a hostile work environment simply is not a permissible means of exerting (constitutionally protected) ‘control’ over employees and accomplishing the mission of the business or religious organization.”).

¹⁶³ *Ellerth*, 524 U.S. at 757.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 762.

¹⁶⁶ *Id.* at 769 (Thomas, J., dissenting).

¹⁶⁷ *Id.* at 762.

¹⁶⁸ *Id.* at 744.

hostile work environments created by co-workers when the employer is negligent,¹⁶⁹ and subject to liability for hostile work environments created by supervisors when the employer fails to take reasonable care.¹⁷⁰ Liability for hostile work environments, at most, implicates a religious employer's non-decision – its negligence and failure to take reasonable care. A religious employer's non-decision does not implicate their protected right to select and control their ministerial employees.¹⁷¹ The ministerial exception's purpose is the protection of a religious employer's decisions in selecting, supervising, and controlling its ministerial employees. That underlying purpose is entirely absent in the case of hostile work environments.

It is crucial to note the limitations of this argument. The creation of a hostile work environment is generally outside the scope of employment because, generally, employers do not have policies promoting or ratifying employee harassment. Of the cases surveyed where a court considered the harassment of a ministerial employee, the religious employer never claimed the harassment as part of their employment policies. In the unlikely circumstance in which an employer has a policy in favor of harassment, such harassment remains, nonetheless, “not essential for management supervision and control of employees.”¹⁷² A hostile work environment is simply “not a permissible means of exerting (constitutionally protected) ‘control’ over employees and accomplishing the mission of the business or religious organization.”¹⁷³ Moreover, while tangible employment actions depend necessarily on a supervisor's actual or apparent authority, hostile work environments may still be created by both supervisors and co-workers; hostile work environments are not essential for selection or control.

2. Church-Minister Relationship

As articulated above, the Church-Minister Relationship view broadens the ministerial exception beyond its true purpose. If anything that implicates the church-minister relationship is beyond the purview of civil courts, a wide ranging list of tortious – and criminal – conduct would seemingly be beyond the purview of civil courts.¹⁷⁴ Though few scholars support this extreme result,¹⁷⁵

¹⁶⁹ Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

¹⁷⁰ *Id.*

¹⁷¹ Doe v. Roman Cath. Bishop of Orange, No. 17-01424, 2018 WL 6118442, at *4 (C.D. Cal. Feb. 12, 2018) (quoting *Bollard v. Cal. Providence of the Soc’y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999)) (“[T]his case is not about a church’s choice of representative, refusal to ordain, or adverse personnel action. The only relevant decision attributable to the Diocese of Orange is its failure to intervene, stop, and prevent Father Kim’s sexual misconduct against another victim. ‘[I]t strays too far from the rationale of the Free Exercise Clause to extend constitutional protection to this sort of disciplinary inaction simply because a minister is the target as well as the agent of the harassing activity.’”) (citations omitted).

¹⁷² *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 973 F.3d 718, 727–28 (7th Cir. 2020), *reh’g en banc granted, opinion vacated* (Dec. 9, 2020) (first citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 756–57 (1998); then citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–94 (1998)). The implications of a religious employer claiming religious motivations for harassment on Free Exercise and Establishment Clause rights are discussed *infra*, Part III, Section B.

¹⁷³ *Demkovich*, 973 F.3d at 728–29 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

¹⁷⁴ See, e.g., *Eikenberry*, *supra* note 107, at 289–91 (“Allowing sexual-abuse claims while precluding sexual-harassment claims based on the ministerial exception would lead to an absurd result.”) (citations omitted).

¹⁷⁵ See, e.g., *Hamilton*, *supra* note 159, at 238 (citing Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1406 (1981)); *Merken*, *supra* note 156, at 73. *But see* *Chopko*, *supra* note 159, at 1115–17.

some nonetheless posit that the purpose of the exception is to protect the church-minister relationship from state interference.¹⁷⁶ This section will assume *arguendo* that the Church-Minister Relationship view is right. Even if the Church-Minister Relationship view is accurate, hostile work environments nonetheless fall outside the purpose of the ministerial exception.

The Church-Minister Relationship view understands the ministerial exception as necessarily protecting that which is at the core of religious life.¹⁷⁷ The church-minister relationship is at the core, or “epicenter;”¹⁷⁸ it is the church’s “lifeblood.”¹⁷⁹ The subsequent argument, in its simplest form, is that a minister’s hostile work environment claim would impose impermissible intrusion into the lifeblood of the religious organization. As a result, such claims must be categorically barred.

To determine whether hostile work environment claims by ministerial employees categorically implicate the protected church-minister relationship, consider a few examples.¹⁸⁰ Example 1: A teacher at a religious high school teaches English but uses a religious curriculum, incorporates religious values into the classroom, and leads her first period class in daily prayer. She is subjected to harassment by a group of 12th grade students: On a nearly daily basis, the students make sexual comments to her in the hallway and corner her in her classroom during off-periods, asking her about her sexual experience and talking about their own. On at least one occasion, one of the students grabs her butt. The teacher reports this behavior to the school principal, her supervisor, but no action is taken. The students’ behavior continues.¹⁸¹ Example 2: A Black social worker at a religious hospital is responsible for developing home plans and hospital long-term stay plans with patients. The planning includes finding ways to fulfill the patients’ physical, mental, and spiritual needs, including connecting them to faith leaders and leading them in prayer. A long-term patient repeatedly calls the social worker the “n-word” and other racial epithets. The social worker complains to her supervisor, who takes no action. The use of racial epithets continues. Example 3: A religious youth group director regularly leads youth programs and overnights as part of his job responsibilities. All such programs incorporate recreation with religious education. At the overnights, another employee regularly corners the director, propositions him for sex, and demands that they watch pornography together. On one occasion, the other employee exposes

¹⁷⁶ See generally Laycock, *supra* note 3 (arguing both that child sex abuse is not beyond the purview of civil courts, and that the ministerial exception’s purpose is to protect the church-minister relationship). See also *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 982 (7th Cir. 2021) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)) (noting that “religious organizations do not enjoy a general immunity from secular laws,” and that the ministerial exception does not necessarily protect a church from criminal or tort liability, but nonetheless positing that the purpose of the ministerial exception is to protect the ministerial relationship from state interference).

¹⁷⁷ See, e.g., *Demkovich*, 3 F.4th 968 at 980; Laycock, *supra* note 3, at 1376.

¹⁷⁸ Bagni, *supra* note 3, at 1539.

¹⁷⁹ *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood.”). See also *Demkovich*, 3 F.4th at 979.

¹⁸⁰ All three examples assume, without comment, that the religious defendant does not defend the harasser’s behavior as religiously motivated or part of the defendant’s religious practice. If the religious defendant defends harassment on religious grounds, the defendant must bear the burden of persuasion and the case can nonetheless be dealt with on a case-by-case basis. This is discussed *infra*, Part III, Section B, C.

¹⁸¹ Examples do not stem from any particular real-life cases. Example 1, however, takes inspiration from *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094 (N.D. Cal. 2015). In *Bohnert*, the teacher in question was not a ministerial employee. *Bohnert* was decided prior to the Supreme Court’s specification of who is a ministerial employee in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The hypothetical teacher in Example 1 would likely be a minister under the *Morrissey-Berru* standard.

their genitals to the youth group director. The director complained to his supervisor, who takes no action. The conduct continues.¹⁸²

All three individuals in these examples are likely ministers.¹⁸³ Determination of whether someone is a minister depends on “what an employee does.”¹⁸⁴ All three hypothetical employees serve as a “messenger or teacher” of their religious employer’s faith;¹⁸⁵ *what they do* falls into the category of ministerial employees. Moreover, all three likely have actionable hostile work environment claims.¹⁸⁶ If hostile work environment claims by ministerial employees are categorically barred, courthouse doors would slam shut on all three individuals.

