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Separation of Church and Law: The Ministerial Exception in Demkovich v. St. Andrew the Apostle Parish

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SEPARATION OF CHURCH AND LAW: THE MINISTERIAL EXCEPTION IN *DEMKOVICH V. ST. ANDREW THE APOSTLE PARISH*

Jonathan Murray*

Religious freedom is increasingly invoked to defeat liability for behavior that has long been regulated under accepted, neutral law, an argument to which many courts and judges appear receptive. One such area of law seeing this activity is the ministerial exception—a judicial principle recognized under the First Amendment. The ministerial exception guarantees religious organizations’ discretion in how they select their “ministers,” or religious employees dedicated to the organization’s religious mission. However, current law lacks clarity regarding the application of the exception to an organization’s treatment of its ministers. Recently, the Seventh Circuit, sitting en banc, chose to categorically expand the application of the ministerial exception to workplace harassment claims; in essence, ruling that ministers could expect little protection from the law against harassment in the workplace. This Comment evaluates the Seventh Circuit’s categorical expansion of the ministerial exception to workplace harassment claims and compares it to the “balancing approach” the court initially adopted, which would evaluate case-by-case whether a workplace harassment claim implicated too many protected religious concerns to proceed. This Comment argues that the balancing approach

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better conforms to the First Amendment's scope of religious protections. First, it allows suits unconcerned with any significant religious issues to proceed. Second, it avoids the risk of excessive entanglement or protracted scrutiny of religious practice. Finally, this Comment concludes that the categorical expansion of the ministerial exception resembles recent opinions which have endorsed interpretations of the First Amendment that would allow actors to frustrate constitutionally legitimate regulations of commercial behavior, suggesting a new form of Lochner-era jurisprudence may be on the move.

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INTRODUCTION

The legal immunities of religious freedoms are primed to expand. Rulings in the past decade have signaled an appetite of many judges to increase the scope of religious exceptions to statutory liability.¹ A key characteristic of this expansion, or potential thereof, is its focus on areas of commerce and accommodation.² Several circuits have taken cases asking

1. See discussion *infra* Section III.C.

2. *Id.*

whether merchants or other commercial actors holding their services open to the general public can resist neutral antidiscrimination laws on the basis of their religious beliefs.³ Often involving the provision of services to LGBTQ+ patrons, some circuits have recently ruled that antidiscrimination laws protecting identity characteristics, such as sexual orientation, can compel speech and burden religious exercise.⁴ Faced with similar questions of neutral commercial laws and religious freedom, the Supreme Court has thus far avoided a definitive answer by resting on narrow grounds that the law was not neutrally applied.⁵ In several concurrences, however, Justices have repeatedly stated their desire to apply strict scrutiny to neutral laws that incidentally burden religious freedom even without evidence of non-neutral intent or application.⁶

Against the backdrop of cases contemplating expanded religious exceptions to liability, a circuit split has emerged regarding the ministerial exception, which is the protection from liability religious organizations enjoy when making decisions about certain employees.⁷ As a judicial device, the ministerial exception emerged from the interpretation of the First Amendment that courts should avoid interfering with the ecclesiastical governance of religious organizations.⁸ While the Supreme Court endorsed the ministerial exception with regards to hiring and firing decisions,⁹ the question remains whether a religious organization should also enjoy protection from liability for conduct that occurs *during* the course of a complainant's employment. In July of 2021, the Seventh Circuit weighed in on this issue in *Demkovich v. St. Andrew the Apostle Parish*, when

3. Alexander Schmidt, *Commerce, Not Speech: Dismantling the Eighth Circuit's Free Speech Analysis in Telescope Media Group v. Lucero*, 36 WIS. J.L. GENDER & SOC'Y 135, 138–39 (2021).

4. *Id.*

5. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877–79 (2021) (ruling that the antidiscrimination clause of the city's foster care contract was not neutral because it allowed for individual exemptions); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018) (ruling that the commission acted with hostility towards the baker who refused to serve a same-sex couple and thus didn't act neutrally).

6. *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring); *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

7. See cases cited *infra* notes 50–60.

8. See discussion *infra* Part I.

9. *Id.*

a “minister” brought forward hostile work environment claims.¹⁰ The circuit held that the ministerial exception applied to the complainant’s claims and thus could not be adjudicated, as any adjudication regardless of its claim or underlying facts posed too great a risk of entanglement with a church’s operations.¹¹ However, the trial court, the dissenting opinion, and other circuit opinions adopted a less categorical approach in the form of a balancing test that allows claims sufficiently unrelated to a church’s religious mission to proceed.¹²

This Comment contends that the balancing approach honors the imperatives of religious freedom without sacrificing valid claims in the name of that freedom. Part I of this Comment reviews the origins and justifications for the ministerial exception and its current scope as decided by the Supreme Court. Part II reviews the differing opinions between the District Court for Northern Illinois and the majority opinion of the Seventh Circuit regarding how the ministerial exception should apply to hostile work environment claims and how those opinions fit into the current circuit split. Part III argues that when considering this split, courts should adopt the balancing approach to hostile workplace claims by ministers rather than a categorical expansion of the ministerial exception. This argument proceeds by showing how the balancing approach (1) better reflects the purpose of the ministerial exception and the First Amendment, (2) avoids the risk of excessive entanglement, and (3) prevents the creation of *Lochner*-esque commercial rights for employers and vendors in the name of religious freedom.

I. BACKGROUND OF THE MINISTERIAL EXCEPTION

Every court exalts the importance of the freedoms contained within the First Amendment, especially the right to the free

10. “Minister” is placed in quotations as much of the previous jurisprudence regarding the ministerial exception evaluated who actually qualified as a “minister” for purposes of the exception. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 190–91 (2012). In this case, and in the following analysis, the fact that a complainant is a “minister” is presumed unless stated otherwise.

11. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 985 (7th Cir. 2021).

12. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 782–86 (N.D. Ill. 2018), *overruled by Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021); *Demkovich*, 3 F.4th at 986 (Hamilton, J., dissenting); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

exercise of religion.¹³ But they differ on the Amendment's coverage—namely, to what extent it protects conduct and provides exemptions to neutral laws.¹⁴ Prior to ratification of the First Amendment, colonial states' constitutional protections for religious freedom offered varying approaches to protecting religious conduct, from broad protection of religious "duties" to the more narrow protection of "worship."¹⁵ In addition, the early state protections often included specific limits for religious conduct, such as when it threatened the public peace and order.¹⁶ These predecessors of the First Amendment suggest that religious freedom can extend to protecting membership, organization, and internal mandates, no matter how seemingly irrational or undesirable.¹⁷ Having experienced and witnessed both English and colonial oppression of unpopular houses of worship,¹⁸ the founding fathers intended the First Amendment to guard against unwarranted intrusion into these places. Thomas Jefferson's letter to Reverend Samuel Miller summarizes the basic principle: "[T]he government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions."¹⁹

The protection of religious institutions informed the development of the ministerial exception when the Fifth Circuit first created it in 1972.²⁰ In *McClure v. Salvation Army*, an ordained minister brought a Title VII action under the Civil Rights Act against the Salvation Army, a recognized church, for paying her lower wages and providing fewer employment benefits than her male colleagues, then discharging her for protesting.²¹ Interpreting Supreme Court precedent respecting claims brought against churches, the Fifth Circuit recognized that while religious organizations must comply with the Civil

13. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1890 (2021) (Alito, J., concurring) (referring to religious freedom as a "bedrock" constitutional right).

14. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418–20 (1990).

15. *Id.* at 1460.

16. *Id.* at 1464–65.

17. *Id.*

18. *Id.* at 1421–27. The historical nature of the First Amendment with respect to the ministerial exception and oppression of religious organizations is further expanded upon *infra* Section II.A.

19. *Id.* at 1465.

20. Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious*, 7 GEO. J.L. & PUB. POL'Y 119, 124 (2009).

21. *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972).

