Comments:

Prayer Versus Prejudice: The Achievable Coexistence of Religion and Just Remedies for Discrimination Involving Workplace Harassment

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ABSTRACT

The intersection of religion and civil rights in employment law has become a wedge, deepening the ideological divide of the United States. Typically, employers are subject to federal antidiscrimination statutes like Title VII of the Civil Rights Act of 1964. However, religious employers are afforded discretion in employment decisions through carveouts called ministerial exceptions. These exceptions prevent employees designated as ministers from asserting antidiscrimination lawsuits related to tangible employment actions like hiring and firing. This carveout prevents interference with religious institutions' internal governance, thereby respecting their religious autonomy pursuant to the First Amendment. However, the circuits are split as to whether ministers can pursue claims based on intangible employment actions like harassment. This has had an impact on the LGBTQ+ community, as

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individuals with minister status cannot bring hostile work environment claims for harassment based on sexual orientation.

This Comment advocates that the Supreme Court should revisit the old guidelines of the ministerial exception or create a new test that is easily applicable for determining minister status to ensure an adequate balance respecting the values of religious freedom and civil rights protections. A narrower test would lessen the number of individuals who receive minister status and thus enable them to exercise their civil rights by pursuing discrimination claims. As a second step, this Comment argues that, if one is designated a minister, harassment claims should not be barred by the ministerial exception. Instead, harassment claims should be subject to state Religious Freedom Restoration Acts ("RFRAs"), which use a compelling government interest test akin to constitutional strict scrutiny. If the claim is not subject to a RFRA standard, then ministers should be allowed to prove harassment claims under the difficult "severe or pervasive" standard of sexual harassment amounting to a hostile work environment.

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I. INTRODUCTION

Intense political discourse continues to spark crucial dialogue among private citizens and public policymakers alike.[1] One deep-seated civil rights issue that continues to gain traction entails religious freedom and how religious beliefs manifest in response to the changing social landscape. For example, the lines between the secular and the religious often intersect in employment-related matters.[2] In employer-provided group healthcare plans, contraception was typically a covered portion of the Affordable Care Act's minimum essential coverage.[3] However, the Supreme Court, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, granted employers with "sincerely held religious beliefs" an exemption from providing contraceptive coverage.[4] Additionally, religion and civil rights interact in the workplace when religious institutions make certain hiring and firing decisions.[5] For instance, certain generally-applicable antidiscrimination statutes in employment law include exemptions for religious employers to fire an employee with minister status whose personal relationship conflicts with church teaching.[6] Thus, a religious employer can lawfully fire a minister

1. *See generally* Michael Dimock & Richard Wike, *America is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://pewrsr.ch/33SKbWI (explaining that studies have shown an increase in disagreement among the political parties on a variety of issues in the past few years, in part, as the byproduct of "[r]ace, religion and ideology . . . align[ing] with partisan identity").

2. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 193 (2012) (explaining that an employee does not have to perform solely religious functions and can even partake in secular responsibilities as part of a series of considerations determining employee status as a minister).

3. *See* 42 U.S.C. § 300gg-13(a)(4) (stating that a group health plan shall cover women's preventive care and tasking the United States Preventive Services Task Force with recommending services to be covered); *see also* NICOLE HUBERFELD ET AL., THE LAW OF AMERICAN HEALTH CARE 225 (Rachel E. Barkow et al. eds., 2d ed. 2018) (explaining that the U.S. Preventive Services Task Force's "definition of preventive care for women includes 20 FDA-approved contraceptive methods").

4. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2378 (2020); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014) (broadening the scope of religious freedoms to for-profit, nonsecular corporations under the federal Religious Freedom Restoration Act's definition of "person").

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

6. *See Hosanna-Tabor*, 565 U.S. at 188; *see also Our Lady*, 140 S. Ct. at 2060–61.

employee *because of* that minister employee's same-sex relationship.[7] Recently, the Diocese of Brooklyn fired church organist and Catholic Academy music teacher Matthew LaBanca shortly after LaBanca married his now-husband in August 2021.[8] Although LaBanca worked for a religious institution, his job duties did not entail religious education or preaching, and he did not possess formal religious training.[9] Regardless, the diocese fired LaBanca because of his sexual orientation.[10]

In a similar vein, the leadership of a Christian high school in Colorado interrogated its volleyball coach, Inoke Tonga, thereby forcing him to admit he was gay.[11] Based on the diocese's beliefs about sexuality and marriage,[12] the school offered to "help" Tonga using "conversion therapy."[13] Moreover, the school requested, upon his return, that Tonga announce he is not gay, cut off contact with his fiancé, remove any LGBTQ+ support from his social media, and, above all, denounce his support for the LGBTQ+ community in front of the school.[14] Tonga's contract did not state that he could not work as a gay man and coach at the high school,[15] although the school required him to sign a statement indicating that he would align with the school's beliefs and community standards.[16] Rather than denounce his sexuality, Tonga resigned.[17]

In many situations involving employees of religious employers like the above, religious institutions have significant flexibility in their employment decisions through the ministerial exception of the Civil Rights Act of 1964.[18] Title VII of the Act included the ministerial exception as a statutory carveout designed to prevent judicial

7. *See Our Lady*, 140 S. Ct. at 2069 (explaining that judicial intervention in disputes between religious ministers who hold school and teacher positions violates the religious institution's authority to carry out its mission in "educating and forming students in the faith").

8. Liam Stack, *A Gay Music Teacher Got Married. The Brooklyn Diocese Fired Him.*, N.Y. TIMES (Oct. 27, 2021), https://nyti.ms/3bT3GPp.

9. *See id.*

10. *See id.*

11. *See* Josiah Hesse, *Some US Christian Schools Believe Religious Freedom Means They Can Fire Gay Teachers*, THE GUARDIAN (Nov. 21, 2021, 5:00 AM), https://bit.ly/3t9J1Ra; *see also* Alan Gionet, *Former Coach at Valor Christian High School Says His Dismissal Was Effectively Over His Sexual Orientation*, CBS COLORADO (Aug. 24, 2021, 3:09 PM), https://cbsloc.al/3r2gDNY.

12. *See* Gionet, *supra* note 11.

13. Hesse, *supra* note 11.

14. *See id.*

15. *See id.*

16. *See* Gionet, *supra* note 11.

17. *See* Hesse, *supra* note 11.

18. *See* 42 U.S.C. § 2000e-1(a).

entanglement in religious affairs.[19] As such, the ministerial exception exempts religious institutions who manage employees given "minister" status from certain employment antidiscrimination laws.[20] While the exception was originally narrow in scope, the 2020 case of *Our Lady of Guadalupe v. Morrissey-Berru* broadened the standard to focus on an employee's function.[21] Although the First Amendment typically supports a religious institution's internal management and governance decisions regarding the employment of ministers, this expansion has led to some circuit courts dismissing employee ministers' harassment claims.[22] Therefore, a religious employer's derogatory comments, behaviors, and egregious criticisms remain problematically protected, as courts refuse to entangle themselves with religious decisions.[23]

This Comment advocates for a way to balance religious freedoms in making internal management decisions while ensuring that employees of religious institutions are not deprived of civil rights claims.[24] In Section II, this Comment explores the traditional claims of discrimination and harassment[25] by introducing Title VII and the various impacts of employer conduct, focusing on harassment related to sex-based discrimination.[26] Then, Section II explains the kinds of antidiscrimination law protections that apply to religious employers.[27] For example, this Comment delves into Religious Freedom Restoration Acts ("RFRAs")[28] and ministerial exceptions.[29] Thereafter, Section II further elaborates on the ministerial exception by comparing two cases

19. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020) (explaining that courts should stay out of employment disputes involving individuals with "certain important positions" in religious institutions to preserve church autonomy).

20. *See* 42 U.S.C. § 2000e-1(a); *see also Our Lady*, 140 S. Ct. at 2061.

21. *See Our Lady*, 140 S. Ct. at 2068 (reasoning that the Ninth Circuit emphasized the first three factors of the *Hosanna-Tabor* standard more than an employee's "essential functions" thereby reading like a check list contrary to the Court's disfavor of adopting a rigid formula).

22. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 987 (7th Cir. 2021); *see also* Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *12 (E.D. Pa. Jan. 8, 2021).

23. *See Demkovich*, 3 F.4th at 983 (reasoning that offensive and derogatory comments do not give rise to any claim other than employment discrimination and even hostile work environment claims "bring[] the entire ministerial relationship under invasive examination").

24. *See* discussion *infra* Part III.

25. *See* discussion *infra* Section II.A.

26. *See* discussion *infra* Section II.B.

27. *See* discussion *infra* Section II.C.

28. *See* discussion *infra* Section II.C.1.

29. *See* discussion *infra* Section II.C.2.

that dismissed employees' harassment claims with one case that adjudicated the harassment claim.[30]

Next, Section III proposes a balanced solution by first suggesting that courts revert to the *Hosanna-Tabor* test or to a narrower test.[31] Further, Section III shows that a narrower test designating minister status would mean that less individuals lose their right to assert certain employment discrimination claims.[32] Then, Section III recommends ways to protect those who do acquire minister status from workplace harassment by advocating for the application of a RFRA "compelling interest test"[33] or the difficult harassment/hostile work environment standard to assess an employee's harassment claim rather than dismiss it.[34]

II. BACKGROUND

In the height of the Civil Rights Movement, Congress enacted Title VII of the Civil Rights Act of 1964.[35] Title VII addresses inequality[36] among employers "engaged in an industry affecting commerce [involving] fifteen or more employees."[37] Title VII's purpose is to protect against "discrimination on the basis of race, color, religion, sex, national origin, age, or disability."[38] In applying the statute, the Supreme Court has explained that Congress enacted Title VII to achieve equal employment opportunities in situations that previously advantaged white employees.[39] Among the list of protected statuses like "race, color, religion, sex, [and] national origin" explicitly mentioned in Title VII,[40]

30. *See* discussion *infra* Sections II.C.2.a–b.
31. *See* discussion *infra* Sections III.A–III.B.
32. *See* discussion *infra* Sections III.A–III.B.
33. *See* discussion *infra* Section III.C.
34. *See* discussion *infra* Section III.D.
35. *See* Kate Webber, *It is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN'S L. REV. 841, 846 (2015).
36. *See id.* (citing Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 432 (2005) (explaining that the post-*Brown v. Board of Education* response to inequality through demonstrations, sit-ins, and freedom rides fueled efforts at legislation and administrative action and led to the enactment of the Civil Rights Act of 1964)).
37. 42 U.S.C. § 2000e(b) (stating who constitutes an employer under Title VII).
38. 42 U.S.C. § 2000e-16a(b); *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020) (holding that sex encompasses sexual orientation and gender identity in Title VII); *see also* 42 U.S.C. § 2000e(k) (stating that "on the basis of sex" also encompasses "pregnancy, childbirth, [and] related medical conditions").
39. *See* Griggs v. Duke Power Co., 401 U.S. 424, 426, 429–30 (1971) (explaining that an employer's requirement of a general intelligence test as a condition of employment inadvertently impacted African American applicants even though the employer did not engage in explicit discrimination).
40. 42 U.S.C. § 2000e-2(a)(1)–(2).

Congress also referenced other antidiscrimination provisions within Title VII such as the Age Discrimination in Employment Act ("ADEA"), the Rehabilitation Act of 1973, and the Americans with Disabilities Act ("ADA").[41] While the legislature enacted Title VII to serve as a foundation for addressing employment discrimination, the Supreme Court expanded upon certain provisions in the statute through case law.[42]

A. The Foundation of Employment Discrimination

The Supreme Court's ideological composition over the decades since the Civil Rights Act has influenced the application of Title VII, whereby broad or narrow interpretations have favored employees or employers, respectively.[43] For example, under the previously narrow construction of Title VII, courts only prohibited claims of intentional discrimination or disparate treatment.[44] However, in *Griggs v. Duke Power Co.*, the Supreme Court outlined a broader interpretation called the disparate impact doctrine, whereby the Court prohibited facially neutral, but nonetheless discriminatory, "devices and mechanisms" that are unrelated to a reasonable measure of job performance.[45] Moreover, while Title VII's legislative intent is silent as to whether Congress intended to protect more than intentional discrimination,[46] Congress, in Title VII of the Civil Rights Act of 1991, codified a disparate impact provision[47] that does not require proof of intent.[48] In contrast, a related doctrine termed "disparate treatment" does require intent.[49] Intent is not limited to malicious circumstances and can be inferred when "[an] employer's action was motivated by the protected trait."[50] Disparate

41. *See* 42 U.S.C. § 2000e-16b(a)(2)–(3).

42. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191–92 (2012) (providing a standard for determining who constitutes a minister under Title VII's ministerial exception); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2067 (2020) (broadening the test in *Hosanna-Tabor* for determining who constitutes a minister).

43. *See* Webber, *supra* note 35, at 847, 851.

44. *See id.* at 847.

45. Griggs v. Duke Power Co., 401 U.S. 424, 432, 436 (1971); *see* Belton, *supra* note 36, at 434, 436.

46. *See* Belton, *supra* note 36, at 438–39.

47. *See, e.g.*, *id.* at 434; Webber, *supra* note 35, at 847; 42 U.S.C. § 2000e-2(k).

48. *See* Belton, *supra* note 36, at 434, 438; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (providing a burden-shifting framework that analyzes circumstantial evidence to determine discriminatory intent).

49. Jamie Bishop et al., *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369, 373 (2021).

50. *Id.*

treatment claims entail individual or systemic disparate treatment, which includes harassment claims.[51]

B. Harassment Related to Sex

According to the Equal Employment Opportunity Commission (EEOC), harassment on the basis of sex violates Title VII.[52] In addition, the Supreme Court has clarified that "sex" or "on the basis of sex" each include gender identity and sexual orientation.[53] Therefore, sexual or sex-based harassment based on gender-linked traits falls under the overarching category of harassment on the basis of sex.[54] Harassment can entail blatant sexual conduct that is conditioned, either explicitly or implicitly, on the individual's employment.[55] Harassment also encompasses the consequences of submitting to or refusing such conduct.[56] However, harassment can also occur when an employer's conduct has an impact on the employee's work performance or when the conduct creates an "intimidating, hostile, or offensive working environment."[57]

In addressing the EEOC's meaning of "conduct" in 29 C.F.R. § 1604.11(a), the American Civil Liberties Union (ACLU) stated that an employer's conduct does not have to be physical in nature.[58] An employer's hostility can be directed at someone based on their sexual orientation, gender identity, or other non-cisgender-conforming statuses.[59] Illustrating the prevalence of sex-based harassment, a 2021 study on workplace discrimination found that 25% of LGBTQ+ people reported experiencing discrimination based on sexual orientation or

51. *See* Crystal Liu et al., *Seventeenth Annual Review of Gender and Sexuality Law: Annual Review Article*: *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 17 GEO. J. GENDER & L. 411, 414 (2016).

52. *See* 29 C.F.R. § 1604.11(a) (2022); *see also Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://bit.ly/3n3vVjt (last visited Oct. 16, 2021).

53. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737, 1739, 1754 (2020) (explaining that Title VII had implications reaching "beyond what many in Congress or elsewhere expected").

54. *See* L. Camille Hébert, *How Sexual Harassment Law Failed Its Feminist Roots*, 22 GEO. J. GENDER & L. 57, 105 (2020).

55. *See id.* at 64.

56. *See* 29 C.F.R. § 1604.11(a) (2022).

57. *Id.*

58. *See* AM. C.L. UNION, *Know Your Rights Sex - Discrimination*, https://bit.ly/3aJFQ8b (last visited Oct. 16, 2021); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (explaining that actionable conduct does not have to be motivated by sexual desire).

