DePaul Law Review

Volume 71
Issue 1 *Fall 2021*

Article 6

The Seventh Circuit Got it Right the First Time: Addressing the Ministerial Exception and Workplace Harassment

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THE SEVENTH CIRCUIT GOT IT RIGHT THE FIRST TIME: ADDRESSING THE MINISTERIAL EXCEPTION AND WORKPLACE HARASSMENT

I. Introduction

In 2012, the Supreme Court formally recognized a "ministerial exception" preventing Title VII discrimination claims against religious employers by their "ministers."[1] However, the Supreme Court left many questions unanswered regarding the "ministerial exception," especially how it applies to workplace harassment.[2] Thus far, three appellate courts have opined differently on the ministerial exception's applicability to workplace harassment claims, setting up an inevitable Supreme Court decision to address the current split in authority.[3] This Note argues that the Supreme Court should adopt the reasoning in the Seventh Circuit's vacated, original judgment in *Demkovich v. St. Andrew the Apostle Parish*.[4]

Part II of this Note provides a background of the ministerial exception and how it has been interpreted by various circuit courts.[5] Part III analyzes these appellate court decisions, arguing that the Seventh Circuit's original decision in *Demkovich* should be followed because it employs the clearest line of reasoning and, therefore, should be controlling precedent moving forward.[6]

Part IV examines the detrimental impact of expanding the ministerial exception to workplace harassment claims.[7] This Part further suggests that the Supreme Court should adopt the analysis the Seventh Circuit originally provided in *Demkovich* before the Seventh Circuit reversed its decision.[8]

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1. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012).

2. Jessica L. Waters, *Testing* Hosanna-Tabor*: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 Stan. J. of Civ. Rts. & Civ. Liberties 47, 58–59 (2013).

3. *See infra* Part II.

4. From here on, the Seventh Circuit's vacated judgment will be referred to as the original *Demkovich* decision.

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

II. History of the Ministerial Exception

This Part provides background on the constitutional and statutory foundations of the ministerial exception and the Supreme Court decisions delineating its scope. Next, this Part discusses the circuit court decisions leading to the current split in authority over the ministerial exception's applicability to workplace harassment claims.

A. The First Amendment

The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[9] Since the drafting of the Constitution, scholars have debated the intended scope of the First Amendment.[10] How much interference by the government is permissible? Is the government allowed to interfere at all?

The First Amendment is divided into two clauses: the Free Exercise Clause and the Establishment Clause.[11] The Free Exercise Clause prevents the government from regulating people's religious beliefs, allowing Americans the freedom to accept and practice whatever beliefs they choose.[12] The Establishment Clause prohibits the government from establishing an official religion in the United States.[13] The full extent of what establishing a religion means is unclear.[14] While many cases involving religion and the First Amendment only implicate one of the Religion Clauses, the ministerial exception is unique in that it deals with both the Free Exercise Clause and the Establishment Clause.[15]

B. Title VII and Existing Workplace Harassment Remedies

In 1964, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964.[16] Title VII of the Civil Rights Act (Title VII) pre-

9. U.S. Const. amend. I.

10. Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, Am. Bar Ass'n, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/the-ongoing-challenge-to-define-free-speech/ (last visited Oct. 30, 2021).

11. *First Amendment and Religion*, U.S. Cts., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Feb. 19, 2021).

12. *Free Exercise Clause*, Legal Information Inst., https://www.law.cornell.edu/wex/free_exercise_clause (last visited Feb. 20, 2021).

13. *First Amendment and Religion*, *supra* note 11.

14. *Id.*

15. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n., 565 U.S. 171, 188–89 (2012).

16. *Timeline of Important EEOC events*, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/youth/timeline-important-eeoc-events (last visited Feb. 19, 2021).

vents employers from discriminating on the basis of "race, color, religion, sex, or national origin" when making employment decisions.[17] The U.S. Equal Employment Opportunity Commission (EEOC) states that harassment is a form of workplace discrimination that violates Title VII.[18] The EEOC defines harassment as "unwelcome conduct that is based on race, color, religion, sex . . . national origin, age . . . disability, or genetic information."[19] Once the harassment reaches a level that creates a hostile work environment, the harassment becomes unlawful.[20] Slight annoyances do not constitute illegal conduct.[21] On its website, the EEOC lists examples of misconduct that rise to the level of illegal conduct such as offensive jokes, slurs, name calling, ridicule, and put-downs, amongst other forms of harassment.[22]

Under Title VII, employers are liable for harassment if it is conducted by a supervisor and results in an employee's termination, failure of promotion, loss of wages, or other similar repercussions.[23] Employers are also liable for harassment by any other employee if the employer knew about the harassment and failed to take action.[24] However, the options for relief under a Title VII claim are minimal.[25] Different intentional tort theories are used when trying to obtain relief by someone who was harassed in the workplace.[26] Equitable relief such as injunctions and the payment or reduction of backpay are some of the few remedies that a harassed employee has under Title VII.[27] In contrast, compensatory or punitive damages are not permitted forms of relief under Title VII.[28]

Due to their special status under the Religion Clauses, religious organizations have been able to escape many of Title VII's comprehen-

17. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2019).

18. *Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/harassment (last visited Jan. 2, 2021).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Harassment*, *supra* note 18.

25. *See* Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers,* 99 YALE L.J. 1611, 1615 (1990).

26. *See generally* David Yamada, *Workplace Bullying and the Law: A Report from the United States*, *in* JAPAN INST. FOR LAB. POL'Y & TRAINING REPORT NO. 12, 165 (2013)*; see also* Bradford, *supra* note 25, at 1618–20 (Specifically, in cases involving sexual harassment in the workplace, the theories of intentional infliction of emotional distress, assault and battery, and others are used. However, the standard to recover is hard to overcome in these cases.).

27. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Feb. 20, 2021).

28. Bradford, s*upra* note 25, at 1620.

sive employee protections. Under Title VII, religious organizations are "permitted to give preference to members of their own religion"; this is known as the "Religious Organization Exception."[29] "[C]ourts have struggled with the question of how to treat disputes involving religious institutions," leading to the current split in authority regarding the "ministerial exception."[30]

C. The Birth of the Ministerial Exception

The ministerial exception is a legal doctrine that "allows religious organizations to avoid federal anti-discrimination laws."[31] The ministerial exception is justified by the Supreme Court's historical reluctance to intervene in the internal matters of the Church. The Founding Fathers sought to preclude the United States from forming a national church, something they were familiar with from their experiences with the Church of England.[32] The First Amendment was adopted based on this skepticism towards state religion.[33] Given the understanding that religion should be free from governmental interference, it was not until 1952, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church,* that the Supreme Court officially recognized that churches had the freedom to select their clergy members.[34]

The first appearance of a ministerial exception was established in *McClure v. Salvation Army* in 1972.[35] In that case, Billie McClure was a minister at the Salvation Army, a church.[36] She was terminated from her position and subsequently brought suit against the Salvation Army contending that the Church had engaged in discriminatory employment practices in violation of Title VII.[37] In deciding the case, the Fifth Circuit paid particular attention to the special relationship be-

29. *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 22, 2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace#:~:text=religious%20Organization%20Exception%3A%20Under%20Title%20VII%2C%20religious%20organizations,institutions%20whose%20%E2%80%9Cpurpose%20and%20character%20are%20primarily%20religious.%E2%80%9D.

30. Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 483 (2001).

31. *The U.S. Supreme Court Expands the Ministerial Exception*, JDSUPRA (July 15, 2020), https://www.jdsupra.com/legalnews/the-u-s-supreme-court-expands-the-96963/.

32. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n., 565 U.S. 171, 183 (2012).

33. *Id.*

34. *Id.* at 185–86.

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

36. *Id.* at 554.

37. *Id.* at 555.

tween a church and its minister.[38] The Fifth Circuit referred to the relationship between a church and its minister as its "lifeblood."[39] Because a court would have to investigate matters of "ecclesiastical cognizance" in Title VII cases between a church and its minister, the State could easily intrude on matters of the Church.[40] The Fifth Circuit stated that applying the Title VII provisions to relationships between a church and its minister "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[41] After *McClure*, every circuit recognized a ministerial exception barring judicial inquiry into the employment decisions of religious organizations; however, a case involving the ministerial exception did not reach the Supreme Court until 2012 when the Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[42]

Hosana-Tabor was a unanimous decision in which the Supreme Court recognized that the Religion Clauses of the First Amendment prohibited certain employment discrimination claims from being brought against religious organizations.[43] Hosanna-Tabor was a member of the Lutheran Church-Missouri Synod.[44] Their teachers were divided into two categories: "called and lay."[45] "Called teachers are regarded as having been called to their vocation by God through a congregation."[46] To become a "called teacher," candidates had to satisfy specific academic requirements.[47] On completion of these requirements, teachers could be extended the opportunity to be "called."[48] "Called" teachers were then given the title "Minister of Religion, Commissioned."[49] The Respondent in *Hosanna-Tabor* was Cheryl Perich.[50] Perich was employed as a teacher at the school and, after

38. *See id.* at 559.

39. *Id.* at 558.

40. *Id.* at 560 (Here, the Court meant "ecclesiastical cognizance" issues that involved a Church and its clergy. By adjudicating these issues, the Court would have to make decisions based on or about religion.).

41. *McClure*, 460 F.2d at 560.

42. John R. Vile, *Ministerial Exception*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1461/ministerial-exception (last visited Oct. 30, 2021).

43. *See generally id.*

44. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 177 (2012).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id*. at 177.

49. *Id.*

50. *Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 556 U.S. at 178.

completing the requirements, was asked to be a "called" teacher.[51] In June 2004, Perich was diagnosed with narcolepsy.[52] She was placed on disability leave for the 2004 to 2005 school year.[53] When Perich indicated that she was able to return to teaching, issues arose.[54] The school principal expressed concerns about Perich returning and alerted Perich that the school had already found a replacement for her for the rest of the year.[55] Hosanna-Tabor held a congregation meeting where the congregation voted to release Perich from her position.[56] When Perich refused to resign, Hosanna-Tabor notified Perich that the congregation was terminating her.[57]

Perich alleged that her termination violated the Americans with Disabilities Act of 1990 and brought suit against Hosanna-Tabor.[58] In defense, Hosanna-Tabor argued that the suit was "barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers."[59] The Supreme Court's decision formally recognized the "ministerial exception."[60] The Court stated that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[61] Further, the Court reasoned that precedent prohibited the government from being involved in "a church's determination of who can act as its ministers."[62] In defining the ministerial exception, the Court noted:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the *Free Exercise Clause*, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the *Establishment Clause*, which prohibits government involvement in such ecclesiastical decisions.[63]

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id*.
55. *Id.*
56. *Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 565 U.S. at 178.
57. *Id.* at 179.
58. *Id.* at 179.
59. *Id.* at 180.
60. *Id*. at 188.
61. *Id.* at 181.
62. *Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 565 U.S. at 182.
63. *Id.* at 188–89 (emphasis added).

Further, the Supreme Court acknowledged that the ministerial exception went beyond the "head of a religious congregation."[64] The Court stated that "the formal title given [to] Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church" indicated that Perich was a minister and thus was covered by the "ministerial exception."[65] As a result, Hosanna-Tabor could not be liable to Perich for termination based on discrimination.[66]

While the Supreme Court stated that the ministerial exception applied to Perich, it refused to adopt "a rigid formula for deciding when an employee qualifies as a minister."[67] However, the court did express an intention to limit the scope of the exception, noting that it only applied to employment discrimination claims and expressing "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."[68]

D. Post-Hosanna-Tabor

Because of the Supreme Court's refusal to state a formula for defining a minister, the main question that arose post-*Hosanna-Tabor* was how courts would define the position of minister.[69] The question was resolved in *Our Lady of Guadalupe School v. Morrissey-Berru*.[70] The case combined two employment disputes involving religious schools.[71]

The first case involved Agnes Morrissey-Berru, a fifth and sixth grade teacher at Our Lady of Guadalupe School, a Roman Catholic primary school.[72] Morrissey-Berru taught all subjects, including religion.[73] Each year, teachers entered into employment agreements with Our Lady of Guadalupe School.[74] These agreements "made clear that teachers were expected to 'model and promote' Catholic 'faith and

64. *Id.* at 190.
65. *Id.* at 192.
66. *Id.* at 196.
67. *Id.* at 190.
68. *Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 565 U.S. at 196.
69. Leslie C. Griffin, *Divining the Scope of the Ministerial Exception*, AM. BAR ASS'N (Jan. 1, 2013), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/divining_the_scope_of_the_ministerial_exception/.
70. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
71. *Id.* at 2055.
72. *Id.* at 2056.
73. *Id.*
74. *Id.*

morals.'"[75] The agreements also stated that teachers could be terminated for failing to adhere to these principles or for conduct that discredits the Roman Catholic Church.[76]

Morrissey-Berru prepared her students for religious service, prayed with her students, and taught them religious doctrine.[77] During the 2014 school year, the school asked Morrissey-Berru to switch from full-time to part-time; the following year, the school declined to renew her contract.[78] Subsequently, Morrissey-Berru sued the school for age discrimination alleging that it wanted to replace her with a younger teacher.[79]

The second dispute involved Kristen Biel who worked as a teacher at St. James School, a Catholic primary school.[80] Biel's employment agreement "required teachers to serve [their] mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases."[81]

Biel taught her students religion and the tenets of the Catholic Church.[82] After a year at the school, St. James did not renew Biel's contract.[83] Biel alleged that her contract was not renewed because she "requested a leave of absence to obtain treatment for breast cancer."[84] In response, St. James stated that Biel's contract was not renewed due to poor performance.[85]

Justice Alito, writing for the majority, opined that the title of minister is not enough to trigger, nor is it a necessary requirement, for the ministerial exception to apply.[86] Rather, the main inquiry for a court is: what does the employee do?[87] In analyzing this question, the Court concluded that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of education and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First

75. *Id.* at 2056.
76. *Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2057.
77. *Id.*
78. *Id.* at 2057–58.
79. *Id.* at 2058.
80. *Id.*
81. *Id.*
82. *Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2059.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 2063–64.
87. *Id.* at 2064.