Rights Act as employers, the First Amendment protected the selection of ministers from liability as a critical religious freedom.²² Consequently, the Fifth Circuit approved the Salvation Army's motion to dismiss.²³ Over the next forty years, every federal circuit and many states followed suit.²⁴

In *Hosanna-Tabor*, the Supreme Court unanimously endorsed the ministerial exception.²⁵ The First Amendment, the Court ruled, required the ministerial exception to ensure that the federal government could have no role in the filling of "ecclesiastical offices."²⁶ Thus, litigants cannot challenge a religious organization's hiring and firing of ministers, lest Congress and the courts interfere with a house of worship's ability to choose "who will personify their beliefs."²⁷ Crucially, the ministerial exception did not require a religious organization to provide a justification for their ministerial personnel decisions. In fact, the rule protects against any inquiry into the reasons a church had to hire or fire a minister at all.²⁸ The Court also rooted the ministerial exception in its aversion to "entanglement"—intrusive supervision or inquiry of religious matters.²⁹ The intrusion, however, must be "excessive" for judicial proceedings to rise to the level of inhibiting religion's free exercise.³⁰

Having endorsed the ministerial exception, the Supreme Court then focused on providing guidance for determining who qualifies as a "minister" under the exception.³¹ However, thus

22. *Id.* at 559.

23. *Id.* at 561.

24. Ira C. Lupu, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM & MARY J. RACE, GENDER & SOC'Y 249, 254 (2019).

25. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 188 (2012).

26. *Id.* at 184. Writing for the majority, Justice Alito reasoned that the ministerial exception was supported by both the Establishment and the Free Exercise Clause; the former by keeping the government from appointing ministers and the latter by preventing interference with a religious group's appointments. *Id.*

27. *Id.* at 188. Unlike other employees, ministers were special with respect to the First Amendment because religious organizations put "their faith in [their] hands." *Id.*

28. *Id.*

29. *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

30. *Id.*

31. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The opinion described a variety of factors which may help determine whether an employee was a "minister," including their title, responsibilities, and job requirements. *Id.* at 2063.

far, the Supreme Court has only considered the power to hire and fire ministers; it has failed to definitively state whether the ministerial exception should extend to potential claims that occurred during a minister's employment.³² Chief Justice Roberts, writing for the majority in *Our Lady of Guadalupe*, stated that a church's "independence on matters of 'faith and doctrine,' requires the authority to select, *supervise*, and if necessary, remove a minister" but never defined what fell within the Court's conception of protected church supervision.³³ It is the issue of whether the exception should immunize churches against claims arising from the course of employment that the Seventh Circuit took up in *Demkovich v. St. Andrew the Apostle Parish*.³⁴

II. THE DIVIDE ON THE MINISTERIAL EXCEPTION AND HOSTILE WORK ENVIRONMENT CLAIMS

Sandor Demkovich worked as a music director, choir director, and organist for the St. Andrew Parish in Calumet City, Illinois between 2012 and 2014.³⁵ Mr. Demkovich's claims concerned his professional relationship with his immediate supervisor, Reverend Jacek Dada.³⁶ Mr. Demkovich alleged that Reverend Dada habitually abused him for his sexual orientation, diabetes, and metabolic syndrome, including using derogatory terms and disparaging his weight on multiple occasions.³⁷ Reverend Dada ultimately fired Mr. Demkovich because of his marriage to his partner, saying it violated church doctrine.³⁸ When bringing suit, Mr. Demkovich did not dispute his ministerial status and the applicability of the ministerial exception to his firing; instead, he rested his suit on hostile work environment claims.³⁹ Such claims do not challenge personnel decisions but rather contend that a claimant experienced harassment of a protected characteristic so severe that it created

32. *Hosanna-Tabor*, 565 U.S. at 176–77; *Our Lady of Guadalupe*, 140 S. Ct. at 2055.

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

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

35. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 776 (N.D. Ill. 2018), *overruled by Demkovich*, 3 F.4th 968.

36. *Id.*

37. *Id.* at 776–77.

38. *Id.*

39. *Id.* at 778.

an abusive and harmful atmosphere for which the employer is responsible.⁴⁰ For example, the behavior that formed a cognizable basis for the plaintiff's complaint in *Huri*, a Seventh Circuit decision from 2015, included constant derogatory comments, differential treatment, false allegations, and protracted scrutiny by a supervisor, not unlike Mr. Demkovich's complaint.⁴¹

While the Seventh Circuit had extended the ministerial exception into matters beyond hiring and firing, the District Court for the Northern District of Illinois found that the Seventh Circuit had only ever touched on "tangible" employment actions.⁴² Since "tangible" employment actions, like salary decisions, assignments and duties, or promotions and demotions, implicated the internal structure of a religious organization directly, the ministerial exception's underlying protection of ecclesiastical governance extended to such claims.⁴³ By contrast, religious organizations are fully susceptible to suits like hostile work environment claims brought by non-ministerial employees and are in fact required to offer a religious motive for the alleged conduct in order to resuscitate a First Amendment defense.⁴⁴ Thus, as the district court identified that only claims directly challenging a religious organization's choice of hierarchy or mission were prohibited by the First Amendment, it concluded the ministerial exception did not categorically bar all hostile work environment claims by ministers.⁴⁵ Rather, the exception required courts to determine

40. A hostile work environment claim's specific legal elements include "(1) the [employee] was subject to unwelcome harassment; (2) the harassment was based on . . . national origin or religion (or another reason forbidden by Title VII); (3) the harassment was severe or pervasive so as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is basis for employer liability." *Huri v. Off. of the Chief Judge of the Cir. Ct. of Cook Cnty.*, 804 F.3d 826, 833–34 (7th Cir. 2015). To note, *Huri* did not involve a question of the ministerial exception.

41. Compare *id.* at 834, with *Demkovich*, 343 F. Supp. 3d at 776–77.

42. The district court referred to the Seventh Circuit's decision in *Alicea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003), highlighting that the claim in that case alleged inequality and unfairness in working conditions preventing the plaintiff from doing her job, rather than arguing the personal impact of the racist or sexist remarks. *Id.* at 779.

43. *Id.* at 781.

44. *Id.* at 782. Even if a religious motive can be offered, the First Amendment still cannot recreate the absolute protection the ministerial exception affords, and a balancing test is employed instead. *E.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004).

45. *Demkovich*, 343 F. Supp. 3d at 786.

case-by-case whether an adjudication, either substantively or procedurally, posed too great a risk of entanglement or burden on religious freedom to proceed.⁴⁶

Employing this framework, the district court found that Mr. Demkovich's claims relating to harassment for his sexual orientation risked excessive entanglement with church doctrine, both procedurally in the amount of time and witnesses the church would have to provide⁴⁷ and substantively in the parsing of the church's doctrines and procedures regarding sexual orientation and harassment on the basis thereof.⁴⁸ However, Mr. Demkovich's claims relating to his physical disabilities could proceed. Given that the church offered no religious explanation for Reverend Dada's behavior, the inquiry would remain comfortably divorced from religion, asking courts only to make evaluations rooted in familiar, neutral law.⁴⁹

In its finding, the district court looked to the jurisprudence of the Ninth Circuit.⁵⁰ Generally, the Ninth Circuit's ministerial exception cases rested on the principle that where a suit does not ask of any fact finder to "either evaluate religious doctrine or the 'reasonableness' of the religious practices," then adjudication would not breach the First Amendment.⁵¹ On interlocutory appeal, the Seventh Circuit seemed prepared to endorse the findings of the district court and join the Ninth Circuit in adopting a balancing approach to hostile work environment claims by ministers.⁵² Acknowledging the sometimes difficult effort of balancing religious freedom against other equally important rights, the Seventh Circuit initially rejected the idea that a balancing test could not properly manage those interests.⁵³

46. *Id.*

47. The ministerial exception is an affirmative defense that must be raised by the church. *Id.* at 787. Circuits have consistently recognized that some protracted legal battles pitting the State against a religious organization as adversaries can rise to excessive entanglement regardless of the subject of the suit. *E.g.*, *Elvig*, 375 F.3d at 956.

48. *Demkovich*, 343 F. Supp. 3d at 787.

49. *Id.* at 788.

50. *Id.* at 784; *Elvig*, 375 F.3d at 951; *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999).

51. *Bollard*, 196 F.3d at 950.

52. *Demkovich v. St. Andrew the Apostle Par.*, 973 F.3d 718, 720–21 (7th Cir. 2020), *rev'd*, *Demkovich v. St. Andrew the Apostle Par.*, 3. F.4th 968 (7th Cir. 2020).