The question remains: Would the above allegations implicate the church-minister relationship? Hostile work environment claims can stem from the actions of students,¹⁸⁷ as in Example 1, or even the actions of third-party outsiders,¹⁸⁸ as in Example 2. How does a claim alleging student or third-party harassment implicate the church-minister relationship? Hostile work environment claims cover a wide array of unlawful conduct by a wide array of actors. It is unavoidably true that some ministerial hostile environment claims implicate the church-minister relationship. It is also undoubtedly true that some claims, like these, fall outside that lifeblood of the religious organization.

The question at hand is whether hostile work environment claims by ministerial employees

¹⁸² Example 3 takes inspiration from Oral Argument at 2:55, *Demkovich v. St. Andrew the Apostle Par., Calumet City* (No. 19-2142), <http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=19&casenumber=2142&listCase=List+case%28s%29> [<https://perma.cc/LT2K-V533>].

¹⁸³ See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2072, 2076, 2082 (2020) (Sotomayor, J., dissenting) (holding that “the Court . . . collapses *Hosanna-Tabor’s* careful analysis into a single consideration: whether a church thinks its employees play an important religious role,” and that the “apparent deference here threatens to make nearly anyone whom the schools might hire ‘ministers’ unprotected from discrimination in the hiring process”); *id.* at 2082 (Sotomayor, J., dissenting) (holding that the Court’s decision implicates “over a hundred thousand secular teachers whose rights are at risk . . . And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, inhouse lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers’ religious tenets.”).

¹⁸⁴ *Id.* at 2064.

¹⁸⁵ *Id.*

¹⁸⁶ See *Legg v. Ulster Cnty.*, 979 F.3d 101, 117 (2d Cir. 2020) (“We have repeatedly held that the presence of pornography in a workplace can constitute a hostile work environment.”); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (holding that a single use of the “n-word” constitutes severe harassment); *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 175–76 (2d Cir. 2012) (holding that repeated sexual comments and propositions over a long period may constitute actionable severe or pervasive harassment).

¹⁸⁷ Although the Supreme Court has not ruled on this, several lower courts have. See, e.g., *Mongelli v. Red Clay Consolidated Sch. Dist. Bd. Of Educ.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007) (“[L]iability for hostile work environment claims under Title VII may attach to schools that fail to address teachers’ claims of harassment by students.”); *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 182 (D.P.R. 2005) (“Plaintiff may seek redress under Title VII . . . for the sexual harassment suffered on account of one of her students.”). See also *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 955–56 (7th Cir. 2002) (holding that a district may be liable for student-on-teacher harassment in violation of § 1983).

¹⁸⁸ See, e.g., *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005) (holding that an employer can be liable for a hostile work environment caused by the acts of non-employees, including customers); *Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 756 (9th Cir. 1997) (“[A]n employer may be held liable for sexual harassment on the part of a private individual, such as [a customer], where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”).

must be categorically barred by the ministerial exception. If some such claims do not implicate the church-minister relationship, the ministerial exception cannot bar them.¹⁸⁹ That hostile work environment claims by ministerial employees can stem from third party conduct, for instance, demonstrates the crux of hostile work environment claims: they are about severe or pervasive harassment, *not* church-minister relationships. Unlike claims alleging tangible, adverse employment actions that necessarily stem from the authority of the employer, hostile work environments can exist outside that church-minister relationship. That they exist outside that relationship demonstrates that they do not categorically implicate the protected relationship.

Given the short facts in Example 3, it is unclear whether the harassing employee is a co-worker or a supervisor, and whether they too are a ministerial employee. If the harassing employee is a non-minister, the above argument and analysis applies. Immunizing a religious employer from liability for its non-ministerial employees' harassment just because their target was a ministerial employee would be more akin to blanket tort immunity and far beyond protection of the church-minister relationship. Where both the harasser and the individual being harassed are ministerial employees, it is admittedly, trickier. Proponents for a strong ministerial exception that encompasses hostile work environment claims have argued that because such claims "can *only* arise by virtue of the ministerial relationship, [the claims], by nature, can *only* involve ecclesiastical matters."¹⁹⁰ These proponents of the Church-Minister view further argue that the ministerial exception "is designed to keep the courts out of the church-minister relationship, to prevent courts from deciding explicitly religious questions, and to protect religious organizations from government interference in internal ecclesiastical governance."¹⁹¹ The Seventh Circuit adopted this understanding when it barred minister-on-minister hostile work environment claims because such claims are necessarily "not just a legal question but a religious one, too."¹⁹²

Although minister-on-minister harassment cases may sometimes pose religious questions,¹⁹³ this is not categorically true. It is challenging to see how the employee's conduct in Example 3 – unwelcome sexual propositions, pornography, and nudity – implicate any of these enumerated protected interests. That both parties are ministers does not, alone, necessitate that religious questions or internal ecclesiastical governance is at play. While the church-minister relationship is at the core of ecclesiastical matters, legal consequences for this tortious conduct fails to implicate an ecclesiastical choice.¹⁹⁴ The frequent retort to this argument is that it is the judicial intervention itself – the affirmative defense, demand for reasonable care, etc. – that consequently interferes with the church-minister

¹⁸⁹ See *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) ("[T]he scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment.").

¹⁹⁰ Appellant's Reply Brief at 13, *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142).

¹⁹¹ *Id.* at 15 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012)).

¹⁹² *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 979 (7th Cir. 2021).

¹⁹³ What this case-by-case analysis looks like is discussed *infra*, Part III, Section C.

¹⁹⁴ If a religious employer argues that an ecclesiastical choice did, in fact, motivate the tortious conduct, the employer must bear the burden of persuasion (see Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices By Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U.TOL.L.REV. 1049, 1056–57 (2009)), and First Amendment concerns must be explicitly stated, and the harassment itself – both the substance and the manner of criticism – justified and embraced.

relationship.¹⁹⁵ This concern is overstated. Courts regularly, and without First Amendment issue, impose on religious organizations requirements for reasonable care.¹⁹⁶ The distinction between an imposition of reasonable care under Title VII as opposed to a common law tort – and whether that distinction has constitutional implications – is discussed in depth below.

B. Court analysis of ministerial employees' hostile work environment claims does not categorically violate the First Amendment.

The legislative history of Title VII documents significant congressional debate regarding whether the Act's anti-discrimination provisions should apply to religious employers.¹⁹⁷ Congress ultimately landed on a built-in statutory exception for religious employers when it comes to religious discrimination. The statutory exception precludes claims of religious discrimination in employment against religious organizations.¹⁹⁸ In other words, a synagogue can discriminate on the basis of religion when hiring its rabbi. Sensible enough. Title VII does not bar claims of discrimination based on other protected categories.¹⁹⁹ However, under the Act, if that same synagogue wanted to discriminate on the basis of race when hiring its rabbi, it would not be protected.²⁰⁰ That Title VII applies anti-discrimination policy to religious employers is crucial to understanding and contextualizing the ministerial exception. The exception stems not from the statute, but from constitutional necessity. As such, the scope of the ministerial exception is "limited to what is necessary to comply with the First Amendment."²⁰¹

¹⁹⁵ See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 973 (9th Cir. 2004) (Trott, J., dissenting) ("[W]hen the Church tenders its 'reasonable care defense,' every step the Church took to respond and react to Elvig's claims will be reviewed by the district court to determine whether it was reasonable. Such an inquiry into whether the Church exercised 'reasonable care' will involve, by necessity, penetrating discovery and microscopic examination by litigation of the Church's disciplinary procedures and subsequent responsive decisions.").

¹⁹⁶ See, e.g., *Malicki v. Doe*, 814 So. 2d 347, 365 (Fla. 2002) (recognizing the importance of the First Amendment but holding that it does not protect a religious institution from liability for third party tort claims of sexual assault and battery). See also *Demkovich v. St. Andrew the Apostle Par.*, Calumet City, 3 F.4th 968, 988 (7th Cir. 2021) (Hamilton, J., dissenting) ("Courts already navigate these waters with more attention to nuance and less reliance on absolute immunities. Religious liberty still thrives.").