Amendment does not allow."[88] Thus, because Morrissey-Berru and Biel were entrusted with carrying out the mission of the Catholic Church, educating and praying with their students, and guiding their students in the Catholic faith, both teachers fell within the ministerial exception.[89] The fact that they were not given the title "minister" and that they had less formal religious training was not controlling.[90] Their responsibilities demonstrated that they were essentially religion teachers.[91] However, despite expanding the application of the ministerial exception to teachers, the majority still refused to adopt a rigid formula that courts could use to decide if an employee falls within the exception.[92]

E. Emerging Circuit Split Over the Reach of the Ministerial Exception

Following *Morrissey-Berru*, courts are left to decide how *Hosanna-Tabor* applies to situations outside of employment discrimination.[93] One issue that courts have grappled with is whether the ministerial exception bars religious institutions from workplace harassment claims, setting up an emerging circuit split.[94]

1. Elvig Leaves the Door Open

Before the Supreme Court reached its decision in *Hosanna-Tabor*, insulating religious employers from Title VII claims over employment discrimination, circuits dealt with the ministerial exception on their own.

The Ninth Circuit dealt with the issue in *Elvig v. Calvin Presbyterian Church*.[95] The Ninth Circuit's reasoning was based on its earlier decision in *Bollard v. California Province of the Society of Jesus*.[96] *Bollard* involved a man training to become a priest in the Jesuit Order.[97] Bollard claimed that his superiors were sending him sexually

88. *Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2069.
89. *Id.* at 2066.
90. *Id.*
91. *Id.*
92. *Id.* at 2067.
93. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 196 (2012).
94. Jon Steingart, *Bullied Gay Worker Can Sue Catholic Church 7th Circ. Says*, LAW360 (Sept. 1, 2020, 7:01 PM), https://www.law360.com/employment-authority/articles/1306084/bullied-gay-worker-can-sue-catholic-church-7th-circ-says.
95. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).
96. *Id.* at 956.
97. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).

explicit messages and texts.[98] When Bollard brought suit for sexual harassment, the Jesuits argued that it should be barred under the ministerial exception.[99] However, the Ninth Circuit disagreed and concluded that there was neither Free Exercise nor Establishment Clause issues present in the case.[100]

First, the Ninth Circuit reasoned that the Jesuits did not offer a religious justification for the alleged harassment, thus, their argument did not involve any religious doctrine.[101] Therefore, Bollard's claim did not implicate the Free Exercise Clause.[102]

Second, the Ninth Circuit applied the Supreme Court's *Lemon* Test to analyze whether Bollard's claim implicated the Establishment Clause.[103] The *Lemon* Test was formed in an Establishment Clause case, *Lemon v. Kurtzman.*[104] The *Lemon Test* has three parts: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."[105] The *Lemon* Test prong that *Bollard* implicated was the "excessive government entanglement" prong.[106] The *Bollard* court divided entanglement into two types: substantive and procedural.[107] Procedural entanglement involves suits between a religious institution and the government.[108] Since Bollard's suit only involved "secular inquires," the procedural entanglement was "no greater than that attendant on any other civil suit a private litigant might pursue against a church."[109] Thus, the Ninth Circuit concluded that Bollard's suit did not run afoul of the Establishment Clause.[110]

The decision in *Bollard* was a departure from the original line of thinking regarding the ministerial exception.[111] The decision is particularly important because "the original understanding of the ministerial exception was that it provided a safe haven from state regulation

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 947.
102. *Id.* at 948.
103. *Bollard*, 196 F.3d at 948.
104. *Id*.
105. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations and quotations omitted)).
106. *Id.*
107. *Id.*
108. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 957 (9th Cir. 2004).
109. *Id.*; *Bollard*, 196 F.3d at 950.
110. *Bollard*, 196 F.3d at 150.
111. Coon, *supra* note 30, at 537–38.

for *all* matters involving the relationship between a church and its ministers."[112]

In *Elvig*, Monica Elvig, an ordained minister, served as an Associate Pastor at Calvin Presbyterian Church.[113] After taking her position, the Church's pastor began sexually harassing and intimidating Elvig, creating a hostile work environment.[114] She subsequently informed the Church of the harassment; however, the Church took no action to address the issue.[115] Instead, the Church's pastor retaliated against Elvig by verbally abusing her and taking away her duties.[116] Elvig then filed a charge of discrimination with the EEOC and the Church voted to terminate her shortly after.[117] Elvig proceeded to file another charge of sexual harassment, as well as hostile work environment and unlawful retaliation.[118]

In *Elvig*, the Ninth Circuit continued its line of thinking from *Bollard*.[119] *Elvig* states that sexual harassment is not a protected employment decision.[120] Thus, Elvig's harassment claim could proceed without triggering the ministerial exception.[121] The harassment aspect of Elvig's claim would only require a secular inquiry, not an inquiry into the Church's religious doctrine.[122] However, since Elvig alleged tangible employment decisions which are protected by the ministerial exception, such as her suspension and subsequent termination, her claim also implicated the First Amendment.[123] Thus, the harassment aspect of her claim had to be separated from the tangible employment decision aspect.[124] In justifying this separation, the Ninth Circuit clearly articulated why the ministerial exception should not apply to Title VII harassment claims:

> If we were to ignore *Bollard* and adopt a rule that the First Amendment bars Elvig from even stating a Title VII claim—out of speculation that that the affirmative defense *might* somehow involve some doctrinal component—we would be affording blanket First Amend-

112. *Id.* at 538.
113. *Elvig*, 375 F.3d at 953.
114. *Id.*
115. *Id*. at 953–54.
116. *Id.* at 954.
117. *Id.* at 954.
118. *Id.*
119. *See Elvig*, 375 F.3d at 955–56.
120. *Id.* at 962.
121. *Id.*
122. *Id.* at 959.
123. *Id.* at 961–62.
124. *Id.* at 964.