53. *Id.*

The circuit, however, quickly reversed course when it reviewed the case en banc.⁵⁴ The panel found that the ministerial exception required a categorical bar on hostile work environment claims by ministers.⁵⁵ Reasserting that the ministerial exception served to keep the State out of religion, either by adoption or interference, the Seventh Circuit endorsed an interpretation of the exception's jurisprudence that emphasized near absolute control of ministers by religious organizations.⁵⁶ Since religious organizations hire ministers specifically to fulfill their ecclesiastical purpose, ministry creates an inherently unique relationship between institution and employee, which demands special deference from courts.⁵⁷ Adjudicating Mr. Demkovich's claims, and indeed any hostile work environment claim,⁵⁸ can only succeed against the church by showing it failed in some manner to properly supervise its employees. In essence, any labor-related suit by a minister would ask a court to displace the church as a final decision-maker with respect to internal religious matters.⁵⁹ Thus, the Seventh Circuit became the second circuit to extend the ministerial exception to all hostile work environment claims.⁶⁰

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

55. *Id.*

56. *See id.* at 976.

57. *Id.* at 978.

58. *See Demkovich*, 3 F.4th at 978. The doctrinal basis for the Seventh Circuit's categorical extension of the ministerial exception to hostile work environment claims seems primarily concerned with the fourth element of a hostile work environment claim discussed *supra* note 40.

59. *Demkovich*, 3 F.4th at 981.

60. *See Skrzypczak v. Roman Cath. Diocese*, 611 F.3d 1238 (10th Cir. 2010). In the Seventh Circuit's estimation at the time of its opinion in July of 2021, only the Seventh, Ninth, and Tenth Circuits had given definitive answers with respect to the ministerial exception's application to hostile work environment claims and the tangible-intangible employment action distinction, while the Fifth and Eleventh Circuit had failed to clearly fall on either side. *Demkovich*, 3 F.4th at 984. After the *Demkovich* opinion was published, the Sixth Circuit forwent making an explicit adoption of either the categorical expansion or balancing approach, a course similarly adopted by the Third Circuit prior to the *Demkovich* decision. *Middleton v. United Church of Christ Bd.*, 2021 U.S. App. LEXIS 34852 at *10 (6th Cir. Nov. 22, 2021); *see also Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006).

III. CATEGORICAL EXPANSION OR BALANCING APPROACH: WHICH IS THE BETTER EXTENSION OF THE MINISTERIAL EXCEPTION?

While certainly expressing legitimate concerns for the needed separation between a government's regulations and a religious organization's ability to minister, the majority opinion in *Demkovich* overextended the coverage of the ministerial exception by requiring a categorical bar on hostile work environment claims. By distinguishing between "tangible" and "intangible" workplace actions, the balancing approach finds the exception's proper boundaries.⁶¹ In this Part, Section A argues that the balancing approach more faithfully reflects the logic of the ministerial exception and the current state of jurisprudence on the First Amendment more generally. Section B argues that the balancing approach also avoids excessively entangling courts and churches without sacrificing valid claims. Finally, Section C argues that the overextension of the ministerial exception, when compared to the advantages of the balancing approach, threatens to read a *Lochner*-esque incorporation of nonexistent commercial rights into the Constitution through the First Amendment.

A. *The Balancing Approach is More Faithful to the Underlying Rationale of the Ministerial Exception*

To determine which approach to the ministerial exception more accurately reflects the logic of existing Supreme Court jurisprudence, the difference between what each approach will and will not protect is critical. First, the "balancing approach" is somewhat of a misnomer in that it too requires categorical prohibition of certain suits.⁶² Ministers may not bring suits implicating tangible employment actions, or actions directly relating to a church's authority over its selection and organization of its ministers.⁶³ Thus, the "balancing" in the

61. This Comment is limited to discussing which proposal regarding the ministerial exception's expansion that the Seventh Circuit considered is the better understanding of the exception's function. What is the best *possible* formulation of an expansion, or whether the exception should be expanded at all, is beyond this Comment's scope.

62. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 781 (N.D. Ill. 2018), *overruled by Demkovich*, 3 F.4th 968.

63. *Id.*

“balancing approach” occurs when an intangible employment action, or action not challenging a church’s decision with respect to its internal structure, forms the basis of a suit.⁶⁴ Only then does a court engage in a case-specific analysis to determine whether a suit risks excessive entanglement or intrusion into religious doctrine.⁶⁵ The categorical expansion, by contrast, would not allow suits based on intangible employment actions that would survive a balancing test. In other words, the categorical expansion of the ministerial exception only does work that the balancing approach does not when a judge believes the suit will not risk an excessive burden on religious freedom.

As a matter of policy, observers may wonder the point of seeking to protect claims based on “intangible” actions. Tangible actions encapsulate the worst employment consequences, such as termination, lost wages, or denied promotions.⁶⁶ In addition, even the “absolute” prohibition of ministerial employment claims does not exempt tort or criminal violations.⁶⁷ It seems odd, then, to conclude that less harsh employment wrongs receive greater governmental scrutiny under the First Amendment, like a police officer arresting someone for driving drunk even though a pound of cocaine sits next to them in the passenger’s seat. However, permitting ministers to bring “intangible” employment claims like hostile work environment still serves critical policy goals. As the Supreme Court has noted in the Title VII context, hostile work environment claims do not care about “general civility” but rather about conduct so severe and pervasive it alters the conditions of employment.⁶⁸ Such conduct, when it reaches a severe and pervasive level, can amount to workplace bullying which has been linked not only to depression and anxiety, but poor physical health, decreased job security, and strain on personal relationships.⁶⁹ Thus, while “intangible” claims may not encompass the more immediate employment harms, they may still redress serious, lingering harms. Furthermore, recognizing “intangible” claims allows

64. *Id.* at 785.

65. *Id.*

66. See *Demkovich*, 343 F. Supp. 3d at 781; *supra* Part II.

67. *Demkovich*, 3. F.4th at 989.

68. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80–81 (1998).

69. Arash Emamzadeh, *Workplace Bullying: Effects on Work, Health, and Family*, PSYCH. TODAY (Apr. 22, 2021), <https://www.psychologytoday.com/us/blog/finding-a-new-home/202104/workplace-bullying-effects-on-work-health-and-family> [<https://perma.cc/VM4B-376L>].

ministers to experience a sense of vindication for the events which led to their termination without interfering with critical First Amendment considerations.⁷⁰ In such instances, the mere title of “minister” shouldn’t deprive these individuals of that invaluable protection. Thus, if the First Amendment does not call for a complete prohibition of ministerial employment claims, other policy considerations should win out.

Determining whether the ministerial exception necessitates complete prohibition of all ministerial employment claims requires consideration of the First Amendment’s purpose. The Supreme Court has generally recognized two major historical antecedents to the First Amendment that shape its purpose and scope: First, many of the original colonists, especially in the north, had fled religious persecution of their particular sect of Protestantism by the Crown.⁷¹ Second, with the establishment of the Church of England, the boundaries between the Church and the Crown in Britain collapsed; the English monarch became the head of the Church, wielding both political and ecclesiastical power.⁷² Evidently, even those colonists who maintained their participation in the Church of England still chafed at the attempts of the Crown to assert control over American ministerial positions through colonial governors.⁷³ Thus, the First Amendment sought to ensure that no sect could obtain prominence over any other faith, either by keeping religion from capturing or becoming the object of secular government control.⁷⁴ In sum, the First Amendment’s purpose

70. As Demkovich’s experience showed, termination and the harassment leading up to the termination are in truth a single course of events. See *supra* notes 35–39 and accompanying text. By “procedural justice,” I refer to the real relief individuals feel from the fairness of process, as much as fairness of outcome. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132 (2011). Thus, “intangible” claims may allow some sense of vindication without offering remedies that violate First Amendment rights.

71. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 182 (2012); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990). It should be noted here that while the ministerial exception was initially created and adopted by circuit courts before eventually being adopted by the Supreme Court, because the Supreme Court’s opinion is the controlling ruling on the ministerial exception and was critical to the Seventh Circuit’s opinion, only its understanding of the exception is reviewed in depth for the purposes of this Comment.

72. See *Hosanna-Tabor*, 565 U.S. at 182.

73. *Id.* at 183.