¹⁹⁷ H.R. REP. NO. 88-914 (1963), reprinted in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2010 (1968); Congressional Debate on Titles VII and XI, in 1964 LEGIS. HIST. at 3001, 3004, 3050.

¹⁹⁸ 42 U.S.C. § 2000e-1(a) (Title VII does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion . . . connected with the carrying on . . . of its activities."). Levinson, *supra* note 12, at 93 ("The resulting amended version of Title VII, which was primarily intended to permit religious employers to employ individuals of a particular faith to carry out its 'religious activities,' passed both the House and the Senate. Eight years later, the 1972 amendments to Title VII deleted the word 'religious' and clarified that it would not be an unlawful employment practice for religious entities, like schools and universities, to hire employees based on their religious beliefs for all their activities. The statutory text of Title VII thus allows religious employers to be sued for all types of discrimination, except religious discrimination.") (footnotes omitted).

¹⁹⁹ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("Title VII does not confer upon religious organizations a license to make . . . decisions on the basis of race, sex, or national origin.").

²⁰⁰ This is, of course, not true thanks to the judicially created ministerial exception, as discussed throughout.

²⁰¹ *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). See also *Demkovich v. St. Andrew the Apostle Par.*, Calumet City, 3 F.4th 968, 989 (7th Cir. 2021) (Hamilton, J., dissenting) ("[I]f a special difficulty arises under

The ministerial exception must except hostile work environment claims by ministerial employees *only if* it is constitutionally necessary. Proponents of broadening the exception argue that allowing such claims would violate both the Free Exercise and Establishment Clauses of the First Amendment. The major constitutional concerns typically stem from 1) investigation and judicial inquiry itself,²⁰² and 2) the burdens of the affirmative defense.²⁰³

This section will argue that court analysis of a hostile work environment claim by a ministerial employee against their religious employer does not categorically violate the First Amendment. It is crucial to note that in the vast majority of cases surveyed, religious defendants did not defend harassing behavior on religious grounds.²⁰⁴ Religious organizations have typically condemned such behavior, not sanctioned it. In such cases, the full argument discussed in this article applies. If a religious organization does defend harassment on religious grounds, it shall bear the burden of persuasion,²⁰⁵ its First Amendment concerns must be explicitly stated, and the harassment itself – both the substance and manner – embraced.²⁰⁶ In such a case, a secular court’s inquiry will be limited. A court can ask whether such grounds are sincere but cannot probe into the veracity of religious claims.²⁰⁷

There is value in requiring a religious organization to claim and explicitly endorse harassment to receive this limited inquiry; there is value in information-forcing.²⁰⁸ Moreover, religious justifications

the First Amendment, courts will deal with it’); *cf.* Marsha V. Freeman, *What’s Religion Got to Do with it? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J.L. & SOC. CHANGE 133, 135 (2013) (“The courts have allowed what was created as a seemingly narrow exception geared to protecting an institution’s religious freedom to be broadened considerably.”).

²⁰² See, e.g., *Cath. Bishop of Chi. v. N.L.R.B.*, 440 U.S. 490, 502 (1979) (“It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”); Jaziri, *supra* note 54, at 730 (“The fear is that church personnel and religious documents would become subject to a variety of legal processes—including subpoena, discovery, and cross-examination—that would effectively probe the church’s mind regarding the selection of its ministers.”).

²⁰³ See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 973 (9th Cir. 2004) (Trott, J., dissenting) (“Thus, when the Church tenders its ‘reasonable care defense,’ every step the Church took to respond and react to Elvig’s claims will be reviewed by the district court to determine whether it was reasonable. Such an inquiry into whether the Church exercised ‘reasonable care’ will involve, by necessity, penetrating discovery and microscopic examination by litigation of the Church’s disciplinary procedures and subsequent responsive decisions . . . Such a searching analysis will now be applied to the internal workings of the Church.”).

²⁰⁴ See, e.g., *id.* at 959 (quoting *Bollard*, 196 F.3d at 947) (“As in *Bollard*, however, the Defendants here ‘do not offer a religious justification for the harassment [Elvig] alleges,’ and, indeed, deny it occurred at all.”) (citations omitted). *But see* *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 786–87 (N.D. Ill. 2018), *aff’d in part, rev’d in part sub nom.* *Demkovich v. St. Andrew the Apostle Par.*, Calumet City, 973 F.3d 718 (7th Cir. 2020), *reh’g en banc granted, opinion vacated* (Dec. 9, 2020) (noting that harassment on the basis of sexual orientation may have been religiously motivated). Whether the religious defendant in *Demkovich* asserted a religious justification is debatable. See Brief of Plaintiff-Appellee Sandor Demkovich at 33 (No. 19-2142) (“The Archdiocese has not contended that offensive and demeaning insults are part of its religious practices, or that it condones the conduct Demkovich alleges.”).

²⁰⁵ See Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices By Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U.TOLL.REV. 1049, 1056–57 (2009),

²⁰⁶ See Lupu & Tuttle, *supra* note 17, at 293.

²⁰⁷ See generally *United States v. Ballard*, 322 U.S. 78 (1944) (holding that inquiry into whether a religious belief is sincerely held is permissible).

²⁰⁸ See Lupu & Tuttle, *supra* note 17, at 293 (“Because the claim that religious teaching supports the hostile environment would be a defense to otherwise actionable harassment, the employer should have to assert that the employee had violated the

do not necessitate that all actions are constitutionally protected.²⁰⁹ As Caroline Mala Corbin wrote:

[I]f a religious organization states that according to its tenets, married men are the head of household and therefore are paid more than married women, it has conceded discrimination. The court can find that it violated Title VII while deferring completely to the religious organization on doctrinal questions.²¹⁰

What the line is – between protected vs. unprotected religiously motivated activity – is beyond the scope of this article. Although the line is ambiguous, there is a strong argument that severe or pervasive harassment should be beyond the pale.²¹¹

The question remains: What about the majority of cases, in which the defendant does not explicitly claim religious reasons for the harassment? This section will focus primarily on those cases. That the rare religiously motivated harassment poses unique First Amendment questions does not undermine, but in fact supports, the proposition that ministerial employees' hostile work environment claims must be analyzed on a case-by-case basis. This section will focus on investigation and judicial inquiry as well as the Faragher-Ellerth affirmative defense, arguing that neither violate the Free Exercise nor Establishment Clauses. From there, this section will make an affirmative argument that, because hostile work environment claims are essentially tortious, and tort claims by ministerial employees do

community's religious principles. The employer similarly should have to assert that the supervisor's mode of expression of those principles was in keeping with the faith. These requirements of accountability would validate the First Amendment defense without involving the court in a forbidden adjudication of the faith's norms, or its means of communicating those norms."). Religious organizations may balk at the requirement to explicitly endorse harassment. Requiring such an admission to receive this limited inquiry therefore serves a notice function to employees and potential employees, and may actually decrease the number of employers claiming this defense.

²⁰⁹ See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) ("Consistent with the First Amendment (and over sincerely held religious objections), the Government may compel religious institutions to pay Social Security taxes for their employees, deny nonprofit status to entities that discriminate because of race, require applicants for certain public benefits to register with Social Security numbers, enforce child-labor protections, and impose minimum-wage laws.") (citations omitted).

²¹⁰ Corbin, *supra* note 149, at 2014. Corbin continues: "One might argue, however, that by preventing the church from realizing its doctrinal requirements . . . the state will subtly force the church to conform its religious doctrine to the state's values. But under this reasoning, the state could never declare a religious practice illegal, and that is clearly not the case after *Smith*. In allowing Title VII claims against religious organizations, the court is not declaring that antidiscrimination represents an organization's true beliefs. It is merely declaring that antidiscrimination is the secular law and must be complied with." (footnotes omitted). *Id.* Though Corbin is discussing all Title VII claims, the reasoning clearly applies to the more specific hostile work environment context.