> ment protection to churches that unreasonably fail to address clear instances of sexual harassment.[125]

However, despite the Ninth Circuit's willingness to allow Elvig's harassment claim to move forward, the court created a concerning loophole which would allow religious organizations to invoke doctrinal defenses to harassment claims. The court noted that if a hostile work environment claim or workplace harassment claim is brought against a religious institution, the religious institution can invoke the ministerial exception and argue that the alleged harassment is in fact a part of the Church's doctrine.[126] While Calvin Presbyterian Church did not allege that the harassment was justified based on their religious beliefs, the loophole nevertheless opened the door for other religious institutions to use this defense.[127] Thus, there may be room for the ministerial exception in harassment cases but the Ninth Circuit did not "interpret it as a complete barrier to claims" by ministerial employees.[128]

2. The Tenth Circuit Splits from the Ninth Circuit

In 2010, the Tenth Circuit addressed a case similar to *Elvig* in *Skrzypczak v. Roman Catholic Diocese.*[129] In that case, Monica Skrzypczak worked as the director of the Department of Religious Formation for the Roman Catholic Diocese of Tulsa.[130] Although Skrzypczak received positive performance reviews during her time at the Diocese, she was terminated from her position after eleven years.[131] Skrzypczak sued, bringing claims under Title VII for gender and age discrimination and hostile work environment.[132] The Diocese responded by invoking the ministerial exception.[133]

The Tenth Circuit found that Skrzypczak was a minister because some of her duties, despite being purely administrative, furthered the core mission of the Diocese.[134] Skrzypczak argued that her claims of

125. *Elvig*, 375 F.3d at 964.
126. *See id.* at 963.
127. *Id.*
128. Marci A. Hamilton, *The Time Has Come for the Supreme Court to Carefully Examine the "Ministerial Exception," Which Allows Religious Employers to Discriminate in Hiring*, FINDLAW (July 22, 2010), https://supreme.findlaw.com/legal-commentary/the-time-has-come-for-the-supreme-court-to-carefully-examine-the-ministerial-exception-which-allows-religious-employers-to-discriminate-in-hiring.html.
129. Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1244 (10th Cir. 2010).
130. *Id.* at 1240.
131. *Id.* at 1240–41.
132. *Id.* at 1241.
133. *Id.*
134. *Id.* at 1243.

hostile work environment and intentional infliction of emotional distress were not protected by the ministerial exception because they did not involve employment discrimination.[135] The Tenth Circuit rejected this argument, stating that allowing this kind of claim would "involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy."[136] The Tenth Circuit then announced that hostile work environment claims are barred by the ministerial exception.[137] Thus, the Tenth Circuit declined to follow the Ninth Circuit's decision.[138]

3. The Seventh Circuit Joins the Split

The Seventh Circuit joined the fray over whether workplace harassment claims are barred by the ministerial exception with its decision in *Demkovich*.[139] Sandor Demkovich was the music director at St. Andrew the Apostle Church.[140] He was fired after two years of employment.[141] Demkovich was gay and had been with his partner for over a decade.[142] Demkovich was also overweight and suffered from diabetes and metabolic syndrome.[143] At the time of his hiring, the Church was aware of his sexual orientation and health.[144] Reverend Dada, Demkovich's supervisor, subjected Demkovich to hostile comments about his sexual orientation and repeatedly harassed him about his weight and medical issues.[145] After Demkovich married his partner, Reverend Dada demanded his resignation, which Demkovich refused, resulting in his termination.[146] Demkovich sued St. Andrew the Apostle Parish on hostile work environment claims.[147]

In its original decision, the Seventh Circuit addressed whether some types of claims are exempt from the ministerial exception and thus permissible under the First Amendment.[148] The Seventh Circuit took the position that the ministerial exception ensures that religious orga-

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

136. *Id.* at 1245 (quoting Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 976 (9th Cir. 2004) (Trott, J., dissenting)).

137. *Id.* at 1246.

138. *Id.* at 1245.

139. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 736 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

140. *Demkovich*, 973 F.3d at 721.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 721.

146. *Demkovich*, 973 F.3d at 721.

147. *Id.* at 723.

148. *Id.* at 724.

nizations can "select and control" who their ministers are; therefore, the exception applies to all employment actions surrounding hiring, firing, promoting, retiring, and transferring decisions.[149] In the Seventh Circuit's view, hostile work environment claims can be separated from claims about "select[ion] and control."[150] The Seventh Circuit concluded that under *Hosanna-Tabor*, "[s]upervisors within religious organizations have no constitutionally protected individual rights . . . to abuse those employees they manage, whether or not they are motivated by their personal religious beliefs."[151]

However, the Seventh Circuit vacated its opinion on December 9, 2020, and granted a rehearing en banc.[152] The case was reargued on February 9, 2021, and was eventually decided on July 9, 2021.[153] Upon the rehearing en banc, the Seventh Circuit reversed its original decision and held that the ministerial exception barred Demkovich's hostile work environment claims.[154] The Seventh Circuit stated that "precluding hostile work environment claims arising from minister-on-minister harassment also fits within the doctrinal framework of the ministerial exception."[155] In the Seventh Circuit's opinion, the point of the ministerial exception is to prevent litigation from deciding "where a minister's supervisory power over another minister ends and where employment discrimination law begins."[156] If Demkovich was allowed to sue his employer, the court would interfere with the Free Exercise Clause, because the court would be "probing the ministerial work environment."[157] This would run afoul of the Free Exercise Clause because the Clause "protects a religious group's right to shape its own faith and mission."[158]

The Seventh Circuit also said that adjudicating hostile work environment claims by ministers would violate the Establishment Clause.[159] Further, the Seventh Circuit stated that the courts would become too entangled in the relationship between ministers if hostile

149. *Id.* at 727.

150. *Id.*

151. *Id.* at 730.

152. Daniel Wiessner, *In Brief: Full 7th Circuit will review scope of Title VII religious exemption*, REUTERS (Dec. 9, 2020, 5:10 PM), https://www.reuters.com/article/employment-religious/in-brief-full-7th-circuit-will-review-scope-of-title-vii-religious-exemption-idUSL1N2IP3CW.

153. Demkovich v. St. Andrew the Apostle Par., 3. F.4th 968, 973 (7th Cir. 2021).

154. *Id*. at 985.

155. *Id.* at 979.

156. *Id.*

157. *Id.* at 980.

158. *Id.* (quoting Hosanna-Tabor v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012)).

159. *Demkovich*, 3. F.4th at 980.

work environment claims were allowed.[160] Therefore, the Seventh Circuit reversed its prior decision and held that "adjudicating a minister's hostile work environment claims based on interactions between ministers would undermine this constitutionally protected relationship."[161]

The Supreme Court's decision in *Morrissey-Berru* expanded the scope of the ministerial exception in relation to employment discrimination claims.[162] While there were differing opinions on whether the Court reached the right outcome, not all were surprised by it.[163] Most courts have generally resisted deciding ecclesiastical questions for churches.[164] While churches are not exempt from federal employment discrimination laws brought by their non-ministerial employees, the decision in *Morrisey-Berru* allowed for an expansion of employees who can be considered ministers for the purpose of the ministerial exception.[165] Since *Morrisey-Berru*, the Supreme Court has been silent on other ministerial exception issues, leaving the lower courts to interpret how far to extend the exception.