74. *Id.* at 184.

with respect to the ministerial exception is rooted in preventing interference with a church's ability to practice its faith.⁷⁵

The balancing approach honors the First Amendment's purpose by ensuring only claims that sufficiently fall outside matters of church governance and faith can proceed. As the district court in *Demkovich* noted, nothing about a religious organization's ability to govern its internal structure or doctrine is per se burdened by the risk of liability from suits based on intangible employment actions.⁷⁶ The district court found that adjudicating Mr. Demkovich's claims based on harassment for his sexuality would require questioning the church's policies regarding harassment for sexual orientation, which in turn would be informed by its doctrine regarding same-sex marriage and nonheteronormative sexuality.⁷⁷ Thus, such claims did not survive the balancing test.⁷⁸ However, because the church offered no religious reason for why Reverend Dada harassed Mr. Demkovich for his medical conditions, nothing regarding the church's religious practices was implicated by the disability-based claim; the court could keep its inquiry exclusively contained to secular judgments without threatening to excessively involve religious doctrine or unduly impede ecclesiastical governance.⁷⁹ The balancing approach ensures that the ministerial exception, and consequently the First Amendment, does not deny access to the courts for parties who bring suits involving matters generally unconcerned with religion.

Proponents of a categorical expansion argue that the principles of the ministerial exception require coverage of all aspects of the employment relationship between church and minister.⁸⁰ Ministers are the "lifeblood" of a church, as are the relationships between ministers.⁸¹ In other words, ministers and the interactions between them are so integral to how a religious organization practices its faith that everything

75. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

76. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 785–86 (N.D. Ill. 2018), *overruled by Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021).

77. *Id.* at 787.

78. *Id.* at 786–87.

79. *Id.* at 788.

80. *Demkovich*, 3 F.4th at 976–77.

81. *McLure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

involving ministers is ecclesiastic governance.⁸² Fundamentally, hostile work environment claims can only proceed against an organization because of some failure to properly control its employees.⁸³ In the context of religious organizations, employer liability for supervision failures invites the government to substitute a church's managerial choices with its own.⁸⁴

The majority in *Demkovich* helped justify the belief in the inherently ecclesiastical nature of ministerial relationships based on the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*.⁸⁵ There, the *Demkovich* majority pointed to language touching on a religious organization's independence "on matters of 'faith and doctrine' that requires the authority to select, supervise, and if necessary, remove a minister without interference."⁸⁶ While the dissent in *Demkovich* insisted the Supreme Court had limited its inquiry into hiring and firing decisions, the reference to "supervise" does open the door to the exception's expansion into events occurring *during* the course of a minister's employment.⁸⁷ In addition, the fact that the nature of the exception functions without requiring a "religious reason"⁸⁸ implies that all hostile work environment claims necessarily fold into a judicial device more concerned with the separation of church and state on all matters of governance rather than the interaction of religious doctrine with laws of general applicability.⁸⁹

However, the *Demkovich* majority's interpretation of the Supreme Court's opinions overlooks the context of both those cases and the ministerial exception itself. While the Court did suggest some applicability of the exception to supervisory activities, it did not indicate that the applicability was categorical such that all hostile work environment claims should be barred. For example, with regard to its language that the ministerial exception does not require a religious justification to apply, the Court carefully attached its logic to hiring and firing

82. *Id.* at 555–56; *Demkovich*, 3 F.4th at 980.

83. *Demkovich*, 3 F.4th at 978.

84. *Id.*

85. *Id.* at 976.

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

87. *Demkovich*, 3 F.4th at 986 (Hamilton, J., dissenting); *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

88. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 194 (2012).

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

decisions.⁹⁰ The Court also declined to make the ministerial exception unlimited, stating that “religious institutions do not enjoy a general immunity from secular laws, but [the ministerial exception] does protect their autonomy with respect to internal management decisions that are *essential to the institution’s central mission*.”⁹¹ The importance of this distinction is lost by the Seventh Circuit’s opinion when it declared ministers the “lifeblood” of organized religion without further context.⁹²

Ministers are essential to religious groups not for their title, but for their role as agents of church doctrine.⁹³ Hiring and firing require a categorical exception in this regard because the religious group determines who is and is not a minister, and thus an agent of doctrine, in the church.⁹⁴ However, a church’s religious practice may not motivate everything that occurs within its halls, and thus no actual burden on that practice exists by allowing certain suits to continue.⁹⁵ In essence, the Supreme Court hesitated to speak in absolutes with regards to the ministerial exception unless in the context of hiring and firing decisions and even seemed to reintroduce the importance of a justification by religious doctrine when referencing internal management decisions beyond the actual selection of personnel.

The balancing approach better captures this nuance in the Court’s signals regarding the ministerial exception. Because the Supreme Court roots the ministerial exception in keeping the State out of religious governance, the balancing approach naturally applies the exemption to tangible employment actions such as promotions or salary as a natural function of church hierarchy.⁹⁶ However, claims relating to how a minister suffered abuse by colleagues or supervisors may not implicate the

90. “The purpose of the exception is not to safeguard a church’s decision to *fire a minister* only when it is made for a religious reason.” *Hosanna-Tabor*, 565 U.S. at 194 (emphasis added).

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

92. *Demkovich*, 3 F.4th at 979 (quoting *Mclure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)).

93. See *Hosanna-Tabor*, 565 U.S. at 188 (“[T]he Free Exercise Clause [] protects a religious group’s right to *shape its own faith and mission* through its appointments.”) (emphasis added).

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

95. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 989 (7th Cir. 2021) (Hamilton, J., dissenting) (finding that legal immunity must be tailored to what is necessary to justify a constitutional restriction on a compelling exercise of congressional power).

96. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 781 (N.D. Ill. 2018), *overruled by Demkovich*, 3 F.4th 968.

church's structure or internal governance given in those instances the harassment a minister suffered had nothing to do with his duties or shared religious mission with his harasser.⁹⁷ Hostile work environment claims create liability for employers who allow employees to be harassed for a protected characteristic to the point of creating intolerable conditions.⁹⁸ The balancing test seeks to recognize the liability religious organizations may suffer when they allow nonreligious-based hostility to persist in their workplaces.⁹⁹ The First Amendment offers no protection for such claims.¹⁰⁰ Thus, the balancing approach allows the courts to determine whether, in a specific case, the claim is still too entangled with a church's doctrines and practices to proceed, or whether the claim is sufficiently divorced from the qualities that make relationships between ministers and churches unique so that the suit can proceed without implicating religious freedom.¹⁰¹

B. The Balancing Approach Does Not Impose Any Procedural Burdens on Religious Organizations that Rise to the Level of Excessive Entanglement

Even if the balancing approach best suits the substantive reasoning of the ministerial exception, courts must still consider procedural concerns. In *Lemon v. Kurtzman*, the Supreme Court found that a law violates the First Amendment if it fosters "excessive entanglement" with religious organizations or doctrine, even if the law has neutral language and does not primarily advance or inhibit a religion.¹⁰² "Entanglement," therefore, is a constitutional harm that occurs when courts parse unbridled through the affairs of religion and burden its

97. *See id.*

98. *Huri v. Off. of the Chief Judge of the Cir. Ct. of Cook Cnty.*, 804 F.3d 826, 833–34 (7th Cir. 2015).

99. *See Demkovich*, 343 F. Supp. 3d at 782 (describing how churches must offer religious motivations to escape liability for conduct for which non-ministerial employees may sue).

100. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 173 (2012).

101. In the *Demkovich* suit, the Church made no claim that the harassment Demkovich faced for his disabilities in any way implicated church doctrine but was entirely the views of the reverend. *Demkovich*, 343 F. Supp. 3d at 788.

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

exercise.¹⁰³ Curtailing State intrusion into religious organizations seeks to prevent comprehensive and protracted scrutiny into religious practice.

Excessive entanglement may also occur when suits invite courts, even if incidentally, to judge the authenticity of a professed religious doctrine.¹⁰⁴ In the context of firing and hiring decisions, Justice Alito noted in his concurrence that “in order to probe the real reason for respondent’s firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.”¹⁰⁵ Related, but distinct, from the concern of courts substituting a church’s judgment of what practices count as religious is the skepticism towards the ability of courts to make a judgment about religious doctrine *well*. As Justice Marshall wrote, “[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigant’s interpretations.”¹⁰⁶ In summary, the doctrine of excessive entanglement seeks to avoid involving the State generally, and courts particularly, “in endless inquiries as to whether [the matter at issue] was based in Church doctrine or simply secular animus.”¹⁰⁷

However, this aversion to entanglement does not make matters involving religious organizations untouchable by courts.¹⁰⁸ For example, even with the robust deference the ministerial exception affords, courts can still judge who qualifies as a “minister” to determine the exception’s application.¹⁰⁹ Furthermore, courts may also hear claims against churches brought by non-ministerial employees, which can include scrutinizing a church’s professed religious motive for the conduct at issue when they raise a First Amendment defense.¹¹⁰ With

103. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (“Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”).