²¹¹ See *Morrissey-Berru*, 140 S.Ct. at 2072 (Sotomayor, J., dissenting). The irremediable harm caused by severe or pervasive harassment has been studied in depth and is a strong point in this argument. See, e.g., Jose A. Bauermeister, et al., *Sexuality-Related Work Discrimination and Its Association with the Health of Sexual Minority Emerging and Young Adult Men in the Detroit Metro Area*, 11 SEX RES. SOC. POLICY 1 (2014) (discussing the harms of discrimination, including harassment, on the basis of sexuality); Jason N. Houle, et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. MENT. HEALTH 89 (2011) (addressing the harms to mental health caused by sexual harassment); Heather McLaughlin, et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 3 GENDER SOC. 333 (2017) (addressing the economic harms caused by sexual harassment); Christiana Silva, *Almost Every Transgender Employee Experiences Harassment or Mistreatment on the Job. Study Shows*, Newsweek (November 29, 2017, 6:44 PM), <https://www.newsweek.com/transgender-employees-experience-harassment-job-726494> (discussing the frequency of harassment and excessive harm faced by transgender workers).

not categorically violate the First Amendment, hostile work environment claims by ministerial employees similarly do not categorically violate the First Amendment.

1. Free Exercise Clause

The ministerial exception is grounded in both the Free Exercise and Establishment Clauses of the First Amendment.²¹² Although it has roots in both clauses, or perhaps because of that, courts often conflate or fail to specify which clause they are relying on when making ministerial exception determinations.²¹³ One study found that “the courts never split their decisions on the First Amendment Religion Clauses. All high-entanglement-risk cases were also judged to pose a high threat to free exercise, and vice versa.”²¹⁴ Despite the widespread conflation of the two clauses, this section will look at each clause in turn.

The Free Exercise Clause protects a religious organization’s right to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”²¹⁵ Proponents of a broad ministerial exception have argued that hostile work environment claims violate the Free Exercise Clause by, among other things, 1) interfering with internal church governance and discipline²¹⁶ and 2) altering a church’s incentives in hiring ministers by requiring an eye towards litigiousness.²¹⁷ Consider first the argument that hostile work environment claims necessarily interfere with internal church governance and discipline, therefore violating the Free Exercise Clause. Ira C. Lupu and Robert W. Tuttle posed the question well when they asked: “Is it possible for courts to evaluate the reasonableness of mechanisms for prevention and correction of harassment without intruding on the internal governance of a religious institution?”²¹⁸ This question is crucial, but the concern is overstated.

Hostile work environment claims pose limited inquiry: Did harassment happen, was it severe or pervasive, and did the employer take reasonable care to prevent or correct it? This narrow inquiry

²¹² See Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 34 (2017) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)) (“[The Court] held that the ministerial exemption, as an affirmative defense to discrimination claims, is constitutionally compelled by both the Free Exercise and Establishment Clauses.”).

²¹³ See *Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church*, 63 F. Supp. 2d 694, 705 n.9 (E.D.N.C. 1999) (explaining the “similarity of the discrete inquiries” at play when analyzing the Free Exercise and Establishment Clauses. “While the *McClure* court based its decision on an analysis of the free exercise clause, some of the courts following *McClure* have based their decisions on a combination of free exercise and establishment clause principles”).

²¹⁴ Belcove-Shalin, *supra* note 16, at 126–27.

²¹⁵ *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

²¹⁶ See, e.g., *Chopko*, *supra* note 159, at 1117 (quoting *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979)), *aff’d*, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979)) (“[I]f the plaintiff’s claims depend on a court reviewing internal policies and protocols, scrutinizing a religious chain of discipline, and assessing culpability because the religious entity emphasized reconciliation and not punishment, the ‘very process of inquiry’ may lead to an unconstitutional exercise.”).

²¹⁷ See, e.g., *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (“[W]e think it fair to say that the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties would be filled.”); *Minker v. Balt. Ann. Conf. of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (“The Church asserts that simply permitting a court to hear Minker’s contract claims might distort church appointment decisions—causing churches to make only those choices that avoid the appearance of legal impropriety.”).

²¹⁸ Lupu & Tuttle, *supra* note 17, at 277.

looks at discrete questions, failing to encroach on a church's core internal governance. That limited inquiry, "combined with the ability of the district court to control discovery," can protect a church's internal governance and disciplinary procedures.²¹⁹ Moreover, the reasonableness inquiry, referenced by Lupu and Tuttle above, asks only whether the employer's actions could stop unlawful harassment, not what their motivations were or whether they did so using religious or secular tenants.²²⁰ This inquiry is no more intrusive of internal governance than the permissible question of: Who is a minister?²²¹

The second argument, that hostile work environment claims will alter a church's decisionmaking in hiring ministers, is similarly without merit. Churches are not generally immune from civil suits; non-ministerial Title VII claims, breaches of contract, torts, and other common law and statutory claims may arise at any time.²²² These claims may stem from a wide array of actors and may pose significant liability for a religious organization. If a church is going to consider litigation costs when making employment decisions, one additional source of liability is not the determinative factor.²²³ Even looking only at ministers, "if a ministerial position includes driving the church van, a church may forgo hiring the more spiritual applicant for one who has never been in an auto accident to avoid tort liability."²²⁴ Tort liability from bad driving, however, poses no Free Exercise problem. Hostile work environment claims by ministerial employees will not alter a church's decisionmaking in hiring ministers any more than the myriad of other liabilities for which churches are already susceptible. Such considerations, accordingly, pose no Free Exercise problem.

Connected to this argument is the concern that liability for hostile work environments encourages employers to implement anti-harassment training and policies.²²⁵ Such government encouraged policies and training, the concern elaborates, violate a church's Free Exercise rights.²²⁶ This concern is ameliorated by the same argument as above: Because religious organizations may face liability for non-ministerial hostile work environment claims, these incentives to create anti-harassment training and prevention already exist. Allowing ministerial hostile work environment claims impose no new incentives on religious organizations. Moreover, how an organization runs such prevention or

²¹⁹ *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999). *See also* *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 967–68 (9th Cir. 2004) (quoting Fed.R.Civ.P. 26 advisory committee's notes) ("In 2000, the Federal Rules of Civil Procedure were amended 'to involve the court more actively in regulating the breadth of sweeping or contentious discovery.' In particular, the new rules limit the breadth of discovery that can occur absent court approval. Under Rule 26(b)(1), for example, discovery must now relate more directly to a 'claim or defense' than it did previously, and 'if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved.'").

²²⁰ *See* *Elvig supra* note 219, at 963.

²²¹ *See* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2066–2067 (2020) (determining who is a minister without any First Amendment problem).

²²² *See generally* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119 (2009) (documenting various types of civil suits against religious organizations).

²²³ *Chopko, supra* note 159, at 1089–90 ("The demise of charitable immunity generally, and its limitation in virtually every jurisdiction, means that these entities must pay attention to their legal relationships and conduct.").

²²⁴ *Corbin, supra* note 149, at 2009.

²²⁵ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."); *see also* *Levinson, supra* note 12, at 110 ("The purpose of the affirmative defense is to promote Title VII's goal of encouraging employers to implement sexual harassment policies.").

²²⁶ *Hamilton, supra* note 159, at 243 (quoting Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1118 (2003)) ("The imposition of such a secular duty carries a risk of subtly altering the church's internal structure.").

correction mechanisms – whether in a religious or secular manner – is entirely up to them.²²⁷

2. Establishment Clause

The Free Exercise Clause has not been the primary concern in the two ministerial exception Supreme Court cases nor lower court cases addressing hostile work environments in particular.²²⁸ Rather, excessive entanglement, impermissible under the Establishment Clause, has animated recent court decisions. State action is permissible under the Establishment Clause if 1) it has a secular purpose, 2) its primary effects neither advance nor inhibit religion, and 3) it does not excessively entangle government with religion.²²⁹ Title VII has a secular purpose and does not advance nor inhibit religion. The crucial question is: Do Title VII hostile work environment claims by ministerial employees excessively entangle government with religion?