59. *See* AM. C.L. UNION, *supra* note 58.

gender identity in the last year, and 10% of LGBTQ+ individuals left a job because the work environment did not accept LGBTQ+ people.[60]

Aside from the ACLU's broad definition of conduct,[61] the Supreme Court, in *Meritor Savings Bank v. Vinson*, further interpreted the breadth of workplace harassment fostering a hostile work environment on the basis of sex.[62] In that case, the Court referred to the EEOC's guidelines, which describe actionable workplace conduct under Title VII as including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[63]

In *Meritor*, a bank employee alleged that the bank's vice president sexually harassed her.[64] Fearing termination, the employee engaged in sexual favors, fondling, and intercourse.[65] The Supreme Court ruled against the employer, holding that "'hostile environment' sex discrimination is actionable under Title VII."[66] The Court further emphasized that Title VII is not limited to "'economic' or 'tangible' discrimination" and deferred to the EEOC guidelines stating that harassment leading to intangible or "noneconomic injury can violate Title VII."[67] In further emphasizing this point, the Supreme Court explained that employees should be able to "work in an environment free from discriminatory intimidation, ridicule, and insult."[68]

The Court thus imposed a standard for sexual harassment whereby conduct is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[69] This standard poses a "sufficiently demanding" burden to prevent Title VII from becoming a "general civility code."[70] The Court relied on the EEOC's guidelines, explaining that a trier of fact must analyze the totality of the circumstances and the context in which the alleged harassment occurs.[71]

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60. Chris Kolmar, *LGBTQ+ Workplace Discrimination Statistics [2022]: Rates and Trends*, ZIPPIA (Feb. 21, 2022), https://bit.ly/3zs8XXL.

61. *See* AM. C.L. UNION, *supra* note 58 (explaining that the scope of harassment is much broader, including vulgar jokes, sexual gestures, statements that belittle someone based on sex, and policies that disadvantage a group based on sex among others).

62. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

63. *Id.*

64. *See id.* at 60.

65. *See id.*

66. *Id.* at 73.

67. *Id.* at 64–65.

68. *Id.* at 65.

69. *Id.* at 67.

70. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining that "conduct that is merely offensive" is insufficient to trigger Title VII).

71. *See Meritor*, 477 U.S. at 69.

Later, in *Harris v. Forklift Systems, Inc.*, the Court specified various factors that courts may use to determine whether an environment is hostile or abusive.[72] Moreover, the Court explained that courts should consider whether a reasonable person would find the situation objectively hostile and abusive, though a court may also account for the subjective perception of the victim.[73] Five years after *Harris*, in *Oncale v. Sundowner Offshore Services*, the Court held that same-sex harassment was actionable under Title VII.[74]

A harassment claim does not always make an employer liable for an employee's conduct.[75] For example, an employer with a policy against sexual harassment and internal procedures addressing such harassment may not be liable if an employee fails to use those procedures.[76] However, an employer may be liable when the employer possesses actual knowledge of the harassment or if the employee has no other means of reporting.[77] Thus, an employer may incur liability for its own harassing conduct and may be vicariously liable for a supervisor's harassment when the employer has "empowered" the supervisor.[78]

Overall, the extent of liability for employers or supervisors[79] is predicated on whether an employment action is tangible or intangible.[80] First, tangible employment actions include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[81] In exercising tangible employment actions, or actions with economic injury, employers can be held strictly liable for their conduct under Title VII.[82] In addition,

72. *See Harris*, 510 U.S. at 23 (explaining that factors include the frequency and severity of the conduct, as well as whether the conduct was physically threatening or humiliating and interferes with an employee's work).

73. *See id.* at 21–22; *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

74. *See Oncale*, 523 U.S. at 75 (demonstrating that the Court did not address harassment based exclusively on sexual orientation or gender identity at this point).

75. *See Meritor*, 477 U.S. at 72.

76. *See id.* at 71.

77. *See id.*

78. Vance v. Ball State Univ., 570 U.S. 421, 431 (2013).

79. *See* 42 U.S.C. § 2000e(b) (stating the definition of employer includes "any agent of such a person").

80. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998).

81. *Ellerth*, 524 U.S. at 761 (adding that other examples of materially adverse change can include "a decrease in wage or salary, a less distinguished title, a material loss of benefits," or limited or reduced responsibilities (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993))).

82. *See* RESTATEMENT (THIRD) OF AGENCY § 7.01(AM. L. INST. 2006) ("An agent is subject to liability to a third party harmed by the agent's tortious conduct . . . . [An] actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.").

employers may be held responsible for the tangible employment actions of employees with higher authority (such as supervisors) through the doctrine of vicarious liability under Title VII.[83] Generally, the actions of employees with the same level of authority do not constitute harassment, as employees with equal standing do not have the power to inflict financial or economic consequences like docking pay, demoting, or firing.[84]

Second, liability may attach to intangible actions.[85] Intangible employment actions are those that do not cause economic injury,[86] including hostile work environment claims.[87] While an employee may allege harassment, an employer can assert an affirmative defense by demonstrating that the company implemented certain procedures to "prevent and correct any harassing behavior."[88] Moreover, the employer must also show that the employee knew these remedies were available and failed to take advantage of them.[89]

C. The Separation of Church and State's Implications on the Religious Freedom Restoration Act and the Ministerial Exception in Title VII

While provisions exist for remedying traditional employment discrimination suits, employees may encounter obstacles when the employer is a religious entity. Religious entities have a constitutional right to religious liberty free from government intervention.[90] In our country's infancy, the Framers recognized the benefit and necessity of fashioning a government system to avoid the possibilities of tyrannical rule resembling the then-British monarchy.[91] One foundational philosophy entailed preventing the government from interfering with internal decisions among religious institutions and clergy, commonly known under the maxim "separation of church and state."[92] Despite the

83. *See Vance*, 570 U.S. at 424, 431; *see also Faragher*, 524 U.S. at 780.

84. *See Ellerth*, 524 U.S. at 762.

85. *See Faragher*, 524 U.S. at 786.

86. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

87. *See* Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *7 (E.D. Pa. Jan. 8, 2021).

88. *Vance*, 570 U.S. at 424.

89. *See id.*

90. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012).

91. *See* Hans A. von Spakovsky, *Constitution at 230: Separation of Powers Prevents a Democratic Tyranny*, THE HERITAGE FOUND. (Sept. 12, 2017), https://herit.ag/3mvF5VT.

92. Anton Sorkin, *Graduation Ceremonies: A Prayer for Balancing Sponsorship and Censorship*, 41 S. ILL. U.L.J. 345, 347 (2017). *See generally* Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 32 (2019) (explaining *Reynolds v. United States*, 98 U.S. 145 (1879), where the

colonies' various approaches to religion in the early colonial period,[93] the Constitution officially enumerated religious freedom through the Free Exercise Clause and the Establishment Clause of the First Amendment.[94]

1. The Federal Religious Freedom Restoration Act and State RFRAs

Despite the Framers' intent to prohibit a blending of religion and government, legislation continues to broaden the protections available to religious institutions by expanding the scope of religious freedom.[95] For example, the federal RFRA garners its authority from the First Amendment and expands protection for the free exercise of religion[96] without government interference[97] through a test akin to the Supreme Court's constitutional strict scrutiny test.[98] Former President Bill Clinton signed the federal RFRA into law in 1993 with bipartisan support.[99] RFRA emerged largely as a response to the Supreme Court's decision in *Employment Division v. Smith*.[100]

In *Smith*, a private drug rehabilitation center fired two of its employees who were members of the Native American Church when the

government's suppression of Mormon polygamy served as the first case to associate the concept of separationism with religion clauses).

93. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421(1990).

94. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

95. *See* 42 U.S.C. § 2000bb-1(a); 42 U.S.C. § 2000e-1(a).

96. *See* 42 U.S.C. §2000cc-5(7)(a) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); *see also* 42 U.S.C. § 2000bb-2(4) (explaining that RFRA adopted the Religious Land Use and Institutionalized Persons Act of 2000's definition of "exercise of religion").

97. *See* 42 U.S.C. § 2000bb(a)(1) (indicating that Congress recognized that the Constitution's framers intended the free exercise of religion to be secured by the First Amendment).

98. *Compare* 42 U.S.C. § 2000bb-1(b)(1)–(2) (explaining that a government may only burden a person's free exercise of religion if the government demonstrates that the burden is "in furtherance of a compelling governmental interest" and uses "the least restrictive means of furthering that . . . interest"), *with* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (applying strict scrutiny to burdens on religion by requiring the government to show that such restrictions served a compelling interest and were narrowly tailored).