III. Analysis of the Circuit Court Decisions

This Part analyzes the circuit court decisions surrounding the ministerial exception and workplace harassment claims. Part III argues that the Tenth Circuit's decision in *Skrzypczak* is incorrect and should be disregarded moving forward. Further, this Part explains why the Ninth Circuit's decision in *Elvig* was correct, albeit confusing. Finally, this Part examines the Seventh Circuit's original decision in *Demkovich*, before it was vacated, and argues that courts should follow this line of reasoning moving forward.

A. The Tenth Circuit Got It Wrong

The first instinct of any court is to not involve itself in matters regarding religion.[166] This notion was reflected by the Tenth Circuit's

160. *Id.* at 981.

161. *Id.* at 985.

162. Thomas Johnson II & Tanya Warnke, *The U.S. Supreme Court Expands the Ministerial Exception,* JDSUPRA (July 15, 2020), https://www.jdsupra.com/legalnews/the-u-s-supreme-court-expands-the-96963/#:~:text=ON%20July%208%2C%202020%2C%20in,avoid%20federal%20anti%2Ddiscrimination%20laws.

163. *See* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 Lewis & Clark L. Rev. 1265, 1267–68 (2017).

164. *Id*. at 1291.

165. *See* Waters, *supra* note 2, at 58, 76–77; Johnson & Warnke, *supra* note 162.

166. Coon, *supra* note 30, at 483–84.

decision in *Skrzypczak*.[167] In *Skrzypczak*, the Tenth Circuit categorically refused to allow ministerial employees to file any Title VII claims against their religious employer.[168] To the Tenth Circuit, the risk of procedural and substantive entanglement with the "Church's core functions" if a hostile work environment claim were allowed to proceed was too great.[169] The Tenth Circuit harshly criticized the Ninth Circuit's decision in *Elvig*, calling it an "arbitrary and confusing application" of the ministerial exception.[170] Admittedly, the decision in *Elvig*, while correct, was confusing and complicated.[171] However, with the original decision in *Demkovich*, concerns about a confusing application of the ministerial exception should be placated.[172]

The Tenth Circuit did not thoroughly analyze why the ministerial exception should apply to workplace harassment claims.[173] Stating that excessive entanglement will occur if courts allow workplace harassment claims to proceed, without demonstrating what that entanglement would be, renders its argument invalid.[174] While it may not be the easiest or the most comfortable decision to make, courts must be able to look at these cases as if the supervisor is not a part of the religious institution and the case does not involve any trace of religion.[175] As demonstrated by the Seventh Circuit, it is possible to separate the unlawful activity of workplace harassment from the religion itself.[176]

By separating hostile work environment and workplace harassment from tangible employment actions that implicate religious doctrine, Free Exercise and Establishment Clause issues can be avoided. If the claims cannot be separated, courts can simply handle those claims as they arise.[177] The Seventh Circuit in the original *Demkovich* decision

167. Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1245 (10th Cir. 2010).

168. *Id.* at 1246.

169. *Id.* at 1245.

170. *Id.*

171. *Id.* at 1244–45.

172. *Compare* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 738 (7th. Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021), *with* Elvig v. Calvin Presbyterian Church 375 F.3d 951, 961 (9th Cir. 2004).

173. *See* Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1246 (10th Cir. 2010).

174. *Id.* at 1245.

175. *See* Ira C. Lupu & Roger W. Tuttle, *Courts, Clergy and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 157 (2009) ("If both act and injury can be separated from the religious body's evaluative process, then and only to that extent, the defamation claim should be justiciable.").

176. *Demkovich*, 973 F.3d at 734–35.

177. *Id.* at 735 ("We believe that risk can be managed by avoiding substantive decisions on issues of religious doctrine or belief and by balancing First Amendment rights with the em-

demonstrated the way that courts should handle a workplace harassment claim against a religious employer.[178]

It is alarming that the Ninth Circuit's holdings in *Bollard* and *Elvig* give religious institutions the option to argue that harassment is a part of their doctrine, thus bringing the harassment within the purview of the ministerial exception.[179] However, there is no evidence suggesting that this tactic will prevail.[180] The Seventh Circuit originally demonstrated this through the dismissal of the defense's claim that the harassment Demkovich experienced was motivated by Catholic doctrine.[181] If churches do invoke this defense, then courts will encounter a First Amendment issue because previous Supreme Court decisions have held that it is improper for courts to question the "truthfulness or validity of religious beliefs."[182] Therefore, a court will not be able to reject an argument by a religious institution that harassment is a part of its religious doctrine if the religious institution sincerely believes it is a part of its doctrine.

The best way to prevent this is to preclude religious institutions from claiming harassment is a part of their religious doctrine. Preventing ministerial employees from filing federal claims against their religious employers signals that their employers are above the law and demonstrates that the government is not willing to support ministerial employees.[183] As Professor Robin West puts it, one would think that "because of their institutional role as moral leaders in civil society, [religious employers] should abide by public and private obligations of fairness."[184]

B. Harassment as a Religious Doctrine?

The Ninth Circuit correctly concluded in *Elvig* that Title VII harassment claims against religious institutions should move forward so long

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ployee's rights and the government's interest in regulating employment discrimination. We trust that district courts will manage these issues in their sound discretion.").

178. *Id.*

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

180. *Demkovich,* 973 F.3d at 734–35.

181. *Elvig*, 375 F.3d at 963; *Demkovich*, 973 F.3d at 734–35.

182. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170 (2d Cir. 1993) (citing Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886–87 (1990)).

183. *See generally* 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 (2019) ("The sexual harassment carve-out from the ministerial exception has at its base the principle that religious entities, like all other employers, must protect their employees from certain kinds of indignity and disrespect."). *Id.* at 300.

184. Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, SCHOLARSHIP AT GEO. 1, 4 (2015).

as they do not implicate protected ministerial decisions.[185] The ministerial exception was created to protect religious organizations from "constitutionally impermissible interference by the government."[186] However, Congress has a "fully applicable command 'to protect employees from sex discrimination—even employees of religious organizations.'"[187] By separating the harassment from tangible employment decisions, the Ninth Circuit struck the right balance between the First Amendment rights of religious institutions and the rights of employees to recover against their employer.[188] In fact, tangible employment decisions will not be involved at all in the inquiry because the only focus will be on a minister's decision to harass an employee.[189] By limiting the focus of the inquiry to harassment, religious institutions are given sufficient protection from the government intruding into their religious practices and decisions.[190] Thus, the Ninth Circuit's decision was the correct move forward because it protects religious employees' right to recover for harassment while maintaining separation between church and state.[191]

While the final decision by the Ninth Circuit in *Elvig* is correct, its most controversial aspect was the court's view that religious institutions can assert that harassment is a part of their religious teaching.[192] Professor Caroline Corbin presents an interesting argument to refute this position.[193] Professor Corbin argues that when religious organizations discriminate based on their religious doctrine, religious questions are not implicated.[194] This is because the religious institutions will have already articulated their religious doctrine when they present their defense.[195] Thus, Title VII cases can proceed while "deferring

185. *Elvig*, 375 F.3d at 969.

186. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999).