The affirmative defense to hostile work environment claims – demanding that employers exercise reasonable care – arguably entangles judicial inquiry with religion.²³⁰ The concern is that inquiry into a church’s reasonable care will require a court to examine “every step a church took to respond to a plaintiff’s allegation . . . entangl[ing] [the court] with religious decision-making processes.”²³¹ The question, put simply, is: Does this inquiry – did the church exercise reasonable care? – *excessively* entangle the court with religion?

One judicial inquiry intimately related to this topic is the question of who qualifies as a minister under the ministerial exception. As the Supreme Court determined in *Morrissey-Berru*, civil courts identify ministers based on what a given employee does.²³² This totality of the circumstances test bestows to courts the right to consider several key questions: Does the individual role inculcate or transmit messages of faith?²³³ Do they conduct religious ceremonies, prayers, or rituals?²³⁴ Are there other “relevant circumstances” that elucidate “whether each particular position implicated the fundamental

²²⁷ Lupu & Tuttle, *supra* note 17, at 295–96 (“Of course, a religious denomination may express its concern about harassment of employees, clergy included, in religious terms. With respect to policies and training, we can imagine the deployment of language about respecting the dignity of the person, in addition to or instead of more conventional phrasing about the physical and emotional integrity of employees. All that matters for purposes of the defense, however, is that the policy and training be reasonable steps to prevent the wrong. Preferring secular to religious understandings of the wrong would raise a constitutional problem of discrimination against religion. Employers, secular or religious, are required to provide good faith and effective communication, in any terms that supervisors and other employees can reasonably understand.”).

²²⁸ See, e.g., *Dolquist v. Heartland Presbytery*, 342 F.Supp.2d 996 (D. Kan. 2004) (evaluating the Establishment Clause as the primary concern); *Rojas v. Roman Cath. Diocese of Rochester*, 557 F.Supp.2d 387 (W.D. N.Y. 2008) (evaluating the Establishment Clause as the primary concern). See also Lupu & Tuttle, *supra* note 17, at 271 (calling free exercise concerns “barely relevant” and establishment clause concerns “central”).

²²⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²³⁰ See *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 973 (9th Cir. 2004) (Trott, J., dissenting) (“Such an inquiry into whether the Church exercised ‘reasonable care’ will involve, by necessity, penetrating discovery and microscopic examination by litigation of the Church’s disciplinary procedures and subsequent responsive decisions.”).

²³¹ *Jaziri*, *supra* note 54, at 747.

²³² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020).

²³³ *Id.* at 2064.

²³⁴ *Id.*

purpose of the exception?”²³⁵ This broad, far reaching inquiry about issues of faith, internal religious role, and religious structure has the seal of approval from the Supreme Court; “Who is a minister?” poses no entanglement problem.²³⁶

Compare the inquiry about who is a minister to the question of whether reasonable care was taken. “There is no neutral and secular legal manner to resolve the question of who qualifies as a minister.”²³⁷ Contrary to that, reasonable care relies on secular, neutral principles²³⁸ that can be asked and answered without reference to religious doctrine: Was there an anti-harassment policy? Was it clear where harassment could be reported? Was there training?²³⁹ The question of who is a minister is a more “theological question” than is the question of reasonable care.²⁴⁰ If “Who is a minister?” does not involve excessive entanglement between a court and church, how does “did they take reasonable care?”²⁴¹

Moreover, courts inquire into this question without excessive entanglement when non-ministerial employees bring hostile work environment claims against their religious employers. Consider two hostile work environment claims. Scenario A: A janitor at a religious school alleges that his supervisor, a minister, repeatedly subjected him to a hostile work environment based on his national origin. If the janitor brings his claim and the court concludes that the harassment was severe or pervasive, the court then asks whether the religious school exercised reasonable care to prevent or correct the harassment. Scenario B: A teacher at a religious school alleges that his supervisor, a minister, repeatedly subjected him to a hostile work environment based on his national origin. If the teacher brings his claim and the court concludes that the harassment was severe or pervasive, the court then asks whether the religious school exercised reasonable care to prevent or correct the harassment. If you got *déjà vu* reading the two scenarios, it was warranted. The two scenarios are identical, save that one plaintiff is a janitor and the other, a teacher. The question – whether the school exercised reasonable care – is identical. If hostile work environment claims by ministerial employees are barred, Scenario A would be allowed while Scenario B would not.²⁴² With identical questions for the court, it is implausible

²³⁵ *Id.* at 2067.

²³⁶ Some judges have questioned the constitutionality of this inquiry. *See id.* at 2069–70 (Thomas, J., concurring) (“I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations’ good-faith claims that a certain employee’s position is ‘ministerial.’”). This constitutional concern has not received significantly more widespread attention, and the question remains permissible.

²³⁷ Griffin, *supra* note 130, at 1006–07.

²³⁸ *See Jones v. Wolf*, 443 U.S. 595 (1979) (rejecting mandatory deference to religious organizations and instead holding that neutral principles of law could permissibly be used to adjudicate a church property dispute).

²³⁹ *See* U.S.EQUAL EMP’T OPPORTUNITY COMM’N, *Best Practices for Employers and Human Resources/EEO Professionals*, <https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resources/eec-professionals> [<https://perma.cc/78X3-5S3M>].

²⁴⁰ Griffin, *supra* note 130, at 1006–07. Consider also how in *Hosanna-Tabor* the court had to evaluate the distinction between called teachers and lay teachers, a clearly religious question, that posed no Establishment Clause problem. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 177 (2012).

²⁴¹ As one commentator noted, “application of the ministerial exemption can entangle a court in religious doctrine more than application of Title VII. In determining whether a plaintiff counts as a ‘minister’ who triggers the ministerial exemption, courts must decide whether the plaintiff plays an important religious role. In so doing, courts are deciding directly questions of religious doctrine in a way they never do when deciding whether discrimination occurred.” Corbin, *supra* note 149, at 2026.

²⁴² Under *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), the teacher is likely a minister for the

that the question excessively entangles the court with religion in one scenario, and not the other. Since the janitor can bring his claim without Establishment Clause problems, so too must the teacher be able to.

Finally, the bar for excessive entanglement has grown higher in recent years and a court's inquiry into reasonable care does not meet that high bar of impermissibility. In *Bowen v. Kendrick*, the Supreme Court found no excessive entanglement when the government reviewed grantee religious organizations' counseling programs, monitored their materials, and paid periodic visits.²⁴³ In *Agostini v. Felton*, the Supreme Court held that a program sending public employees into religious schools did not involve excessive entanglement, despite regular government visits and inquiries to ensure that the public employees were not teaching religious doctrine.²⁴⁴ According to the Supreme Court, "[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two."²⁴⁵ Some level of entanglement is permissible, *excessive* government entanglement is not.²⁴⁶ The question of whether a church exercised reasonable care will, admittedly, require some interaction between church and state. This interaction, like that in *Agostini* or *Bowen*, does not require *excessive* government entanglement with religion and is therefore permissible.

3. Hostile work environment claims are essentially tortious and therefore, court analysis of such claims does not categorically violate the First Amendment.

Hostile work environment claims, though stemming from Title VII, are essentially tortious. Just as tort claims by ministerial employees against their religious employers do not necessarily implicate First Amendment rights, neither do hostile work environment claims. This section will first demonstrate that tort claims are not categorically barred by the First Amendment and then proceed to explain how hostile work environment claims are essentially the same or analogous to tort claims. Finally, this section will connect those two claims to conclude that hostile work environment claims by ministerial employees are not barred by the First Amendment.

i. Tort claims are not categorically barred by the First Amendment.