99. *See* 139 CONG. REC. 26416 (Oct. 27, 1993) (showing that the Senate passed RFRA with a vote of 97-3); *see* 139 CONG. REC. 27239-41 (Nov. 3, 1993) (reporting a unanimous vote in the House).

100. *See, e.g.*, Emp. Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (explaining that the compelling interest test is inapplicable to Free Exercise challenges); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 684 (2014); Holt v. Hobbs, 574 U.S. 352, 356 (2015).

employees ingested a drug called peyote during a religious ceremony.[101] The state declined to grant employment compensation because the use of peyote violated an Oregon statute prohibiting the knowing and intentional possession of a controlled substance absent medical prescription.[102] The state responded to the employees' Free Exercise argument by claiming that the controlled substance statute was a "neutral law of general applicability" that did not relieve an individual from complying with a valid law even though the law conflicted with the plaintiffs' religion.[103] Ultimately, the Supreme Court held that the compelling interest test outlined in *Sherbert v. Verner*[104] and *Wisconsin v. Yoder*[105] was inapplicable to challenges based on the Free Exercise Clause.[106]

Consequently, the federal RFRA explicitly noted that the government "shall not substantially burden a person's exercise of religion *even if the burden results from a rule of general applicability*."[107] The federal RFRA then elaborated that a government may burden a person's free exercise of religion if the restriction imposed furthers a compelling government interest and uses the least restrictive means of furthering that governmental interest.[108] Additionally, in seeking to reinstate or "restore" the compelling interest test, RFRA acknowledged that neutral laws may nonetheless burden religious exercise "as surely as laws intended to interfere with religious exercise."[109] RFRA aimed to broaden religious protections to prohibit substantial governmental burdens on the free exercise of religion.[110] While Congress initially intended RFRA to apply at the federal and state level through the Fourteenth Amendment,[111] the Supreme Court ruled in *City of Boerne v. Flores* that applying RFRA to the states exceeded the scope of Congress's power.[112]

101. *See Smith*, 494 U.S. at 874; *see also* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) (explaining that three defendants—some of whom were members of the Native American Church before forming the Peyote Way Church—valued peyote as a sacrament and considered it a deity whose use for nonreligious purposes was sacrilegious).

102. *See Smith*, 494 U.S. at 874; *see also* OR. REV. STAT. § 475.005(6)(a) (defining "controlled substance" as a drug classified under the federal Controlled Substances Act, 21 U.S.C. §§ 811–812).

103. *Smith*, 494 U.S. at 879; *see also* 42 U.S.C. § 2000bb(a)(2).

104. *See* Sherbert v. Verner, 374 U.S. 398, 399, 409–10 (1963).

105. *See* Wisconsin v. Yoder, 406 U.S. 205, 207, 234 (1972).

106. *See Smith*, 494 U.S. at 881–84.

107. 42 U.S.C. § 2000bb-1(a) (emphasis added).

108. *See id.* at § 2000bb-1(b)(1)–(2).

109. 42 U.S.C. § 2000bb(a)(2).

110. *See* Holt v. Hobbs, 574 U.S. 352, 356–57 (2015).

111. *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997).

112. *See id.* at 511; *see also Holt*, 574 U.S. at 357.

Following the Court's decision in *Flores*, about half of the states have adopted their own RFRAs or have broadly construed the religious freedom portions of their respective constitutions to further protect citizens' religious liberties.[113] While state RFRAs at least adopt the compelling interest test, the states require prospective plaintiffs to meet varying thresholds to prompt the government's obligation to demonstrate a compelling interest.[114] For example, some states require a plaintiff to demonstrate a "substantial burden" on their ability to freely practice their religion before a court will apply the compelling interest test.[115] The purpose of requiring a plaintiff to prove substantiality is to segregate "trivial" or "*de minimis*" infractions from valid claims.[116] However, other state RFRAs do not require substantiality and may only require a plaintiff to demonstrate a "burden."[117] Still, other RFRAs omit 'substantial' and 'burden' altogether, stating that all "restrictions on religious liberty" require compelling justification for government interference in religious liberty.[118]

2. The Ministerial Exception to Title VII

In a similar vein to the federal and state RFRAs, the First Amendment also supports some statutory carveouts that explicitly allow for greater protection of religious rights, called ministerial exceptions.[119]

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113. *See, e.g.*, ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. § 41-1493.01 (LexisNexis 2022); ARK. CODE ANN. § 16-123-404 (2021); CONN. GEN. STAT. § 52-571b (2022); FLA. STAT. § 761.03 (2022); IDAHO CODE § 73-402 (2022); 775 ILL. COMP. STAT. 35/10 (2022); IND. CODE § 34-13-9-8 (2022); KAN. STAT. ANN. § 60-5303 (2022); KY. REV. STAT. ANN. § 446.350 (LexisNexis 2022); LA. STAT. ANN. § 13:5233 (2022); MISS. CODE ANN. § 11-61-1 (2022); MO. REV. STAT. § 1.302 (2022); MONT. CODE ANN. § 27-33-105 (2021); N.M. STAT. ANN. § 28-22-3 (2022); OKLA. STAT. tit. 51, § 253 (2022); 71 PA. CONS. STAT. § 2404 (2022); 80.1 R.I. GEN. LAWS § 42-80.1-3 (2022); S.C. CODE ANN. § 1-32-40 (2022); S.D. CODIFIED LAWS § 1-1A-4 (2022); TENN. CODE ANN. § 4-1-407 (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (2021); VA. CODE ANN. § 57-2.02 (2022).

114. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 478 (2010).

115. *Id.*; *see, e.g.*, ARIZ. REV. STAT. § 41-1493.01; TENN. CODE ANN. § 4-1-407.

116. ARIZ. REV. STAT. § 41-1493.01(E).

117. *See, e.g.*, ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. § 52-571b.

118. Lund, *supra* note 114, at 478–79 (explaining that many state RFRAs, like the federal RFRA, allow winning plaintiffs to recover attorney's fees and costs despite differences in terminology, though some RFRAs reject assigning fees and others decline to address the issue). Other differences include notice and exhaustion procedures and coverage exclusions, which are statutory carveouts where a RFRA does not apply or that limit a RFRA's application. *See id.*

119. *See, e.g.*, Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 741 (2005) (explaining a historical religious exemption for sacramental wine used in Catholic masses through the Volstead Act during the Prohibition Era); James Grant Semonin, *"For the Forgiveness of Sins": A Comparative Constitutional Analysis and Defense of the Clergy-Penitent Privilege in the United States*

Although laws prohibiting discrimination are broadly applicable to most employers, Title VII's ministerial exception is one of a handful of statutes that includes a religious carveout for employers who practice a specific religion.[120] Such carveouts are particularly relevant with regard to laws promulgated against discriminatory behavior in employment practices and public accommodations, such as Title VII of the Civil Rights Act of 1964, which gained traction throughout the 1960s and into the 1970s.[121] In allowing religious institutions the freedom to govern and control their ministers, the original scope of the Civil Rights Act of 1964 included religious exemptions for those who perform *religious* activities.[122] Later, the Equal Employment Opportunity Act of 1972 expanded this exemption to protect a religious employer's secular *and* religious activities like hiring and firing.[123] These hiring and firing decisions are tangible employment actions or "official act[s] of the enterprise" that control subordinates and "fall within the special province of the supervisor."[124] Title VII defines religion as encompassing "all aspects of religious observance and practice, as well as belief."[125] Moreover, Title VII precludes individuals of a particular religion who qualify as "ministers" from filing certain discrimination claims against a religious "corporation, association, educational institution, or society."[126] Thus, the exception enables religious entities to exercise discretion in hiring, firing, and internal decision-making without fearing potential lawsuits.[127]

The Supreme Court first adopted the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[128]

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and Australia, 47 J. LEGIS. 156, 156, 164 (2020) (noting that all 50 states and the District of Columbia observe a rule of evidence called the clergy-penitent privilege where clergymen are insulated from certain judicial inquiries regarding confessional communications, although the rule's scope varies by state); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (explaining that RFRA exempts for-profit, secular corporations with religious views from abiding by the Patient Protection and Affordable Care Act's contraceptive coverage in health insurance).