187. *Elvig*, 375 F.3d at 956 (quoting *Bollard*, 196 F.3d at 944).

188. *Id.* at 960.

189. *Id.* at 963.

190. *Id.*

191. *Id.* at 969.

192. Lupu & Tuttle, *supra* note 183, at 278; *Elvig*, 375 F.3d at 963.

193. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2014 (2007).

194. *Id.*

195. *Id.* Professor Corbin further explained this theory as follows:

> If the risk posed by a Title VII claim is that judging whether an employment decision was based on race or sex rather than true qualifications will require a court to determine a religious organization's tenets and who best embodies them, that risk disappears where the religious organization admits that sex or race played a role. For example, if 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.

Id.

completely to the religious organization on doctrinal questions."[196] For example, in Elvig's case, Calvin Presbyterian would have to admit that its religious doctrine permits harassment based on sex; thus, there would be no need to actually inquire into Calvin Presbyterian's doctrine.[197]

Although the argument seems contradictory, it demonstrates that the Ninth Circuit's statement regarding a possible doctrinal defense to workplace harassment claims is flawed.[198] Although the Ninth Circuit came to the correct decision, a much clearer and succinct articulation of the idea that Title VII workplace harassment claims should not be barred by the ministerial exception was detailed in the Seventh Circuit's original *Demkovich* decision.[199]

C. Demkovich Had It Right the First Time

The Seventh Circuit's original line of thinking in its first decision in *Demkovich* provides clearer guidance for courts to address claims of hostile work environment and workplace harassment against religious institutions.[200] The Seventh Circuit acknowledged the uncomfortable situation that courts deciding these types of cases face. Longstanding legal norms provide that courts should not decide ecclesiastical decisions, and there is no evidence suggesting that courts will stray from this standard.[201] However, workplace harassment and hostile work environment claims have nothing to do with ecclesiastical decisions because they are not "tangible employment actions," rather they are claims that fall outside of what is necessary to properly control and supervise ministerial employees.[202]

The Seventh Circuit had the difficult task of deciding the broad and consequential question of: "whether ministerial employee plaintiffs may *ever* bring hostile environment claims against religious employers."[203] In any case involving the government and a religious institution, neither the Free Exercise nor the Establishment Clause can be violated.[204] The Supreme Court in *Hosanna-Tabor* stated that the

196. *Id.*
197. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 963 (9th Cir. 2004).
198. *Id.*
199. *See* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 722–23 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).
200. *See generally Demkovich*, 973 F.3d at 722–23.
201. Lupu & Tuttle, *supra* note 183, at 1278.
202. *Demkovich*, 973 F.3d 718 at 723.
203. *Id.*
204. *First Amendment and Religion*, *supra* note 11.

ministerial exception is needed to protect the Church's right to free exercise and also to prevent excessive entanglement that would violate the Establishment Clause.[205] The Seventh Circuit took each clause separately and explained why allowing ministerial employees to sue would not violate either of the Religion Clauses.[206]

Under the Free Exercise Clause, the main issue is whether the harassment is a tangible employment action.[207] *Hosanna-Tabor* ensured that religious institutions could "select and control" their ministerial employees.[208] As the Seventh Circuit concluded, defining the meaning of "selection" is easy; it simply means to hire or fire an employee.[209] It is also not hard to discern the meaning of the issue of control. The ability to control one's employees can be accomplished through benefits, compensation, and training—all tangible employment actions.[210] Selection and control of employees does not include making degrading remarks or creating a hostile work environment.[211] However, Saint Andrew the Apostle Parish argued that the power given to them by *Hosanna-Tabor* was not enough to effectively control or select their ministers.[212] In its original judgment, the Seventh Circuit swiftly and correctly struck down this argument.[213] However, on rehearing en banc, the Seventh Circuit equated harassment of a ministerial employee to supervision of a ministerial employee.[214] This is a disturbing revocation of its past decision stating that there was not a tangible employment issue at stake regarding hostile work environment claims.[215]

There is no valid reason for employers to harass employees to get them to quit or to further control them because religious employers already have the ability to hire or fire employees based on their sexual orientation.[216] For example, if Saint Andrew the Apostle Parish had a

205. Hosanna-Tabor v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 181 (2012).
206. *Demkovich*, 973 F.3d at 727–34.
207. *Id.* at 727.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 728–29.
212. *Demkovich*, 973 F.3d at 728.
213. *Id.* at 729.
214. Demkovich v. St. Andrew Apostle Par., 3 F.4th 968, 979 (7th Cir. 2021).
215. *See* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021), *and* Demkovich v. St. Andrew Apostle Par., 3 F.4th 968. (7th Cir. 2021).
216. *Demkovich*, 973 F.3d at 729; *e.g.*, Lupu & Tuttle, *supra* note 183, at 292. The Seventh Circuit originally articulated this by stating the following:

> Because Demkovich was a ministerial employee, Dada could have lawfully dismissed Demkovich as soon as Dada learned of the employee's plan to marry a same sex part-

problem with Demkovich's sexuality, then there was nothing precluding it from terminating his employment.[217] As the Seventh Circuit originally stated, "[i]t is hard to see how the Church could not have adequately controlled plaintiff as a ministerial employee by deciding whether to hire him and whether to fire him, or by deciding his job duties . . . and so forth."[218]

The issue of excessive entanglement is arguably the hardest to reconcile.[219] As previously discussed in *Elvig,* two types of entanglement must be dealt with: procedural and substantive.[220] There is a chance that procedural entanglement can arise during a workplace harassment case involving a religious institution.[221] However, the risk of procedural entanglement does not support an outright ban on all hostile environment claims.[222] The Seventh Circuit originally suggested that courts are capable of dealing with procedural entanglement as it arises.[223]

The more complicated of the two entanglement issues is substantive entanglement.[224] Substantive entanglement entails civil courts deciding cases that involve religious institutions while applying neutral, secular principles of law.[225] Courts must avoid questioning religious doctrines.[226] The Seventh Circuit acknowledges the potential existence of substantive entanglement in future ministerial exception and workplace harassment cases.[227] However, the Seventh Circuit originally found that the risk posed by the entanglement was not excessive in *Demkovich*.[228] The harassment that Demkovich experienced was considered abuse under neutral, generally applicable standards which

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ner. Alternatively, Dada could have chosen to retain Demkovich as a Music Director while encouraging him—in a respectful or loving way, rather than a harsh and degrading way—to bring his conduct into conformity with church teaching.

Id.

217. *Demkovich*, 973 F.3d at 734 ("The Church was free to decide whether to retain plaintiff as a minister or fire him.").

218. *Id.* at 729.

219. *Id.* at 731–32.

220. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 956 (9th Cir. 2004); *Demkovich*, 973 F.3d at 732.

221. *Demkovich*, 973 F.3d at 733.

222. *Id.*

223. *Id.* ("[T]he potential for procedural entanglement does not bar plaintiff's claims here entirely. Courts can deal with procedural entanglement problems as they arise rather than closing the courthouse doors to an entire category of cases.").