Courts have long recognized that religious organizations may be held liable for tortious conduct.²⁴⁷ Religious organizations are not above the law.²⁴⁸ Churches have been held liable for a wide

purpose of the ministerial exception.

²⁴³ *Bowen v. Kendrick*, 487 U.S. 589, 615–17 (1988).

²⁴⁴ *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997).

²⁴⁵ *Id.* at 233.

²⁴⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 613–15 (1971).

²⁴⁷ *See, e.g., Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1244–45 (10th Cir. 2010) (quoting *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)) (“Of course churches are not—and should not be—above the law.’ Churches ‘may be held liable for their torts and upon their valid contracts.’”). *See also* Levinson, *supra* note 12, at 112–13; Carmella, *supra* note 210, at 43 (discussing the history of charitable immunity and its decline with the advent of insurance).

²⁴⁸ *See Skrzypczak*, 611 F.3d at 1244–45 (quoting *Rayburn*, 772 F.2d at 1171); *Guerrier v. S. New Eng. Conf. Ass’n of Seventh Day Adventists, Inc.*, No. CV085007824, 2009 WL 4282894, at *3 (Conn. Super. Ct. Nov. 12, 2009) (citing *Friedlander v. Port Jewish Ctr.*, 588 F. Supp. 2d 428, 431 (E.D.N.Y. 2008)) (holding that the ministerial exception “plainly [did] not create for religious institutions a charmed existence free from liability for their torts and upon their valid contracts.”). *See also* Malicki v.

range of tort claims ranging from assault or battery²⁴⁹ to intentional infliction of emotional distress.²⁵⁰ Churches have also been held liable under several theories of tort negligence based on the sexual misconduct of its clergy.²⁵¹ While some tort claims have been dismissed on First Amendment grounds,²⁵² these have been analyzed on a case-by-case basis. Neither the processes that a court need to partake in, nor the demand for reasonable care have posed categorical constitutional problems for tort claims against religious organizations.²⁵³ Torts generally do not, and certainly do not categorically, pose a First Amendment issue.²⁵⁴ The First Amendment does not exempt religious organizations from neutral tort law.

ii. Hostile work environment claims are essentially tortious.

The Supreme Court relied on tort and agency principles in determining the scope of liability for a hostile work environment claim.²⁵⁵ In *Burlington Industries v. Ellerth*, the Supreme Court analyzed a

Doe, 814 So.2d 347, 351 (Fla. 2002); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (buttressing this understanding by leaving tort claims out of the scope of the ministerial exception).

²⁴⁹ See Malicki, 814 So.2d at 364; Esbeck, *supra* note 154, at 76–77 (explaining that ministers’ tort claims are analyzed on a case-by-case basis and asserting “there can be little question that religious officers and organizations are liable in tort for assault, battery, false imprisonment, and the like, all claims which involve coercive and often violent activity”).

²⁵⁰ *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346 (5th Cir. 2020) (allowing an Executive Director’s claims for intentional interference with business relationships, defamation, and intentional infliction of emotional distress to go forward); *McKelvey v. Pierce*, 800 A.2d 840, 858 (N.J. 2002). See also *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 472 (8th Cir. 1993) (holding that the court had jurisdiction over a claim of intentional interference with a legitimate expectation of employment brought by a minister against a religious organization).

²⁵¹ See, e.g., *Rashedi v. Gen. Bd. of Church of Nazarene*, 54 P.3d 349, 350–54 (Ariz. Ct. App. 2002); *Noll v. Hartford Roman Cath. Diocesan Corp., No. HHDHX04CV024034702S*, 2008 WL 4853361 (Conn. Super. Ct. Oct. 20, 2008); *Smith v. O’Connell*, 986 F.Supp. 73 (D.R.I.1997).

²⁵² See, e.g., Michael Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877, 905–06 (2018) (explaining how tort claims based on religious shunning have “[f]or the most part,” been dismissed on church autonomy grounds); Carmella, *supra* note 212, at 43 (explaining that clergy malpractice torts, though analyzed case-by-case, tend to “involve a court and jury in evaluating religious doctrine and practice,” and are generally dismissed on church autonomy grounds).

²⁵³ See Carmella, *supra* note 212, at 51–52 (quoting *Morrison*, 905 So. 2d at 1222) (“[C]ourts have allowed these abuse cases to proceed to a jury trial, and have allowed juries to make detailed factual findings of how churches handled abuse complaints because that is the way tort law works. If a church ‘has specific knowledge that children within its care are in danger of sexual molestation, and if it has the authority, power and ability to protect those children from that known danger of abuse and molestation, it is for a jury to determine whether it took reasonable steps to protect the children.’”).

²⁵⁴ Eikenberry, *supra* note 107, at 289 (citing *Smith v. O’Connell*, 986 F. Supp. 73, 79 (D.R.I. 1997)) (“Plaintiffs alleging that religious organizations are liable for sexual assault by their clergy members have had to overcome Free Exercise arguments in order to proceed with their claims. The courts that have allowed such claims to go forward have held that neutral tort law can be used without violating the Free Exercise Clause and that the *Smith* case requires that churches not be immune from neutral laws of general applicability.”).

²⁵⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758 (1998) (explaining the scope of liability under hostile work environment claims, the Court stated that the “[s]cope of employment does not define the only basis for employer liability under agency principles. In limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment”). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 796–97 (1998).

hostile work environment claim as an intentional tort.²⁵⁶ The Court stated: “An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct.”²⁵⁷ The Court also held that the Restatement of Agency “makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority . . . or who was ‘aided in accomplishing the tort by the existence of the agency relation.’”²⁵⁸ The Court repeatedly and without fanfare analogized the hostile work environment claim to a common law tort and analyzed the claim under this tort framework. Even the dissenting justices in *Ellerth* who objected to the imposition of employer liability analyzed the hostile work environment claim under this tort framework.²⁵⁹ There was unanimity that hostile work environment claims are essentially tortious.

Moreover, the standard for analysis for several tort claims and Title VII hostile work environment claims is significantly similar.²⁶⁰ In *Malicki*, the court reasoned that the necessary inquiry for a tort claim based on a minister’s sexual misconduct was “whether the Church Defendants had reason to know of the tortious conduct and did nothing to prevent reasonably foreseeable harm.”²⁶¹ This inquiry did not differ depending on whether it was a child or adult alleging tortious sexual misconduct.²⁶² Similarly, this inquiry does not differ depending on whether the claim is brought under common law tort or as a Title VII hostile work environment claim. In both cases, the underlying question is the same: Did the defendant know of the unlawful conduct and do nothing to prevent or correct the harm?

In the case of a co-worker harasser, a hostile work environment claim asks whether the employer was negligent.²⁶³ In the case of a supervisor harasser, a hostile work environment claim asks whether the employer took reasonable care to prevent or correct harassing behavior.²⁶⁴ The negligence at issue in the case of a co-worker harasser is explicitly tort negligence.²⁶⁵ Tort negligence (in Title VII) is unambiguously the same as tort negligence (in a tort claim). The reasonable care inquiry is also no more intrusive and is substantially similar to the tort standard; it “reflects foundational tort law principles.”²⁶⁶ Beyond congruent analysis, the underlying interests and harms of hostile work environment claims, things like the protection of “bodies, dignity, and psychic well-being,” map

²⁵⁶ *Ellerth*, 524 U.S. at 744, 756. The *Ellerth* Court uses the word “tort” 43 times throughout the opinion. *Id.*

²⁵⁷ *Id.* at 756.

²⁵⁸ *Id.* at 744 (quoting Restatement (Second) of Agency § 219(2)(d)).

²⁵⁹ *Ellerth*, 524 U.S. at 771–772 (Thomas, J., dissenting).

²⁶⁰ See Levinson, *supra* note 12, at 113 (“In cases where the harassment is perpetrated by coworkers, victims would have to demonstrate that the religious employer’s response was negligent, thereby meeting the same negligence standard common to all tortious conduct.”).