104. *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

105. *Id.* at 205 (Alito, J., concurring).

106. *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

107. *Alicea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003).

108. *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (“Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”); *see also* *Ohio C.R. Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986) (“[R]eligious schools cannot claim to be wholly free from some state regulation.”).

109. *See Hosanna-Tabor*, 565 U.S. at 190.

110. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 782 (N.D. Ill. 2018), *overruled by* *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021) (citing cases in which no religious beliefs prevented the proceeding of a

respect to drawing lines between religious and secular activity, entanglement does not threaten to grow excessive when the inquiry by the court resembles any other routine procedure, placing no greater burden on religious organizations than any other party might endure.¹¹¹ Thus, in order for a suit to *excessively* entangle religion, a party must either ask a court to question whether an organization genuinely holds a professed belief, aside from obvious “sign[s] of subterfuge,”¹¹² or ask if hearing the suit and rendering a verdict will require comprehensive, detailed supervision of the organization’s activities.¹¹³

To determine whether the doctrine of excessive entanglement demands either a categorical bar or balancing approach to hostile work environment claims, courts again must consider what the categorical expansion blocks that the balancing approach does not. The balancing approach allows for judicial scrutiny into religious beliefs, but only in a limited context. First, consistent with the excessive entanglement doctrine, the balancing approach directs a judge to dismiss a suit where vindication of the plaintiff’s claims requires a judgment regarding the genuineness of religious doctrine.¹¹⁴ For example, for Mr. Demkovich to succeed on his harassment claim for his sexual orientation, the district court would have to scrutinize how and to what extent the church practiced its religious stance against same-sex marriage.¹¹⁵ However, the church made no doctrinal claims with respect to the other bases of Mr. Demkovich’s suit; as such, no part of adjudication, whether in discovery, trial, or judgment, would ask anything of church doctrine.¹¹⁶ The fact that the church in *Demkovich* declined to offer a religious reason for the harassment Mr. Demkovich suffered begs the question of whether categorical expansion and

non-minister’s suit based in secular claims or where courts engaged in evaluations of the extent of the burden on religious rights).

111. *Hernandez*, 490 U.S. at 696–97 (finding that no risk of excessive entanglement existed from an IRS review of church payments even though the review could require inquiry into regular practices and other pertinent information, given it did not parse through religious doctrine and did not require protracted, detailed monitoring).

112. *Demkovich*, 343 F. Supp. 3d at 786 (quoting *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018)).

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

114. *Demkovich*, 343 F. Supp. 3d at 786.

115. *Id.* at 787.

116. *Id.* at 788.

the balancing approach make distinctions without differences, so long as a religious organization offers a religious motivation in court. However, because entanglement must be excessive to offend the First Amendment, courts have room to ask religious organizations to offer some support for claims that the harassment in question implicated religious practices, lest the ministerial exception threatens to “[swallow] up the rule.”¹¹⁷ Thus, since some forms of hostile work environment claims do not excessively entangle religion, the categorical expansion of the ministerial exception only does work that the balancing approach does not when a court determines it can hear a suit without having to make a nonobvious determination of religious sincerity or excessively monitor a religious organization’s activities.

Asserting that all suits regarding hostile work environment claims by a minister will encroach on the First Amendment, the Seventh Circuit rested its opinion on two principle holdings. First, because the relationships between ministers are intrinsically religious, allowing any scrutiny into those relationships constitutes permitting a judgment about a religious organization’s “doctrine.”¹¹⁸ In essence, the Seventh Circuit reasserted that hostile work environment claims by ministers unconstitutionally scrutinize a religious organization’s supervision of its employees.¹¹⁹ Second, allowing proceedings to continue into any matter potentially raised by a minister’s hostile work environment claim would require protracted government scrutiny rising to the level of impermissible intrusion.¹²⁰ In order to support its position, the majority cited Supreme Court precedent that found that a public school allowing players to say prayers before a football game constituted excessive entanglement,¹²¹ and that held that a religious organization should not have to choose between “proffering a religious justification or risking legal liability.”¹²²

117. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397 (4th Cir. 1990) (quoting *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320, 323 (W.D. Va., 1983)) (finding that the “economic reality” of their employment meant the laborers in question were lay teachers).

118. See *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980 (7th Cir. 2021).

119. *Id.* at 981.

120. *Id.*

121. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–10 (2000).

122. *Demkovich*, 3 F.4th at 982 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 194–95 (2012)).

However, justifying the categorical exemption for hostile work environment claims based on the *Demkovich* majority's view of ministerial relationships again overlooks the reasons why ministers are subject to exemptions in the first place.¹²³ The ministerial exception does not protect all governing decisions of an organization that happens to be religious; it is designed to protect *religious governance*.¹²⁴ The other cases cited by the Seventh Circuit all focused on matters of hiring and firing, which constitutes religious governance *per se*.¹²⁵ However, whether all hostile work environment claims involve religious governance is not clear; as the dissenting opinion noted in the Seventh Circuit's ruling, hostile work environment claims scrutinize actions taken by a supervisor "outside the scope of [their] employment," which in the context of ministers would mean outside the scope of their charge to shape religious doctrine.¹²⁶

A defense to hostile work environment actions based on sexual harassment helps illuminate the distinction. The Supreme Court ruled that an employer can argue in defense that "(a) . . . [they] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."¹²⁷ Since the defense to hostile work environment claims focuses on *any* sexually harassing behavior, by implication, a hostile work environment claim is not limited to a harasser's behavior done in the name of their supervisory duties and therefore does not challenge how an organization shapes its hierarchy.¹²⁸ Since only issues of

123. See *supra* notes 90–95 and accompanying text.

124. See *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

125. *Hosanna-Tabor*, 565 U.S. at 173. It's also worth noting here that the Seventh Circuit's citation to *Santa Fe Independent School District* is distinguishable; *Santa Fe Independent School District* concerned policy that amounted to state-sanctioned religious speech. Thus it was not the fact that religious beliefs were present in a public forum that excessively entangled church and state, but rather the school's effective adoption of them. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 ("These invocations are authorized by a government policy and take place on government property at government-sponsored school related events.").

126. *Demkovich*, 3 F.4th at 990 (Hamilton, J., dissenting).

127. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (emphasis added).

128. *Demkovich*, 3 F.4th at 990 (Hamilton, J., dissenting) (noting that hostile work environment claims involve different considerations and elements for

religious governance enjoy First Amendment protection without needing some doctrinal justification, nothing about hostile work environment claims require categorical exclusion to avoid unconstitutional intrusion into religious affairs.

Additionally, even if any action taken by ministers within the church's hierarchy implicates "doctrine" in some fashion, the ministerial exception itself has already established that scrutiny into ministerial duties would not rise to the level of "excessive."¹²⁹ In *Hosanna-Tabor*, the Supreme Court undertook the task of evaluating whether the plaintiff was a minister.¹³⁰ They considered the church "holding out" the plaintiff as a minister, the training and education required for the plaintiff to obtain her position, and the ways in which she obtained work benefits uniquely available to ministers.¹³¹ However, most importantly to the issue of whether supervisory behavior receives protection from the ministerial exception, the Court scrutinized her job duties: teaching scripture, leading hymns, and running devotional exercises.¹³² When courts evaluate the duties of an employee to determine who is a minister, they scrutinize the same scope of activities a plaintiff-minister references in their hostile work environment claims—simply put, their activities and life within the religious organization's work environment.¹³³ Consequently, the Seventh Circuit's holding with respect to preventing excessive entanglement with the ministerial relationship resembles the logic of Justice Thomas's split from the Court in terms of its competency to make the inquiries present in *Hosanna-Tabor*.¹³⁴

employer liability, and so does not impact a religious organizations ability to select, supervise, or control their ministers).

129. See *Hosanna-Tabor*, 565 U.S. at 191–92.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 176–77; see *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *Demkovich*, 3 F.4th at 988–89 (Hamilton, J., dissenting) (discussing how religious organizations are already subject to liability and scrutiny for civil claims similar to hostile work environment suits).