120. 42 U.S.C. § 2000e-1(a); *see also* 42 U.S.C. § 12113(d) (describing the Americans with Disabilities Act of 1990's religious exception).

121. *See* Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 221, 222 (2019).

122. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964) (emphasis added).

123. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

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

125. 42 U.S.C. § 2000e(j).

126. 42 U.S.C. § 2000e-1(a); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020).

127. *See Our Lady*, 140 S. Ct. at 2072.

128. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

There, Cheryl Perich began working for Hosanna-Tabor as a "lay" teacher (or laity)[129] and eventually satisfied various academic requirements to receive a diploma of vocation to become "called."[130] In this role, Perich taught secular and nonsecular subjects, led daily prayer and devotional exercises, and attended services.[131] After taking a disability leave, Perich contacted the school so that she could return; however, the school informed her that it contracted with another lay teacher through the rest of the year.[132] The school administration deemed Perich physically incapable of resuming work and offered Perich a "peaceful release" whereby the school requested that she resign as a called teacher in exchange for the school providing partial coverage of her health care premiums.[133] Ultimately, Perich refused to resign, choosing instead to return to work and declared that she would assert her rights.[134] This caused the school board to rescind her diploma of vocation and terminate her employment for "insubordination and disruptive behavior," although Perich's actions would normally be protected under Title VII.[135]

The Court, however, declined to adopt a definitive test for determining who qualified for minister status.[136] Instead, the Court weighed several factors, including: the title Perich held, the training or background required for the title, the way she held herself out in this position, and the functions of her job duties.[137] Relying on these factors, the Court concluded that Perich qualified for minister status and could not file a discrimination suit.[138] Further, the Supreme Court acknowledged a religious institution's right to select its own ministers

129. A laity is an individual who is neither a clergy member nor ordained. *See Laity*, MERRIAM-WEBSTER, https://bit.ly/3phSWkY (last visited Feb. 23, 2022) (defining laity as referring to people of a religious faith who are distinguished from its clergy); *see also Laity*, ENCYCLOPEDIA.COM, https://bit.ly/3JU2om8 (last visited Feb. 23, 2022) ("Laity refer[s] to those members of a religious community who . . . do not have the responsibilities of fulfilling the priestly functions appropriate to the offices of the clergy or ordained ministers."); *see also Clergy*, MERRIAM-WEBSTER, https://bit.ly/3pHJ4kL (last visited Feb. 23, 2022) (defining clergy as "a group ordained to perform pastoral . . . functions").

130. When someone becomes 'called,' they take on a heightened religious role or pastoral function. *See Hosanna-Tabor*, 565 U.S. at 177–78 (defining "called" as "having been called to their vocation by God through a congregation").

131. *See id.* at 178.

132. *See id.*

133. *Id.*

134. *See id.* at 179.

135. *Id.*

136. *See id.* at 190.

137. *See id.* at 192.

138. *See id.*

free from secular control.[139] In respecting a religious entities' internal governance decisions, requiring a church to "accept or retain an unwanted minister" would be interfering with church matters.[140] Although "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important," religious groups have deference in the interest of making their own determinations on minister selection, teaching the faith, and imparting the groups' mission.[141]

Since the Court implemented its flexible totality-of-the-circumstances considerations for minister status, various courts have subsequently demonstrated their ability to follow this standard in their own determinations of whether an employee constitutes a minister. For example, while applying the *Hosanna-Tabor* standard in *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, the Northern District of Indiana held that a language arts teacher was not a minister despite leading occasional prayer and agreeing in her contract to conduct herself "in accordance with the episcopal teaching authority, law and governance of the Church in this Diocese."[142] The district court emphasized that qualifying the plaintiff as a minister would greatly expand the scope of the exception.[143]

Further, the Seventh Circuit Court of Appeals determined a grade school teacher at a Jewish school was considered a minister, in part because of her role as a teacher with an extensive background in Jewish and Hebrew studies.[144] Moreover, the court also considered her function teaching a specific Jewish curriculum known as the Tal Am, her having the type of experience that motivated the school's hiring decision, and her praying with students.[145] Consequently, the court ruled she was a minister and barred her claim under the ADA.[146]

Eight years later, the Supreme Court broadened the scope of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-*

139. *See id.* at 186; *see also* Emp. Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885, 890 (1990) (explaining that neutral laws of general applicability did not allow Native Americans to use Peyote in a religious ceremony because use of the drug violated the law in Oregon).

140. *Hosanna-Tabor*, 565 U.S. at 188, 196.

141. *Id.* at 196 (declining to address the possibility of bringing other types of suits related to contracts or tortious conduct).

142. Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1171–72 (N.D. Ind. 2014).

143. *See id.* at 1177.

144. *See* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 656 (7th Cir. 2018).

145. *See id.* at 660 (explaining further that the court could "never question a religious organization's designation of what constitutes religious activity" even though the school intended for her role to be religious).

146. *See id.* at 661 (refuting amicus suggestions that urged the court to solely analyze a functional approach as "inappropriate").

Berru.[147] In *Our Lady*, the Supreme Court consolidated cases involving the termination of two teachers, one with breast cancer and the other elderly, who worked at Catholic schools. [148] The teachers did not have significant religious or vocational training and had not held themselves out as religious-affiliated instructors.[149] The Court ruled that the teachers were still ministers subject to the ministerial exception because the teachers were responsible for religious education and faith formation.[150] A teacher's role within a religious institution was deemed critical to imparting the faith, and the Court explained that requiring formal training to undertake this obligation would "have a distorting effect."[151] Thus, the Supreme Court relaxed the totality-of-the-circumstances test with the four guiding considerations put forward in *Hosanna-Tabor* to avoid the possibility of a rigid application.[152] Although *Our Lady* conclusively gives religious institutions broad discretion in tangible employment actions such as hiring and firing their own ministers, the Court did not specify whether an individual with minister status could assert intangible employment actions like harassment claims unrelated to their employment termination.[153] After the Court's *Our Lady* decision, two recent district court cases, *Demkovich v. St. Andrew the Apostle Parish* and *Koenke v. St. Joseph's University*, applied this new, broad standard where religious institutions fired their employees for their sexual orientation, and the courts ultimately dismissed accompanying harassment and hostile work environment claims.[154]

While *Hosanna-Tabor* and *Our Lady* did not rule on harassment claims, those cases do provide guidance on the core importance of the exceptions for religious entities' designation of ministers under the First Amendment.[155] Namely, the purpose of the ministerial exception is to allow religious institutions to "select and supervise" their own

147. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

148. *See id.* at 2071 (Sotomayor, J., dissenting).

149. *See id.* at 2080.

150. *See id.* at 2055 (majority opinion).

151. *Id.* at 2064.

152. *See id.* at 2068; *see also id.* at 2072 (Sotomayor, J., dissenting) (explaining that the majority determined the teachers were ministers despite a primarily nonreligious curriculum, no substantial or religious prerequisite training for the role, and no requirement that the teacher be Catholic).

153. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 987 (7th Cir. 2021) (Hamilton, J., dissenting).

154. *See id.* at 984 (majority opinion); *see also* Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *11 (E.D. Pa. Jan. 8, 2021).

155. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012); *see also Our Lady*, 140 S. Ct. at 2060–61.

ministers.[156] Other means of control for religious institutions can also include decisions regarding compensation, benefits, and resources, among others.[157] Among the above-mentioned methods of control, the scope of employment does not include conduct that constitutes sexual harassment and fosters a hostile work environment.[158]

a. Recent Cases Applying the Ministerial Exception and Declining to Adjudicate Accompanying Harassment Claims

In applying the ministerial exception since *Our Lady*, some circuits have used the *Our Lady* analysis to dismiss a minister's antidiscrimination claims and have also declined to address accompanying harassment or hostile work environment claims.[159] For example, in the first Seventh Circuit case to apply the ministerial exception,[160] *Demkovich v. St. Andrew the Apostle Parish*, Sandor Demkovich served as the church's music director, choir director, and organist under the supervision of Reverend Jacek Dada.[161] Eventually, Dada and Demkovich's employment relationship deteriorated, and Dada subjected Demkovich to "derogatory comments and demeaning epithets" due to his sexual orientation and other conditions like weight and diabetes.[162] When Dada became aware that Demkovich was planning to marry his same-sex partner, the frequency and hostility of these comments allegedly increased and, according to Demkovich, negatively impacted his mental and physical health.[163] Dada subsequently asked Demkovich to resign because his marriage was against church teachings.[164] Demkovich then sued St. Andrew the Apostle Parish for employment discrimination.[165]

156. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 195; *Our Lady*, 140 S. Ct. at 2060; Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. & SOC. CHANGE 11, 29–30 (2021) (posing a theory—the select and supervise theory—that argues hostile work environment claims do not implicate the ministerial exception).