224. *Id.*

225. *Id.*

226. *Id.*

227. *Demkovich*, 973 F.3d at 733.

228. *Id.* at 734 ("We are not persuaded that the risk of substantive entanglement is so great that this case or all such cases must be dismissed without further inquiry or discovery.").

would apply to non-ministers.[229] Courts can deal with the issue of substantive entanglement by balancing the Church's First Amendment rights with those of the employee and the interest that the government has in regulating employment harassment.[230]

The original *Demkovich* decision promulgated the notion that both religious liberty and "the rights of employees to be free from discriminatory hostile work environments" can be protected.[231] "The right balance is to bar claims by ministerial employees challenging tangible employment actions but to allow hostile environment claims that do not challenge tangible employment actions."[232] The ministerial exception will still be able to protect churches from being sued as a result of hiring and firing decisions, but by not extending the exception to these tortious-like claims, employees can retain protection from harassment.[233] In fact, the fear of excessive entanglement and intrusion on religious liberty may be unfounded.[234] The Ninth Circuit has not encountered the issue of entanglement in a single case in the nearly twenty years after its *Elvig* decision.[235]

The Seventh Circuit's strongest argument in the original decision was that the tortious nature of workplace harassment made the ministerial exception inapplicable.[236] Churches are not allowed to act criminally or tortiously towards their employees, ministerial or not.[237] Churches can be, and are, held accountable for torts and breaches of contract.[238] Allowing ministerial employees to bring hostile work claims against their religious employers would simply be an extension of an already present legal norm.[239] The growing amount of tort litigation against religious institutions signals that the public is sympathetic

229. *Id.*

230. *Id.* at 735.

231. *Id.* at 720 ("[T]he courts have a long history of balancing and compromising to protect religious freedom while enforcing other important legal rights.").

232. *Id.*

233. *Demkovich*, 973 F.3d at 729.

234. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 991 (7th Cir. 2021) (Hamilton, J., dissenting).

235. *Id.*

236. *Id.*

237. Lupu & Tuttle, *supra* note 183, at 286.

238. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985).

239. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 729 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021) ("*Hosanna-Tabor*'s decision not to extend constitutional protection to tortious conduct, in combination with the Court's understanding of hostile work environments as essentially tortious in nature, point toward allowing hostile work environment claims by ministerial employees so long as they do not challenge tangible employment actions.").

towards victims of "clergy exploitation."[240] The extensive tort litigation that the Catholic Church has recently faced also demonstrates that the risk of procedural entanglement can be avoided.[241] Secular legal rules can be applied to actions involving ministerial employees just as they are applied to everyone else.[242] Even *Hosanna-Tabor* stated that the specific holding did not cover tortious conduct by religious employers.[243] The tort-law origins of harassment claims show a lack of constitutional necessity for barring ministerial employees' hostile work environment claims.[244]

While on the surface it may seem like the better option is to file a tort claim instead of a Title VII discrimination claim, both options should still be available.[245] As published author Sharon Bradford observed, "alternative paths should not be necessary to prove complete relief to victims" of a hostile workplace and harassment.[246] Many employees are given "a right without a remedy" under Title VII.[247] The remedies provided by this right may be further reduced if the employees are in a ministerial position.[248] Because of the lack of damage remedies under Title VII, victims of harassment turn to other sources of relief; however, they are of "limited and diminishing availability."[249]

The ministerial exception is not a general immunity from civil laws governing an employer's relationship with its employees.[250] Just because religious employees have one option for redress, it does not mean that other plausible and possible options should be unavailable.[251] To offer the most protection to religious employees, both the options of suing under Title VII and filing a tort claim must be available.[252]

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240. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection,* 75 IND. L. J. 219, 242–43 (2000).

241. *Demkovich*, 973 F.3d at 733; *see, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430–32 (2d Cir. 1999); *see generally* Malicki v. Doe, 814 So. 2d 347, 351–57 & n.2, 7, 10 (Fla. 2002).

242. *Demkovich*, 973 F.3d at 733.

243. *Id.* at 729.

244. *Id.* at 728.

245. Bradford, *supra* note 25, at 1619.

246. *Id.*

247. *Id.* at 1630.

248. *Id.*

249. *Id.* at 1617.

250. *See* Lupu & Tuttle, *supra* note 183, at 132.

251. Bradford, *supra* note 25, at 1619.

252. *See id.* at 1618–19.

IV. Ministerial Employees Deserve Protection

The decision to vacate the original *Demkovich* decision was particularly disheartening considering that the Seventh Circuit's original decision provided a perfect line of reasoning that the Supreme Court could have used in articulating how the ministerial exception does not apply to workplace harassment claims. There was no need for the Seventh Circuit to abandon its already correctly decided opinion. However, the newest decision reinforces the notion that courts are extremely reluctant to get involved in issues dealing with religion. The Seventh Circuit's newest decision demonstrates the lengths that a court will go to side with religious institutions, simply to avoid a possible First Amendment issue.

The relationship between church and state has been debated since the founding of the United States.[253] The Catholic Church is allowed to believe what they would like about same-sex marriage and the LGBTQ+ community, but they should not be allowed to harass someone they hired. The debate over the extent of government interaction with religious institutions should be limited to the scope of tangible employment decisions.[254] As the Seventh Circuit stated in its original judgment, "supervisors within religious organizations have no constitutionally protected individual rights under *Hosanna-Tabor* to abuse those employees they manage, whether or not they are motivated by their personal religious beliefs."[255]

Over 200,000 Americans work in religious organizations.[256] Many of those employees fall within the purview of the ministerial exception as defined in *Hosanna-Tabor* and more recently, in *Morrisey-Berru*.[257] Nearly one-fifth of American workers find their workplace to be hostile.[258] If courts continue to categorically bar hostile environment claims by ministerial employees, then thousands of ministerial employees will lose federal protection from harms incurred while sup-

253. Hosanna-Tabor v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 182 (2012) ("Controversy between church and state over religious offices is hardly new.").

254. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959–62 (9th Cir. 2004).

255. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 730 (2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

256. *Religious Organizations – May 2019 National Industry-Specific Occupational Employment and Wage Estimates*, U.S. Bureau of Lab. Stats., https://www.bls.gov/oes/2019/may/naics4_813100.htm (last visited Feb. 20, 2021).

257. *See Hosanna-Tabor*, 565 U.S. at 188–91; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055–64 (2020).