134. See *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., dissenting) ("A religious organization's right to choose its ministers would be hollow, however, if secular courts could second guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenants."). However, if courts were forced to grant legal immunity based on the ministerial exception without any power to ask whether an employee is "minister," the exception could cleave religious organizations entirely from many iterations of employment law. See *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396–97 (4th Cir. 1990).

Finally, the Seventh Circuit also failed to offer any compelling reason why a hostile work environment claim brought by a minister subject to the balancing test invites more entangled proceedings between church and state than other forms of permissible claims, like torts or claims by non-ministerial employees. If a hostile work environment claim brought by a minister can survive a balancing test, then the only real difference that remains between a minister and any other employee is a *job title*.¹³⁵ For example, the Seventh Circuit attempted to distinguish ministerial harassment claims from tort claims by stating that other tort claims do not “probe” for religiously based discriminatory animus and that a minister’s hostile work environment claim brings the entire ministerial relationship to bear.¹³⁶ However, in making this argument, the Seventh Circuit repeats in its failure to appreciate that the rights the ministerial exception protects do not turn on status.¹³⁷ First, the Seventh Circuit’s holding that other tort claims do not introduce the issue of religiously based discriminatory animus is patently absurd; courts have long recognized the reality that parties often offer religious reasons to justify the commission of torts.¹³⁸ Second, the “ministerial relationship” does not exist in all interactions between two parties who both happen to be employees of the church. The protection of the relationship between ministers and churches fundamentally exists only to the extent that it protects the ability of the church to shape its mission and hierarchy—in other words, to fulfill its religiously motivated doctrine.¹³⁹

Thus, given that a balancing approach allows suits to proceed that are entirely consistent with similar suits that do not excessively entangle church and state, the approach can better honor the spirit of the ministerial exception without risking impermissible intrusion into the affairs of religious organizations.

135. See *Demkovich*, 343 F. Supp. 3d at 785.

136. *Demkovich*, 3 F.4th at 983.

137. See *supra* notes 90–95 and accompanying text.

138. *E.g.*, *Ohno v. Yasuma*, 723 F.3d 984, 1006 (9th Cir. 2013) (“American courts can recognize tort liability for acts assertedly motivated by religion.”).

139. See *supra* notes 90–95 and accompanying text.

C. *The Categorical Expansion Represents a Lochner-esque Intrusion into Constitutionally Valid Economic Regulations*

If the categorical expansion of the ministerial exception departs from the scope of its original reasoning and does not prevent excessive entanglement, what is its impact? When a minister's hostile work environment claim does not implicate the First Amendment either by substantively challenging religious practice or excessively entangling it in the court, it resembles ordinary labor disputes governed by commercial laws.¹⁴⁰ Thus, categorical expansion of the ministerial exception to such cases does not preserve a constitutional religious right but instead invents a constitutional economic right. Ultimately, categorical expansion resembles the logic of the *Lochner* cases.¹⁴¹

The *Lochner* cases refer to a series of decisions made by the Supreme Court, starting at the turn of the twentieth century, which read fundamental economic rights into the due process clauses of the U.S. Constitution.¹⁴² The Court rooted the logic of their decisions in personal freedom. For example, in *Lochner*, the Court proclaimed that hour limits on bakers' work schedules threatened "the general right of an individual to be free in his person and in his power to contract in relation to his own labor," which was entitled to "the protection of the provisions of the Federal Constitution."¹⁴³ In a technical sense, the ability to contract without statutory constraints entails more freedom, at least from government involvement. However, freedom only functioned in *Lochner* to excuse judicial frustration of legitimate

140. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963–64 (9th Cir. 2004).

141. See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 2002 (2007) (criticizing proponents' argument in support of the ministerial exception that a minister consciously chooses a unique employment with less oversight, which resembles the freedom of contract logic adopted in *Lochner*); Amanda Shanor, *The New Lochner*, 2016 *WIS. L. REV.* 133, 136 (2016). Shanor highlights how First Amendment jurisprudence regarding speech also seems to be trending in similar veins to *Lochner* jurisprudence; *Masterpiece Cakeshop* represents this confluence of both religious freedom and speech concerns in the context of a *Lochner* comparison. See *infra* notes 164–166 and accompanying text (addressing the issue of speech and religion in the context of icing on a cake).

142. See generally *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Child's Hosp.*, 261 U.S. 525 (1923).

143. *Lochner*, 198 U.S. at 58.

regulation.¹⁴⁴ As Justice Holmes wrote in his dissent, the true motivation of the Supreme Court's decision was not to preserve a right embedded in the Constitution; rather, the Justices decided to instill their preferred *economic theory* into the Constitution.¹⁴⁵ Soon thereafter, the Supreme Court's jurisprudence turned away from recognizing fundamental economic rights and accepted the authority of governments to regulate the marketplace.¹⁴⁶

The specter of *Lochner* looms over the categorical expansion of the ministerial exception; many holdings expanding religious freedom would frustrate antidiscrimination law rooted in the government's market regulations.¹⁴⁷ Federal laws, such as the Civil Rights Act and the Americans with Disabilities Act, rely on Congress's power to regulate interstate commerce.¹⁴⁸ While such acts may also draw on or, according to some opinions, should be rooted in the Fourteenth Amendment,¹⁴⁹ they have clear market logic. Antidiscrimination laws regulate who can participate in the marketplace, or more specifically, what burdens on market participation private actors can force others to suffer.¹⁵⁰ The ministerial exception by design allows religious

144. *Id.* at 75 (Holmes, J., dissenting).

145. *Id.* To Holmes, the "liberty" protected by the Constitution does not encompass one's opinion on regulation, but rather "fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76.

146. *E.g.*, *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overturning previous case and allowing state minimum wage law for female employees to stand).

147. *E.g.*, *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 973 (7th Cir. 2021). Mr. Demkovich sued under Title VII of the Civil Rights Act and the Americans with Disabilities Act. It should be noted here that some of the Supreme Court cases cited in the context of economic regulations involved state antidiscrimination laws, which may be somewhat unique given that states possess inherent police powers. However, they are still relevant to the issue of whether certain religious protections resemble guarantees of economic rights since they often involve the regulation of employers or vendors. *E.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1728–29 (2018).

148. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) ("[T]o invoke the sweep of congressional authority, including the power . . . to regulate commerce . . .").

149. For example, Justice Douglas wrote that the power to fight discrimination based on an individual's status would better rest on Congress's enforcement powers under the Fourteenth Amendment. *Heart of Atlanta*, 379 U.S. at 279–80 (Douglas, J., concurring).

150. *Id.* at 252–56 (majority opinion) (discussing the burdens African Americans suffered in interstate travel because of segregation and how its nexus

organizations to frustrate some valid market regulations as a necessity of the First Amendment.¹⁵¹ However, categorical expansion of the exception reaches beyond its scope.¹⁵² When a minister's hostile work environment claim survives the balancing test, no issues of religious governance¹⁵³ or excessive entanglement remain.¹⁵⁴ In such claims, only the *commercial* discretion of the church is at stake in the suit—but instead of forcing bakers to stay in the bakery in unsafe conditions, it is the discretion to permit abusive comments and practices in its workplace.¹⁵⁵ Thus, the categorical expansion allows religious organizations as employers, not churches, to assert an inflated liberty interest against constitutionally valid economic regulation.¹⁵⁶

More broadly, the use of religious freedom to frustrate valid antidiscrimination market regulations has recently received support from several Supreme Court Justices. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, Justice Alito implied that even a corporate entity engaging in secular commercial practices possessed a religious right to offer or deny employee healthcare benefits without direction from the government.¹⁵⁷ However, the

with commerce allowed Congress to pass the Civil Rights Act consistent with its regulatory authority).

151. See *supra* notes 26–29 and accompanying text. Some commentators have suggested that the ministerial exception itself has weak constitutional justification. Corbin, *supra* note 141, at 2038.

152. See *supra* notes 82–87 and accompanying text.

153. See discussion *supra* Section III.A.

154. See discussion *supra* Section III.B.

155. *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 787–88 (N.D. Ill. 2018), *overruled by Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021) (citing cases in which the lack of religious doctrine at stake in the suits meant they could be resolved by law that governs similar, nonreligious parties).

156. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 475–77 (1987) (“That overenforcement of certain constitutional values may lead to undermining other constitutional values is clear. This was particularly true during the *Lochner* era when solicitude for individual rights of contract thwarted majoritarian self-government.”).