157. *See Demkovich*, 3 F.4th at 990.

158. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 757 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 793–94 (1998) (listing a variety of courts of appeals cases determining that hostile work environment claims do not fall under the purview of employer supervision).

159. *See Demkovich*, 3 F.4th at 973; *see Koenke*, 2021 U.S. Dist. LEXIS 3576, at *11.

160. *See Demkovich*, 3 F.4th at 984.

161. *See id.* at 973.

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

The district court determined Demkovich possessed minister status, dismissing his claim.[166] While the ministerial exception barred Demkovich's termination suit as a tangible employment action, Demkovich amended his complaint to include intangible actions like hostile work environment claims, which included discriminatory remarks and insults.[167] The district court determined that tangible employment actions implicated a minister's employment status and categorically barred Demkovich from bringing a lawsuit.[168] However, the district court acknowledged that intangible actions were not a "categorical bar;" thus, application of the ministerial exception to intangible actions required a case-by-case balancing, which triggers ministerial protections if the matter results in church-state entanglement.[169] Ultimately, after implementing the case-by-case balancing, the district court declined to distinguish between tangible and intangible employment actions in religious matters.[170] The district court again dismissed Demkovich's sex, sexual orientation, and marital status-based harassment claims before factual discovery as a matter of law and kept his disability claim.[171]

However, upon vacating a panel opinion affirming the district court's decision and rehearing this interlocutory appeal,[172] the Seventh Circuit determined that hostile work environment claims—even related to Demkovich's disability—fell within the purview of the ministerial exception.[173] The Seventh Circuit reasoned that its decision was intended to maintain consistency with the Supreme Court in *Hosanna-Tabor* and *Our Lady*.[174] The Seventh Circuit reasoned further that religious institutions need not provide justification for either termination claims nor hostile work environment claims.[175] In adjudicating hostile work environment claims, the Seventh Circuit reasoned that undertaking such a heavily fact-based inquiry that poses both legal and religious questions[176] would "lead to impermissible intrusion into, and excessive entanglement with, the religious sphere."[177] Specifically, the Seventh Circuit explained that courts' involvement in religious decisions would

166. *See id.*
167. *See id.*
168. *See id.* at 974.
169. *See id.*
170. *See Demkovich*, 3 F.4th at 974.
171. *See id.*
172. *See Interlocutory*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining interlocutory as "interim or temporary" and "not constituting a final resolution of the whole controversy").
173. *See Demkovich*, 3 F.4th at 985.
174. *See id.* at 978.
175. *See id.*
176. *See id.*
177. *Id.* at 980.

pose a difficult task for juries to parse out whether an allegedly discriminatory act was "church doctrine" or "secular animus."[178] The court asserted that religious organizations therefore maintain the ability to manage internal affairs that extend beyond hiring and firing,[179] as courts' intrusions into religious matters can foster fear of potential liability and hinder how the organization operates and implements its mission.[180] Finally, the Seventh Circuit further determined that entanglement of the state into religious affairs in questioning the institutions' internal hierarchy and discipline decisions ran counter to the Establishment and Free Exercise Clauses.[181] Thus, religious institutions may avoid litigation to focus on "personal and doctrinal assessments of who would best serve the pastoral needs of their members."[182]

Similarly, in *Koenke v. St. Joseph's University*, the Eastern District of Pennsylvania also interpreted the ministerial exception as broadly prohibiting intangible employment actions and accordingly dismissed the plaintiff's harassment claim.[183] In *Koenke*, a private Catholic university hired the plaintiff, Noel Koenke, a gay woman, as a director for music and worship.[184] Koenke claimed the university imposed "impermissible conditions on her continued employment, impermissible differential treatment conditions regarding the terms, conditions, and privileges of her employment, and a constructive discharge."[185] For example, Koenke claimed the university pressured her to conceal her same-sex marriage, which led to a suicide attempt and contributed to her marriage ending.[186] Eventually, Koenke filed suit against the university under Title IX,[187] which prohibits educational institutions receiving federal funds from engaging in sex-based discrimination.[188] Koenke claimed that she was discriminated against for her sexual orientation, asserting claims of "hostile work environment and tangible adverse employment actions."[189]

The district court applied the standard from *Our Lady* and declined to intervene in the university's decisions regarding employment

178. *Id.* at 981.

179. *See id.* at 979.

180. *See id.* at 980–81.

181. *See id.*

182. *Id.* at 981 (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)).

183. *See* Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *1–2, 8–9 (E.D. Pa. Jan. 8, 2021).

184. *See id.* at *2.

185. *Id.* at *2–3.

186. *See* Tim Cwiek, *Lesbian Files Appeal in Employment Dispute Against University*, PHILA. GAY NEWS (Mar. 9, 2021, 11:00 AM), https://bit.ly/3zwaHz1.

187. *See* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 534 (3d Cir. 2018) (noting that Title VII precedents are applicable to Title IX claims).

188. *See* 20 U.S.C. § 1681(a).

189. *Koenke*, 2021 U.S. Dist. LEXIS 3576, at *2.

relationships.[190] Further, the district court reiterated that *Hosanna-Tabor* and *Our Lady* demonstrated that ministerial laws apply to employment relationships between ministers and religious institutions[191] and would definitively apply to Koenke, who acknowledged her minister status.[192] Moreover, the district court asserted that the Supreme Court did not confine the ministerial exception to tangible or intangible employment actions and declined to create an exception to the standard.[193]

While *Demkovich* and *Koenke* demonstrate the application of the broadened ministerial exception since *Our Lady*, the *Demkovich* and *Koenke* courts acknowledged that the Supreme Court has not completely barred discrimination suits against religious institutions.[194] However, since *Hosanna-Tabor* and *Our Lady* solely adjudicated the standard for determining whether an employee bears minister status and did not address the applicability of harassment claims, the debate on whether the ministerial exception purports to bar intangible employment actions like harassment continues to be a divisive issue among the circuits.[195] For example, prior to the Court's ruling in *Our Lady*, federal circuits had reached different conclusions in answering the question of whether to pursue harassment claims under the ministerial exception, creating a circuit split.[196]

b. Cases that Promote Adjudication of Accompanying Employment Harassment Claims Involving Religious Institutions

The Ninth Circuit assessed whether a court may adjudicate harassment claims against religious institutions that have amounted to a hostile work environment and approached the analysis by distinguishing tangible and intangible employment actions.[197] In *Bollard v. California*

190. *See id.* at *6.

191. *See id.* at *9.

192. *See id.* at *2.

193. *See id.* at *9.

194. *See id.* at *10; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

195. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 986–87 (7th Cir. 2021) (Hamilton, J., dissenting).

196. *See Koenke*, 2021 U.S. Dist. LEXIS 3576, at *11; *see also* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010); Preece v. Covenant Presbyterian Church, 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *17–19 (D. Neb. Apr. 22, 2015); Ogugua v. Archdiocese of Omaha, Case No. 8:07CV471, 2008 U.S. Dist. LEXIS 85317, at *14 (D. Neb. Oct. 22, 2008). *But see* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 964 (9th Cir. 2004).

197. *See Bollard*, 196 F.3d at 948–49 (recognizing a religious institution's right to choose its ministers but finding application of Title VII to a harassment claim poses a low level of interference with religious faith or doctrine).