²⁶¹ *Malicki v. Doe*, 814 So. 2d 347, 364 (Fla. 2002).

²⁶² *Id.*

²⁶³ *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

²⁶⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

²⁶⁵ *Vance*, 570 U.S. at 446 (explaining that the “negligence standard . . . is thought to provide adequate protection for tort plaintiffs in many other situations. There is no reason why this standard, if accompanied by proper instructions, cannot provide [adequate protection] in the context at issue here”). See also Levinson, *supra* note 12, at 113.

²⁶⁶ Lupu & Tuttle, *supra* note 17, at 266.

perfectly onto the concerns typically at issue in tort law.²⁶⁷

iii. Hostile work environment claims are, accordingly, not categorically barred by the First Amendment.

This argument has a basic logical structure: 1) tort claims do not categorically violate the First Amendment, 2) hostile work environment claims are essentially tort claims and, therefore, 3) hostile work environment claims do not categorically violate the First Amendment. Judges are capable of First Amendment-sensitive case-by-case analyses of tort claims against religious employers. Hostile work environment claims are analogous to torts; therefore, judges can permissibly use case-by-case analysis to analyze hostile work environment claims. Opponents of this view infrequently oppose point one: Most scholars concur that tort claims do not categorically violate the First Amendment.²⁶⁸ Opponents do, however, frequently attack this argument on point two: They argue that hostile work environment claims and tort claims are importantly different.

In an *amici curiae* brief in support of the petition for rehearing en banc in *Demkovich*, amici argued that the tort analogy is inapplicable because 1) “tort law defines unlawful conduct in objective terms,” while hostile work environment claims are subjective, and 2) hostile work environment claims “typically arise out of speech that is alleged to be hostile or offensive” while tort claims arise out of conduct.²⁶⁹ The first argument falls short when we consider the tort of intentional infliction of emotional distress; torts, like hostile environment claims, often require both objective and subjective factors.²⁷⁰ Hostile work environment claims are no more subjective than permissible tort claims. As for the second argument, torts, just like hostile work environment claims, can arise out of verbal or physical abuse.²⁷¹ Torts and hostile work environment claims both arise out of conduct.²⁷²

²⁶⁷ *Id.* at 286.

²⁶⁸ *See, e.g.,* *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1244–45 (10th Cir. 2010) (quoting Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)) (“‘Of course churches are not—and should not be—above the law.’ Churches ‘may be held liable for their torts and upon their valid contracts.’”); Esbeck, *supra* note 154, at 76–77 (explaining that minister’s tort claims are analyzed on a case-by-case basis and asserting “there can be little question that religious officers and organizations are liable in tort for assault, battery, false imprisonment, and the like, all claims which involve coercive and often violent activity”); Helfand, *supra* note 252, at 905–06 (explaining how tort claims based on religious shunning have “[f]or the most part,” been dismissed on church autonomy grounds, but acknowledging that this is not categorically the case).

²⁶⁹ Brief for Robert F. Cochran, et al. as Amici Curiae Supporting the Petition for Reh’g En Banc, at 4–5, *Demkovich v. St. Andrew’s the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142).

²⁷⁰ *See, e.g.,* *Anderson v. First Century Fed. Credit Union*, 738 N.W.2d 40, 51–52 (S.D. 2007) (explaining that an intentional infliction of emotional distress claim requires “(1) an act by the defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause the plaintiff severe emotional distress; (3) the defendant’s conduct was the cause in-fact of plaintiff’s distress; and (4) the plaintiff suffered an extreme disabling emotional response to defendant’s conduct”).

²⁷¹ *See* *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 569 n.18 (1987) (“The American Law Institute urges that as long as the distress [in a claim of intentional infliction of emotional distress] is ‘genuine and severe,’ bodily harm should not be required. Restatement § 46(k). Many jurisdictions have adopted the Restatement’s approach, *see, e.g.,* *Poulsen v. Russell*, 300 N.W.2d 289, 291 (Iowa 1981); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me.1979).”).

²⁷² *See* Brief for Robert F. Cochran, et al. as Amici Curiae Supporting the Petition for Reh’g En Banc, at 4–5, *Demkovich v. St. Andrew’s the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142) (explaining that the tortious nature of the claim requires an objective standard).

An additional argument is that hostile work environment claims are necessarily distinct from torts because hostile work environment claims *only* exist thanks to the employment relationship. This, however, is a distinction without a difference. The argument presumes that in all hostile work environment claims the “right at issue is the right to employment.”²⁷³ Remedies for hostile work environments, like remedies in tort, run the gamut. Reinstatement, for example, or other substitutes for reinstatement,²⁷⁴ would necessarily violate the First Amendment. Remedies for hostile work environment, cabined by what remedies are permissible under tort claims, would pose no similar First Amendment problem. Remedies for the harm the harassment caused do not implicate the “right to employment.”

C. Case-by-case analysis is the only constitutionally sound approach forward.

This article does not posit radical change or demand an overhaul of the ministerial exception. To the contrary, this article recognizes the constitutional grounding of the exception and the normative and constitutional importance of allowing religious organizations to select ministers without state interference. This article endorses a modest approach: a case-by-case analysis of hostile work environment claims by ministerial employees. Some claims may violate a church’s First Amendment rights and should, accordingly, be barred by the ministerial exception. The proposal herein does not displace a court’s right to utilize the ministerial exception in harassment cases.²⁷⁵ Rather, this proposal modestly asks a court to look at the specific facts of the case or controversy and determine whether the suit can go forward without intruding on a defendant’s First Amendment rights. If a set of facts does not implicate the church’s First Amendment rights, the case should go forward.

Congress intended Title VII to cover religious employers and ministerial employees.²⁷⁶ Congressional intent and statutory text can, of course, be overturned by the demands of the Constitution; they cannot, however, be overthrown by mere speculation.²⁷⁷ A categorical exception of

²⁷³ Oral Argument at 20:58, *Demkovich v. St. Andrew the Apostle Par.*, Calumet City, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142), <http://media.ca7.uscourts.gov/oralArguments/or.jsp?caseyear=19&casenumber=2142&listCase=List+case%28s%29> [<https://perma.cc/4593-DXP2>].

²⁷⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012) (“Perich continues to seek front pay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney’s fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna–Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.”).

²⁷⁵ *See, e.g. Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *7 (D. Neb. Apr. 22, 2015) (utilizing a case-by-case analysis and looking at the specific facts of the case, the court held that the First Amendment required the minister’s harassment claim be dismissed).

²⁷⁶ *See* 42 U.S.C. § 2000e-2(a) (“It shall be an unlawful employment practice 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.”); 42 U.S.C. § 2000e-1(a) (2013) (Title VII does not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion,” but does apply with respect to an individual’s race, color, sex, or national origin).

²⁷⁷ *See Vartanian, supra* note 194, at 1056–57 (quoting *Crowley v. State*, 268 N.W.2d 616, 618 (S.D. 1978)) (“[T]here is a presumption that a congressional statute, such as Title VII, does not violate the First Amendment, for ‘it is not for the courts to assume in advance that Congress will pass any legislation in violation of the First Amendment.’ . . . Accordingly, when a party

hostile work environment claims by ministerial employees relies on unsubstantiated speculation that all such claims will violate the First Amendment. Since religious organizations have no blanket immunity from litigation, however, whether the First Amendment demands immunity in a given case must depend on the “potential in each case for interference with the selection of clergy or conflict with religious teaching.”²⁷⁸ First Amendment concerns may, in some cases, never occur. Some cases may be proven by “neutral methods of proof”²⁷⁹ and fail to implicate a church’s selection and control of its ministers and the church-minister relationship. Categorically excepting all hostile work environment claims by ministerial employees, before a speculative First Amendment issue even arises, would be premature. If it becomes clear that a plaintiff cannot prevail without inquiring into ecclesiastical policy or other matters protected by the First Amendment, a court can and must, at that point, end the suit.²⁸⁰ That case-by-case analysis may at times require nuanced, challenging decisions does not mean courts should acquiesce and abandon their constitutional duty.²⁸¹ Courts must attempt to use neutral principles of law to adjudicate the case before them;²⁸² if First Amendment issues arise, courts can react accordingly.²⁸³

Not only is a categorical approach unnecessary under the First Amendment, it may actually pose independent Establishment Clause problems.²⁸⁴ The Establishment Clause prohibits religious exemptions from generally applicable laws when the exemption would do material harm to third

challenges a statute on First Amendment grounds, it ‘will not be set aside when any state of facts may reasonably be conceived to justify it.’ This heavy burden on the challenger places ‘[a]ll presumptions . . . in favor of the constitutionality of a statute and this continues until the contrary is shown beyond a reasonable doubt.’” (citations omitted).