157. 573 U.S. 682 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1465–68 (2015). While *Hobby Lobby* concerned the Religious Freedom Restoration Act of 1993 (RFRA), which imposes a stricter standard of scrutiny for religious burden than the Court's jurisprudence under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the statute is still understood by courts “as analogous to a constitutional right.” *Id.* at 1467–68. Regardless, scrutiny under either the RFRA or the First Amendment still required the finding that “[t]he burden on free exercise . . . was the loss of unfettered liberty to contract over benefits and receive a tax deduction.” *Id.* at 1498.

presence of sincere religious beliefs by the owners of Hobby Lobby does not necessarily transform their labor contracting into a constitutionally protected practice. As the Supreme Court held in *Cantwell v. Connecticut*,

the [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second can not be . . . [A] State may by general and non-discriminatory legislation . . . safeguard the peace, good order, and comfort of the community¹⁵⁸

Justice Alito, along with Justices Thomas and Gorsuch, again signaled a desire to stretch religious freedom in his concurrence in *Fulton v. City of Philadelphia*.¹⁵⁹ While arguing to reexamine precedent that recognizes the validity of religiously neutral laws,¹⁶⁰ Justice Alito wrote that antidiscrimination conditions on foster care contracts violated the First Amendment rights of the Catholic agency in the suit by forcing them to abandon their beliefs that same-sex couples are unfit parents in the eyes of God.¹⁶¹ However, as Justice Alito notes, the precise question of the case asked whether the First Amendment prohibits Philadelphia from making antidiscriminatory policies a condition of receiving a foster care contract if an applicant, due to their religion, refuses to work with nonheteronormative applicants.¹⁶² Thus, Justice Alito implies that the First Amendment should allow even public service providers to freely decide who they do business with

158. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). The case concerned defendants who were prosecuted for handing out religious material in violation of an anti-solicitation law. The Court found the law did violate the First Amendment because the secretary of the public welfare council of Connecticut was authorized to evaluate the authenticity of the religious motivations of those who applied for a permit to solicit. But it also held that “[t]he general regulation, in the public interest, of solicitation, *which does not involve any religious test* . . . is not open to any constitutional objection, even though the collection be for a religious purpose.” *Id.* at 305 (emphasis added).

159. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring).

160. *Id.* at 1883 (discussing how the decision in *Smith*, 494 U.S. 872, permitted any neutral law which “categorically prohibits or commands specified conduct” so long as the impact on religious exercise is incidental, even if the law “serves no important purpose and has a devastating effect on religious freedom.”).

161. *Id.* at 1887.

162. *Id.* (“[T]here can be no doubt that Philadelphia’s ultimatum restricts CCS’s ability to do what it believes the Catholic faith requires.”).

according to their religion despite the regulatory wishes of the State. Under the Justice's logic, the publicly contracted providers could determine the level of access to their services applicants may have as a constitutional right.¹⁶³

Finally, Justice Gorsuch and Justice Alito in *Masterpiece Cakeshop* declared hypocrisy in the idea that bakers might refuse to sell a cake with homophobic speech, but that a religious baker could not refuse to sell a cake to a same-sex couple because of their sincerely held religious beliefs.¹⁶⁴ However, as Justice Kagan noted in her dissent, refusing to provide a specific item declaring a certain opinion is wholly different from a vendor denying an entire line of products, made generally available to the public, to a legally protected class of citizens.¹⁶⁵ Whether in the specific case of a categorical expansion of the ministerial exception or the indications given by several Supreme Court Justices, a clear pattern emerges: many judges are increasingly willing to find that even a religiously neutral market regulation impacting an organization's nonreligious, commercial behavior can still violate religious freedom simply because the impacted party disagrees with the regulation.¹⁶⁶ By endorsing an

163. See *id.* Justice Alito attempts to avert this conclusion on the particularities of the case, arguing that no nonheteronormative applicant ever attempted to work with the Catholic foster agency, and if they did, they would have been referred to another agency able to help them. *Id.* at 1886. But Justice Alito ignores the fact that requiring the city to accommodate discriminating service providers would force it to provide fewer foster services willing to work with nonheteronormative applicants, shrinking the market available to them compared to heteronormative applicants. See *id.* at 1875–76 (majority opinion).

164. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1734–35 (2018) (Gorsuch, J., concurring).

165. *Id.* at 1733 (Kagan, J., concurring). Justice Gorsuch attempts to rebut this distinction by saying it adopts an arbitrary sliding scale of generalization with regards to the character of the product to reach a judge's desired outcome. *Id.* at 1738–39 (Gorsuch, J., concurring). However, Justice Gorsuch ignores that the bakers, not the judges, chose the levels of generalization involved here. The secular bakers refused only a customer's specific request for homophobic icing, while the religious cake maker refused to sell the same-sex couple *any* wedding cake, a generally available product in his shop, regardless of any specific decoration. There is nothing arbitrary in a judge's scrutiny of how a baker is treating a class of customers relative to others, which may include asking what exactly the baker denies to them. See *id.* at 1733 (Kagan, J., concurring).

166. While some judges have embraced an expansive view of the First Amendment's ability to create exemptions to neutral laws, other lower courts have followed the narrower logic of the majority opinions thus far given by the Supreme Court, such as their adherence to the limited grounds of the controlling opinion of *Masterpiece Cakeshop*. David S. Cohen, *Silence of the Liberals: When Supreme*

individual's ability to use constitutional provisions to undermine laws they find personally objectionable, the pattern of opinions resurrects the logic of the *Lochner* decisions.¹⁶⁷

Proponents of the categorical expansion of the ministerial exception, and the opinions offered by Justices Alito and Gorsuch in *Masterpiece Cakeshop*, may object to the *Lochner* comparison in several respects. First, unlike the rights discussed in the *Lochner* cases, religious freedom enjoys explicit protection in the U.S. Constitution.¹⁶⁸ Furthermore, no individual questions the fundamental nature of religious rights to American conceptions of liberty, especially considering its historical origins.¹⁶⁹ Thus, courts should practice more sensitivity towards burdens on religious freedoms than they would for "freedom" as a general concept.¹⁷⁰ Finally, with respect to the ministerial exception, comparing the interests of religious organizations to bakers or craft stores overlooks a small yet critical distinction: religious organizations exist to exercise religion rather than market products or services for profit.¹⁷¹ Thus, religious organizations should receive strong protection for their faith that does not fail easily.

However, while these arguments raise important points regarding the nature and purpose of religious freedom, in the

Court Justices Fail to Speak Up for LGBT Rights, 53 U. RICH. L. REV. 1085, 1103 n.109 (2019).

167. Adam Winkler, *Masterpiece Cakeshop's Surprising Breadth*, SLATE (June 6, 2018, 10:29 AM), <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html> [<https://perma.cc/ZNK2-T84Y>] (arguing that recognizing religious rights for corporations allows business to pick and choose their customers and compliance with other neutral laws); see also Sepper, *supra* note 157, at 1471 ("Across business religious liberty claims, free exercise of religion is defined by reference to businesses' ability to contract.").

168. U.S. CONST. amend. I.

169. See *supra* notes 13–19 and accompanying text.

170. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

171. The nature of 501(c)(3) organizations under the Internal Revenue Code (IRC) can help illuminate the distinction between churches and businesses for the purpose of this Comment's discussion. Under the IRC, an organization to qualify for tax exemptions must be organized and operated *exclusively* for an exempt purpose, one of which is the advancement of religion. 26 U.S.C. § 501(c)(3). In addition, the organization cannot be organized or operated for the benefit of private interest nor have its "net earnings . . . inure to the benefit of any private shareholder or individual." *Exemption Requirements – 501(c)(3) Organizations*, INTERNAL REVENUE SERV. (Feb. 17, 2022), <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> [<https://perma.cc/H5B8-H6YG>].

context of the ministerial exception, they do not answer why the balancing approach to the ministerial exception does not offer adequate protection. The balancing approach may only allow cases to proceed that the categorical expansion does not in situations where religious concerns are incidental or perhaps not even claimed by a religious organization.¹⁷² Thus, because such cases would effectively focus on claims against an employer who happens to be a religious organization, the practices scrutinized would be secular or, more specifically, commercial.¹⁷³ Furthermore, the ministerial exception offers broad room to define who a “minister” is. Courts have applied the exception not only to leaders of the pulpit,¹⁷⁴ but also organists¹⁷⁵ and teachers who do not need to meet any religious requirements to hold their position.¹⁷⁶ Thus, if courts adopt both a categorical bar to ministerial employment claims and show considerable deference to how a religious organization defines its ministers, the employer, rather than the law, could effectively decide which suits may proceed.¹⁷⁷ In such circumstances, religious organizations could use a categorical bar on ministerial employment claims to exercise the same unfettered powers over its employees as the bakeries wielded in the 1900s.