258. *One-fifth of Americans Find Workplace Hostile or Threatening*, CNBC (Aug. 14, 2017, 6:34 AM), https://www.cnbc.com/2017/08/14/one-fifth-of-americans-find-workplace-hostile-or-threatening. html.

porting religious institutions.[259] As the dissent states in the Seventh Circuit's most recent decision, "the combination of the majority's holding in this case with efforts to expand the categories of employees deemed 'ministerial' threatens to leave many without basic legal protection of their dignity and employment."[260]

Religious freedom and lack of government interference will always remain at the forefront of court decisions involving religious institutions.[261] However, churches cannot be above the law.[262] The harm that comes from a hostile work environment outweighs the risk that a court will interfere with a church's ecclesiastical decisions.[263] Employees who experience a hostile work environment often suffer from depression and nervousness.[264] In addition to psychological injuries, headaches, nausea, and other physical injuries often result from harassment in the workplace.[265] For example, a Swedish study found that workers who experience sexual harassment are at a greater risk of suicide.[266] "American researchers believe that this study underscores the need to consider workplace sexual harassment as both an occupational hazard and a significant public health problem."[267] The risk of excessive entanglement is not worth a ministerial employee being harassed daily, and there is little justification for allowing it under the First Amendment.[268]

The ministerial exception was not intended to extend to workplace harassment claims.[269] If this issue reaches the Supreme Court, then the Supreme Court should adopt the reasoning articulated in the Seventh Circuit's vacated judgment.[270] If the Supreme Court chooses to follow the Tenth Circuit, and not the Seventh Circuit, more ministerial

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259. Jamie Manson, *After the Supreme Court's Latest Decision, Who Would Want to Work in a Church?*, NAT'L CATHOLIC REP. (July 14, 2020), https://www.ncronline.org/news/opinion/grace-margins/after-supreme-courts-latest-decision-who-would-want-work-church.

260. Demkovich v. St. Andrew Apostle Par., 3 F.4th 968, 996 (7th Cir. 2021) (Hamilton, J., dissenting).

261. *See* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 720 (7th. Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

262. *Demkovich*, 973 F.3d at 723.

263. Hosanna-Tabor v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 185–89 (2012).

264. Bradford, *supra* note 25, at 1615.

265. *Id.*

266. Bryan E. Robinson, *Does Sexual Harassment Raise the Risk of Suicide?*, PSYCHOL. TODAY (Nov. 1, 2020), https://www.psychologytoday.com/us/blog/the-right-mindset/202011/does-sexual-harassment-raise-the-risk-suicide.

267. *Id.*

268. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 735 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

269. *Demkovich*, 973 F.3d at 730.

270. *Id.* at 729.

employees could lose their right to file a federal claim against their employer because of the decision in *Morrisey-Berru*.[271] Who can qualify as a minister was greatly expanded in *Morrissey-Berru*.[272] As stated above, "what matters is what an employee does" when discerning whether an employee is in a ministerial position.[273] The decision in *Morrissey-Berru* allows more religious employees to be considered ministers than was previously intended.[274] Because non-ministerial employees of religious institutions are allowed to file workplace harassment claims, religious institutions may be incentivized to claim that more of their employees are ministers to avoid Title VII claims.[275] To ensure that religious institutions will not abuse an expansion of the ministerial exception, the Supreme Court must revoke the idea that the ministerial exception bars workplace harassment claims for ministers.[276]

While these religious employees have the ability to sue under a tort theory, their recovery in tort is insufficient.[277] Preventing employees from filing Title VII claims greatly reduces their chance of a satisfactory recovery.[278] In addition, tort theories vary from state to state.[279] By forcing religious employees to rely solely on tort theory to recover, their recovery will be based on the state in which they reside.[280] Thus, religious employees might be at an even greater disadvantage simply based on the location of their job.[281]

The law surrounding the intersection of the ministerial exception and hostile work environment claims falls short.[282] Regardless of the Seventh Circuit's most recent decision, there is no evidence to suggest that this issue will be settled anytime soon, setting up another opportunity for the Supreme Court to enter the discussion surrounding the

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271. Manson, *supra* note 259.

272. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) ("In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.").

273. *Id.* at 2064.

274. Manson, *supra* note 259.

275. *Id.*

276. *Id.*

277. Bradford, *supra* note 25, at 1619.

278. *Id.* ("Thus, the need to resort to external causes of action contravenes the spirit and goals of title VII.").

279. *Id.*

280. *Id.*

281. *Id.*

282. *See* Lupu & Tuttle, *supra* note 183, at 252.

ministerial exception's application to hostile workplace and harassment claims.[283]

V. Conclusion

Hostile work environment claims present "a conflict between two of the highest values in our society and legal system: religious liberty and non-discrimination in employment."[284] The ministerial exception protects religious institutions by preventing employment discrimination suits against religious employers under Title VII.[285] The Supreme Court's decision in *Hosanna-Tabor* affirmed that the ministerial exception protects religious institutions from Title VII suits when tangible employment decisions are involved.[286] Since its inception, courts have struggled to cohesively articulate the reach of the ministerial exception.[287] The main emerging issue is how the exception will apply to claims by ministerial employees against their religious employers for workplace harassment.[288]

The ministerial exception should not be used to prevent ministerial employees from suing their religious employers.[289] Religious employers should not have a constitutionally protected right to abuse their employees.[290] The Ninth Circuit supports the contention that the ministerial exception does not bar hostile work environment claims.[291] However, the Ninth Circuit's analysis in *Elvig* is confusing.[292] In order to prevent confusion in future cases, courts should adopt the Seventh Circuit's original analysis in *Demkovich*.[293]

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283. Patrick Hornbeck, *Chicago Archdiocese takes 'religious liberty' too far in* Demkovich *case*, Nat'l Catholic Rep. (Feb. 17, 2021), https://www.ncronline.org/news/opinion/chicago-archdiocese-takes-religious-liberty-too-far-dem kovich-case ("The Supreme Court has not decided whether a religious employer's immunity when it comes to hiring and firing covers mistreating and harassing employees as well.").

284. Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 996 (7th Cir. 2021).

285. Idleman, *supra* note 240, at n.119.

286. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012).

287. *Compare* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 735 (7th. Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021), Elvig v. Calvin Presbyterian Church 375 F.3d 951, 969 (9th Cir. 2004), *and* Skrzypczak v. Roman Catholic, 611 F.3d 1238, 1245 (10th Cir. 2010).

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

289. *Demkovich*, 973 F.3d at 730.

290. *Id.*

291. *Elvig*, 375 F.3d at 969.

292. *See Skrzypczak*, 611 F.3d at 1245 (calling the Tenth Circuit's application of the ministerial exception "confusing").

293. *See generally Demkovich*, 973 F.3d 718.

Prior to its decision to vacate and grant a rehearing, the Seventh Circuit had a clearly delineated answer regarding the intersection of the ministerial exception and workplace harassment.[294] Due to the Seventh Circuit's newest decision, the Ninth Circuit's decision in *Elvig* is the only precedent allowing ministerial employees to sue for workplace harassment unless the issue reaches the Supreme Court. Unfortunately, the glimmer of hope that the Seventh Circuit's original decision gave to ministerial employees has been extinguished with the Court's recent decision to vacate. Workers deserve to have protection from harassment at their job regardless of their employer being a religious institution. A person's dignity does not disappear when they become a minister.

Sara Riddick

294. *Id.* at 735.