Province of the Society of Jesus, John Bollard trained and studied to be ordained under the Society of Jesus, which was comprised of an order of Roman Catholic priests called Jesuits.[198] During his six-year training, two of Bollard's supervisors in the Society sexually harassed him by sending him pornographic material, making unsolicited sexual advancements, and engaging in inappropriate sexual discussions.[199] Bollard alleged that the conduct became so severe that it compelled him to leave the Jesuit Order before taking his vows to become a priest.[200] Bollard subsequently filed a sexual harassment claim under Title VII against the Jesuit Order.[201]

The district court initially dismissed the claim as barred by the ministerial exception; however, the Court of Appeals for the Ninth Circuit reviewed the district court's dismissal *de novo*.[202] The Ninth Circuit reasoned that, on one end, the church retains the right to operate freely from government interference, which was the purpose of incorporating the ministerial exception into Title VII.[203] Nonetheless, the court narrowly construed the ministerial exception as "limited to what is necessary to comply with the First Amendment."[204] Thus, the court explained that applying Title VII was permissible in this case because the conduct did not involve a matter of choosing who will carry out the institution's faith mission and because the Jesuits conceded that the behavior was inconsistent with their beliefs.[205] Thus, the court applied the three-part *Sherbert* test,[206] and concluded that the ministerial exception did not bar a claim of harassment.[207] Further, the court concluded that the possibility of entanglement in religious decision-making inherent in the application of Title VII did not violate the Establishment Clause, as the likelihood of excessive entanglement is no greater than other civil suits that "private litigant[s] may pursue against a church."[208] Ultimately, the Ninth Circuit's approach in *Bollard* supplies

198. *See id.* at 944.
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.* at 947.
204. *Id.*
205. *See id.*
206. *See id.* at 946 (explaining that the *Sherbert* test includes (1) the statute's impact on exercising religious belief, (2) "the existence of a compelling state interest justifying the burden," and (3) "the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state").
207. *See Bollard*, 196 F.3d at 948.
208. *Id.* at 949; *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004) (explaining that an associate pastor permissibly pursued redress for sexual harassment and hostile work environment claims under the *Bollard* framework without

an adequate foundation in advocating for a solution that separately addresses ministers' harassment claims while also respecting concerns for religious freedom.

III. ANALYSIS

Religious institutions enjoy a variety of protections designed to secure the First Amendment freedoms that respect their autonomy and independence to make employment decisions as to who will carry out their missions. The creation of the ministerial exception is one such carveout to generally applicable employment laws like Title VII whereby the government cannot interfere with employment decisions concerning those who are active ministers of a faith.[209] Title VII's ministerial exception can have negative implications for employees designated as ministers by impeding their ability to bring certain civil rights claims.[210] One such issue the exception creates is the blurry standard of determining who is a minister.[211] As a result of this vague standard, many employees may be unaware that they do not have the ability to file suit. The ministerial exception bars suits for tangible actions like hiring and firing, ostensibly to avoid entanglement in the religious institutions' selection of ministers.[212] However, despite the Supreme Court having never determined whether intangible actions like harassment claims are also barred, many circuit courts have opted to dismiss them.[213] Therefore, an appropriate intermediate solution would respect a religious institution's First Amendment right to internal governance while

infringing the ministerial exception's protection for religious employment decisions under the First Amendment).

209. *See* 42 U.S.C. § 2000e-1(a).

210. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (explaining that Title VII and other antidiscrimination statutes that have religious ministerial exceptions preclude a minister employee's ability to assert a claim that interferes with the "employment relationship between a religious institution and its ministers").

211. *Compare id.* at 190 (providing a flexible yet focused set of guidelines for minister status), *with* Our Lady of Guadalupe Sch. v. Morrissey Berru, 140 S. Ct. 2049, 2066–67 (2020) (determining minister status by a broad assessment of function).

212. *See* discussion *supra* Section II.C.2.

213. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 985 (7th Cir. 2021) (dismissing a minister's hostile work environment claim regarding harassment for his sexual orientation); Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *12 (E.D. Pa. Jan. 8, 2021) (dismissing all of a minister's employment discrimination claims, including her hostile work environment claim); Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010) (holding that the appellant's minister status bars her hostile work environment claim); Preece v. Covenant Presbyterian Church, 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *15–17 (D. Neb. Apr. 22, 2015) (dismissing an employee minister's sexual harassment claim to avoid interference with church's internal management of its ministers).

simultaneously upholding civil rights for all persons by severing and separately adjudicating intangible employment actions like harassment.

To ensure an adequate balance between respect for religious freedom and the ability to assert civil rights claims, the Supreme Court should first consider reapplying *Hosanna-Tabor*'s narrower standard or creating a new standard for determining minister status. First, a narrower standard would restrict minister status to fewer individuals and allow those who are not designated ministers to assert civil rights claims. Second, if a person is considered a minister, but asserts a harassment claim, then courts should consider applying the RFRA standard, a difficult standard requiring that burdens on religion serve a compelling government interest through narrowly tailored means.[214] Third, if courts do not apply the RFRA standard, then the difficult sexual harassment standard should apply to distinguish between merely offensive claims and those that are truly egregious.

A. Limiting the Ministerial Exception by Returning to the Hosanna-Tabor *Standard or Creating a New Standard*

In upholding the delicate balance between religious freedoms and civil rights, deciding whether to adjudicate harassment claims can be simplified by first revamping the analysis for determining who constitutes a minister.[215] The broad, and somewhat-vague, *Our Lady* test of "what an employee does"[216] has superseded the more in-depth totality-of-the-circumstances formula the *Hosanna-Tabor* Court used to determine minister status.[217] In *Hosanna-Tabor*, the Court declined to adopt a rigid formula, preferring a totality-of-the circumstances test in conjunction with guidelines.[218] Further, the Court explained that emphasis on certain factors in isolation should not be an indicator of minister status.[219] However, when the Ninth Circuit applied the *Hosanna-Tabor* standard, the Supreme Court in *Our Lady* worried that the *Hosanna* guidelines were applied more like a "checklist."[220] As a result, the *Our Lady* Court removed *Hosanna-Tabor*'s flexible yet focused standard and opted to derive minister status from a broad inquiry into all circumstances primarily related to function.[221] Thus, the overarching consideration of the *Our Lady* test focuses primarily on the

214. *See* 42 U.S.C. § 2000bb-1(b)(1)–(2).

215. *See Hosanna-Tabor*, 565 U.S. at 190 (explaining the Court's reluctance to adopt a rigid-formula for determining whether an employee constitutes a minister).

216. *Our Lady*, 140 S. Ct. at 2064.

217. *See Hosanna-Tabor*, 565 U.S. at 190–92.

218. *See id.* at 190.

219. *See id.* at 174, 194.

220. *Our Lady*, 140 S. Ct. at 2067.

221. *See id.* at 2066–67.

employee's function by analyzing employee handbooks, employment agreements, mission statements, and other circumstances.[222]

Consequently, the *Our Lady* test has broadened the scope of who constitutes a minister and has laid the foundation for religious institutions to tactfully ensure that most, if not all, employees can be subject to this exception and thus be prevented from relying on Title VII.[223] For instance, one suggestion for how to "game the system" advised religious organizations to "carefully and thoughtfully link employee responsibilities and duties—the things an employee *does*—to its mission."[224] Further, another source asked whether religious employers had their employees sign a statement that they will "abide by [their] church or ministry's beliefs."[225] The source also inquired about an explicit code of conduct and crafting job descriptions that "reflect employees' ministerial duties" to provide the "strongest possible religious freedom protections."[226]

Since the new, broad standard overemphasizes function by analyzing handbooks or mission statements, religious employers have become cunning in their efforts to solidify minister status by incorporating all-encompassing language that will designate their employees as ministers.[227] Because a greater number of individuals are considered ministers, more employees are deprived of the ability to bring certain employment actions under Title VII.[228] By this measure, janitors, school nurses, cafeteria workers, or others who work at a religious institution, but serve no ministerial function, could risk losing the right to pursue civil rights lawsuits.[229] Moreover, websites providing guidelines on how to ensure the protections of the ministerial exception raise skepticism about the overall purpose or spirit of the exception itself. Leaving aside whether a specific religion believes all its employment decisions serve some faith-based function, the *Our Lady* approach appears to be more of a voluntary shield against lawsuits, gained through arbitrary use of handbooks and mission statements. These actions are far

222. *See id.* at 2066.