While the logic of these opinions may resemble *Lochner*, the validity of the comparison lives more in the burgeoning trend, not their current expression or scope. Specifically, some opinions, unlike the *Lochner* Court’s effort to frustrate federal regulation generally, seem to aim for a more narrow effect of allowing individuals to refuse LGBTQ+ individuals full access to

172. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

173. See *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 788 (N.D. Ill. 2018), *overruled by* *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021) (finding the case could proceed because the archdioceses offered no religious basis or endorsement of discriminatory behavior towards Demkovich’s disability).

174. See *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

175. *Demkovich*, 343 F. Supp. 3d at 776–78.

176. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2077–78 (2020) (Sotomayor, J., dissenting).

177. See *id.* at 2076; *supra* note 134 and accompanying text. Justice Sotomayor expressed concern for the deferential attitude the Court showed to how a religious organization defined a minister in *Our Lady of Guadalupe*, an approach that seemed to resemble the same deference Justice Thomas wished the majority had adopted in *Hosanna-Tabor*.

publicly available services or accommodations.¹⁷⁸ For example, Justice Alito seemed to suggest that LGBTQ+ marriage discrimination, unlike interracial marriage discrimination, reflects the views of honorable individuals acting on religious morals.¹⁷⁹ Made in the context of a free speech claim against offering custom web design for same-sex marriages, Justice Alito seemingly made the distinction between LGBTQ+ and interracial marriage discrimination to avoid the conclusion that permitting the First Amendment to protect LGBTQ+ discrimination would undermine critical protection for other marginalized groups in public spaces.¹⁸⁰

However, observers should not jump to concluding that an expansive view of the First Amendment equates to fewer rights for LGBTQ+ individuals. Freedom of expression allowed LGBTQ+ individuals to guard publications exploring queer relationships, sexuality, history, and other topics from censorship while also offering grounds to challenge unfair terminations in the public sector for expressing their orientation.¹⁸¹ Furthermore, freedom of association ensures that LGBTQ+ individuals can act collectively, protecting queer places and groups such as gay bars¹⁸² or student associations that challenge criminalization of same-sex sexual conduct.¹⁸³ In addition, an expansive First Amendment, compared to the Fourteenth Amendment, may offer protection to LGBTQ+ individuals with whom a “straight audience” cannot easily identify their own traditional practices.¹⁸⁴ In other words, a restrictive First Amendment, whether for freedom of religion or speech, may enable farther-reaching antidiscrimination laws

178. See *supra* notes 157–167 and accompanying text.

179. Transcript of Oral Argument at 81–82, 303 *Creative LLC v. Elenis*, No. 21-476 (U.S. Dec. 5, 2022).

180. See *id.*

181. Scott Skinner-Thompson, *The First Queer Right*, 116 *MICH. L. REV.* 881, 886–88 (2018).

182. “Gay bars” here refers to bars which were open to LGBTQ+ patrons, offering critical social spaces free from discrimination. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 *VA. L. REV.* 1551, 1567–68. Gay bars served an important role in fight for LGBTQ+ civil rights, with one of the most notable being the Stonewall Inn in Greenwich Village, where patrons fought back against a police raid and sparked three days of riots, generating new momentum in the movement. *Id.* at 1580–81.

183. Skinner-Thompson, *supra* note 181, at 886–88.

184. See *id.* at 900.

but does so at the risk of creating windows for similarly reaching discriminatory action.

Still, rights of expression and association have natural limiting principles that an expansive view of religious freedom does not. The right to free speech protects only inherently expressive conduct, which reduces its ability to frustrate antidiscrimination laws in public accommodation.¹⁸⁵ As the *303 Creative* oral arguments showed, an expansive view of free speech would not enable vendors or employers to engage in discrimination for mass-produced and publicly available goods, even if they contain expressions originally made by the artist.¹⁸⁶ However, religious freedom can cover nonexpressive conduct if done as a practice of faith, and so offers far less inherent limitations that would help protect the validity of antidiscrimination laws.¹⁸⁷ In addition, courts have no hesitation in probing into the meaning and offensiveness of expressive conduct, whereas religious freedom prohibits such inquiry as inappropriate state intrusion.¹⁸⁸

The First Amendment demands strong protection of faith's tenants and practices to ensure the nation remains a haven of religious tolerance.¹⁸⁹ But to interpret religious freedoms as expansively as these justices and the categorical expansion of the ministerial exception do wipes away the critical harmonization between expansive rights of belief and more limited rights of conduct a pluralistic society demands.¹⁹⁰ The balancing approach to the ministerial exception better reflects

185. *Rumsfeld v. F. for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 65–66 (2006).

186. See Transcript of Oral Argument, *supra* note 179, at 8, 32.

187. What conduct would receive protection, and what would constitute conduct that is susceptible to government regulation, is an open question to justices entertaining a more expansive view of religious freedom. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring). But at least one Justice has suggested they believe that government opposition to discriminatory action, justified by religious belief, must be subject to strict scrutiny, the highest burden. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) (“[N]o bureaucratic judgment condemning a sincerely held religious belief as ‘irrational’ or ‘offensive’ will ever survive strict scrutiny under the First Amendment.”).

188. Compare *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring), and *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987), with *Jacobellis v. State of Ohio*, 378 U.S. 184, 191 (1964) (discussing what constitutes offensive enough obscenity to warrant government regulation).

189. See *Corbin*, *supra* note 141, at 2038.

190. See *supra* Sections III.A, III.B.

that harmony. It still offers the most powerful protection to critical points of control over a religious organization's mission—the appointment and hierarchy of its ministers.¹⁹¹ Meanwhile, it still can offer vindication to employees, ministers or otherwise, who have suffered harms which are essentially commercial in nature.¹⁹²

In short, the balancing approach best minimizes potential discriminatory abuse, whether from the government *or* from the religious organization itself. Otherwise, employers and judges could abuse the First Amendment to serve their own view of the proper rights of different individuals in the marketplace under the guise of heavy deference to faith.¹⁹³

CONCLUSION

The ministerial exception offers protection to religious freedoms so fundamental that the Supreme Court unanimously adopted it with regards to hiring and firing ministers.¹⁹⁴ However, the basis of the Court's endorsement rested on the ability of religious organizations to shape their own faith and mission without undue interference from the State.¹⁹⁵ With regards to hostile work environment claims, that ability is not always at stake. Applying the balancing approach to the ministerial exception in hostile work environment claims recognizes that there is no fear of violating the First Amendment where the claim does not implicate religious governance nor religious belief.¹⁹⁶ Furthermore, such distinction also ensures the balancing approach does not threaten excessive entanglement with religious organizations.¹⁹⁷ Thus, the balancing approach captures the central concern of the First Amendment's historical roots: ensuring religious organizations maintain control over critical appointments as they concern the

191. See *supra* notes 96–101 and accompanying text.

192. See *supra* notes 96–101 and accompanying text.

193. See *Sepper, supra* note 157, at 1475 (“In the view . . . now [of] many courts, the regulation of commerce unfairly disrupts this private order and ‘redistributes’ from the market baseline.”).

194. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 187–89 (2012).

195. *Id.*

196. *E.g., Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947–48 (9th Cir. 1999).

197. See *supra* notes 100–109 and accompanying text.

practice of their faith.¹⁹⁸ To step beyond the balancing approach and adopt a categorical bar of all hostile work environment claims under the ministerial exception does not protect religious rights; instead, it offers convenience to the religious.¹⁹⁹ The U.S. Constitution does not exist to promote any one opinion but rather seeks to accommodate fundamentally different opinions in society.²⁰⁰ Only the balancing approach to the ministerial exception for hostile work environment claims honors that spirit and ensures that organizations cannot abuse religious freedom to separate themselves from the law.

198. See *supra* notes 13–19 and accompanying text.

199. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 989–90 (7th Cir. 2021) (Hamilton, J., dissenting).

200. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).