²⁷⁸ Lupu & Tuttle, *supra* note 17, at 274 (citing *McKelvey v. Pierce*, 800 A.2d 840, 853–54 (N.J. 2002)).

²⁷⁹ *Minker v. Balt. Ann. Conf. of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990).

²⁸⁰ *See, e.g., id.* at 1360; *Costello Publ’g Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (holding that if some form of inquiry is permissible without violating the constitution, the claim need not be dismissed); *McKelvey v. Pierce*, 800 A.2d 840, 852–53 (N.J. 2002) (“It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy . . . Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion. On the other hand, it may turn out that the potentially mischievous aspects of Minker’s claim are not contested by the Church or are subject to entirely neutral methods of proof. The speculative nature of our discussion here demonstrates why it is premature to foreclose appellant’s contract claim.”).

²⁸¹ *Cath. Bishop of Chicago v. N.L.R.B.*, 440 U.S. 490, 518 (1979) (Brennan, J., dissenting) (“[W]hile the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent.”); *McKelvey*, 800 A.2d at 844 (“The First Amendment does not immunize every legal claim against a religious institution and its members. The analysis in each case is fact-sensitive and claim specific, requiring an assessment of every issue raised in terms of doctrinal and administrative intrusion and entanglement. In our view, the lower courts failed to engage in that kind of painstaking analysis and painted with too broad a brush when dismissing *McKelvey*’s case in its entirety. We thus reverse and remand the case to the trial court to determine, on an issue-by-issue basis, whether any of *McKelvey*’s claims may be adjudicated consistent with First Amendment principles.”).

²⁸² *See Jones v. Wolf*, 443 U.S. 595, 604 (1979).

²⁸³ Courts must require religious employers satisfy the burden of persuasion. *See Vartanian, supra* note 194, at 1056–57. First Amendment concerns must be explicitly stated and the specific harassment itself – both the substance and the manner of criticism – justified and embraced by the religious employer. *See id.* at 1068; Lupu & Tuttle, *supra* note 17, at 293.

²⁸⁴ *See Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1184 (Md. 2011) (“Declining to impose neutral and otherwise applicable tort or contract obligations on religious institutions and ministers may actually support the establishment of religion, because to do so effectively creates an exception for, and may thereby help promote, religion.”).

parties.²⁸⁵ An exemption that favors religion at the expense of the non-religious – an exemption that burdens those not benefitted – is impermissible.²⁸⁶ As one commentator put it: to “say that religious liberty must encompass the right to harm others is to turn the First Amendment on its head.”²⁸⁷ Depriving hundreds of thousands²⁸⁸ of employees the right to workplaces with dignity and free from harassment on the basis of sex, race, national origin, age, and disability unquestionably imposes material harm on those individuals.

A case-by-case analysis recognizes this danger and responds accordingly. The First Amendment may at times bar hostile work environment claims by ministerial employees when inquiry into the claim will excessively entangle a court with religious questions.²⁸⁹ At the same time, a case-by-case analysis ensures that the courthouse door is not automatically shut. A categorical exemption, to the contrary, would allow those hundreds of thousands of employees to be harmed without any accountability, even when no First Amendment issues are at play. A categorical exemption would certainly “turn the First Amendment on its head.”²⁹⁰

The contrary argument holds that a categorical rule is necessary to protect religious organizations’ First Amendment rights. “If a Church must litigate a case to final judgment before the judiciary will respect its First Amendment immunity, it will, in effect, lose it.”²⁹¹ The concern is that judicial inquiry itself undermines a church’s religious liberty,²⁹² and that case-by-case analysis is

²⁸⁵ See, e.g., *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) (“[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment.”); *Estate of Thornton v. Caldor Inc.*, 472 U.S. 703, 711–12 (1985).

²⁸⁶ See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the Religious Land Use and Institutionalized Persons Act comported with the Establishment Clause only because courts that apply it “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries”).

²⁸⁷ Freeman, *supra* note 201, at 147 (quoting Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1049–50 (2009)).

²⁸⁸ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2081–82 (2020) (Sotomayor, J., dissenting); Brief for Prof. Leslie C. Griffin et al. as Amici Curiae Supporting Respondents, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-533) (“The Hartford Institute concludes that there are ‘roughly 335,000’ religious congregations in the United States . . . According to Bureau of the Census estimates, in 2008 government agencies reported that 179,682 religious organizations of all sorts had about 1.7 million paid employees.”). Religious organizations and advocates are also taking steps to increase the number and expand the category of employees covered by the ministerial exception, indicating that this number will only grow. See, e.g., FIRST LIBERTY, RELIGIOUS LIBERTY PROTECTION KIT FOR CHRISTIAN SCHOOLS 34, 36 (2016), https://firstliberty.org/wp-content/uploads/2016/10/RLA_CHRISTIAN_SCHOOLS.pdf [<https://perma.cc/LWV8-364V>].

²⁸⁹ Religious employers must bear the burden of persuasion to demonstrate such *excessive* entanglement. Vartanian, *supra* note 194, at 1068.

²⁹⁰ Freeman, *supra* note 201, at 147 (quoting Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1049–50 (2009)).

²⁹¹ Brief for the State of Indiana, et al. as Amici Curiae Supporting Petition for Reh’g En Banc, at 6, *Demkovich v. St. Andrew’s the Apostle Par., Calumet City*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142).

²⁹² *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (“It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”).

insufficiently protective.²⁹³ As courts have noted, however, the ministerial exception and church autonomy broadly “may serve as a barrier to the success of a plaintiff’s claims, but [neither] affect[s] the court’s authority to consider them.”²⁹⁴ Moreover, courts engaging in case-by-case analysis must nonetheless dismiss claims once it is clear that they cannot be proven without infringing on the First Amendment.²⁹⁵ Religious defendants can bring motions for summary judgment or motions to dismiss as soon as there is evidence that further inquiry would infringe upon their constitutional rights. The flexibility of case-by-case analysis protects religious organizations’ religious liberty and meets constitutional demands. Case-by-case analysis further respects the protective bend of Supreme Court precedent while protecting individuals from irremediable harassment.

CONCLUSION

Workplace harassment is ubiquitous, abhorrent, and to some extent, remediable. Access to justice depends on access to hostile work environment claims. Hostile work environment claims by ministerial employees can coexist with robust religious freedom and respect for religious organizations’ First Amendment interests and rights. Case-by-case analysis of ministerial employees’ hostile work environment claims is a constitutionally sound path forward, and respects individual rights and religious organizations’ freedom. Ministerial employees’ hostile work environment claims need not, and should not, be categorically barred by the ministerial exception.

²⁹³ See Laycock, *supra* note 3, at 1392 (arguing that the possibility of government intrusion is “too unpredictable to be avoided on a case-by-case basis. [It] can be minimized only by a strong rule of church autonomy”).

²⁹⁴ *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006)); see also *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014).

²⁹⁵ See, e.g. *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *7 (D. Neb. Apr. 22, 2015).