223. *See* Christopher Vondracek, *Ministries Breathe Sigh of Relief After Supreme Court Protects Religious Employers*, WASH. TIMES (July 10, 2020), https://bit.ly/3fdAg3r; *see also How the Supreme Court's 2020 Ruling in Our Lady of Guadalupe School Affects Churches and Ministries*, ALL. DEF. FREEDOM CHURCH ALL. https://bit.ly/3HJaUDK (last visited Jan. 5, 2022).

224. Vondracek, *supra* note 223 (quoting John Melcon, a law clerk on the United States Court of Appeals for the Fifth Circuit) (emphasis added).

225. ALL. DEF. FREEDOM CHURCH ALL., *supra* note 223.

226. *Id.*

227. *See id.*

228. *See* discussion *supra* Section II.C.2.

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

removed from the genuine desire to allow religious employers to make the independent, religious-mission-related employment decisions that the exception intended.

Thus, the *Our Lady* "function" approach muddles an applicant's understanding of their rights, especially since the Court does not specifically consider factors like title, religious training, or holding oneself out as a minister.[230] One's title and religious training, among other considerations, while not the sole defining features of a minister, "[are] surely relevant" in helping the employee understand they are being employed as a minister.[231] For instance, an employee with a title of "Vocational Leader" or "Spiritual Assistant" who is trained in theological topics and employed by a religious institution likely has an indication that they are considered a minister.

In contrast, the lines may be blurrier with an individual who serves as a guidance counselor, has a degree in psychology and prays occasionally, but mainly coordinates scheduling, college applications, and mental health services. Therefore, without accounting for an employee's background, employees may encounter the difficulty and unfairness of having to seek legal advice or become well-versed in employment law just to work at a religious institution. While the ministerial exception is not solely limited to clergy[232] or the head of a religious congregation,[233] a wider range of employees could be given minister status when their role, in its entirety, has nothing to do with a religious institution's vital religious duties.[234] Thus, a test that fails to set discernible and predictable guidelines for who may be considered a minister has the potential to negatively impact the rights of roughly 1.73 million individuals employed by religious organizations.[235]

230. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 192–93 (2012).

231. *Id.* at 193; *see also* Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829, 834, 837 (6th Cir. 2015) (applying the Ministerial Exception to a "spiritual director"); Rogers v. Salvation Army, No. 14-CV-12656, 2015 U.S. Dist. LEXIS 61112, at *6–7 (E.D. Mich. May 11, 2015) (applying the Ministerial Exception to a "Spiritual Counselor").

232. *See* EEOC v. Cath. Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996).

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

234. *See Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting) (explaining that the *Our Lady* ruling could unjustly deprive the employees of religious institutions of their employment law rights).

235. *See Religious Organizations*, DATA USA, https://bit.ly/3f6SD74 (last visited Jan. 8, 2022).

B. Comparing Application of the Hosanna-Tabor *Standard with the New, Broad* Our Lady *Standard*

An analysis of cases parsing out minister status before *Our Lady* under the *Hosanna-Tabor* standard provides a bit more consistency in expectations than post-*Our Lady* cases. For example, under the *Hosanna-Tabor* standard, *Herx v. Diocese of Fort Wayne-South Bend, Inc.* held that a language arts teacher was not a minister even though she occasionally prayed with students and signed a contract to act in accordance with the school's episcopal authority.[236] Further, in demonstrating the predictability under the *Hosanna-Tabor* standard, the Seventh Circuit Court of Appeals held that a grade school teacher at a Jewish school was a minister because of her religious education background in Hebrew studies and the structure of her curriculum.[237] However, an employee's status can be more difficult to discern in post-*Our Lady* decisions where the sole focus resides in an analysis of an employee's function. For instance, the Southern District of Indiana ruled that a guidance counselor was a minister and barred her claims under the ministerial exception.[238] However, the Eastern District of Pennsylvania determined that a woman who served as Vice President of Student Vocation and Formation for the United Lutheran Seminary was not a minister.[239]

If courts revert to the old standard under *Hosanna-Tabor* or create a similar test with more definite parameters, many employees who might otherwise have been ministers under the broad *Our Lady* standard would be free to assert Title VII or ADA claims of sexual harassment because the ministerial exception would not bar their claims.[240] In other words, reducing the amount of individuals who acquire minister status by applying a narrower test would leave many more individuals free to assert civil rights claims.

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236. *See* Herx v. Diocese of Fort Wayne-South Bend, Inc., 48 F. Supp. 3d 1168, 1176–77 (N.D. Ind. 2014) (adding that qualifying the teacher as a minister would broaden the scope of the ministerial exception).

237. *See* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 656, 660 (7th Cir. 2018).

238. *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 443 F. Supp. 3d 616, 618–19 (S.D. Ind. 2021).

239. *See* Trotter v. United Lutheran Seminary, No. 20-570, 2021 U.S. Dist. LEXIS 142222, at *2 (E.D. Pa. July 29, 2021).

240. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999) ("[The ministerial exception] does not apply to lay employees of a religious institution if they are not serving the function of ministers.").

C. Application of the RFRA Standard Should Allow Ministerial Employees to Pursue Claims for Intangible Employment Actions Like Harassment

Besides a test for lessening the number of individuals who acquire minister status, those who would qualify for minister status should still be able to pursue claims for intangible employment actions like harassment through meeting the RFRA standard. Since the Supreme Court has only determined that the government cannot interfere with tangible employment decisions, the question of whether harassment and other intangible employment decision-based claims are also barred by the ministerial exception remains uncertain.[241] Thus, harassment claims could be assessed under RFRA, relegating employees to a strict scrutiny-esque analysis that is rigorous enough to protect the religious freedom of religious employers but flexible enough to provide the opportunity for ministers to bring valid claims of discrimination. Employees asserting harassment claims should be subject to the religious institution's RFRA defense to discern whether addressing the harassment claims serves a compelling government interest through the least restrictive means.[242]

D. If a RFRA Standard Does Not Apply, Courts Should Allow Ministers to Pursue Sex-Based Harassment Claims Under the Difficult Standard of Sexual Harassment

Finally, religious employers will still have First Amendment protection if the claims are assessed under the traditional, harassment-based hostile work environment standard, which is very difficult to meet.[243] This would filter the merely offensive claims or statements from those that are egregious or harmful, or those that serve no purpose toward internal religious organizational decisions. While some jurisdictions, like those which decided *Demkovich* and *Koenke*, dismissed accompanying harassment claims as a precaution against entanglement issues,[244] they neglected to recognize that "interactions

241. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 986 (7th Cir. 2021) (Hamilton, J., dissenting).

242. *See State RFRAs*, *supra* note 113.

243. *See* Meritor Sav. Bank, FSN v. Vinson, 477 U.S. 57, 67 (1986) (explaining that sexual harassment that creates a hostile work environment must be "severe or pervasive" enough to alter an employee's working conditions "and create an abusive working environment").

244. *See, e.g.*, *Demkovich*, 3 F.4th at 980 (majority opinion); Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *12 (E.D. Pa. Jan. 8, 2021) (noting that the court is persuaded by a list of cases including Ogugua v. Archdiocese of Omaha, No. 8:07CV471, 2008 U.S. Dist. LEXIS 85317 (D. Neb. Oct. 22, 2008), which reiterated concerns with excessive entanglement because an employee's sexual harassment claim was "factually entwined with adverse employment actions").

between church and state are inevitable" such that "[n]ot all entanglements . . . have the effect of advancing or inhibiting religion."[245] Moreover, despite all the protections available, entanglement must be "excessive" before courts run into issues with the First Amendment.[246] In applying the ministerial exception, courts may focus on actions or conduct taken but may not inquire into a church's "theological belief" or motive.[247] Thus, in analyzing the actions that a religious employer undertakes, courts should simply view the action as either one of ecclesiastical governance free from government control[248] or as conduct subject to secular laws, which are not essential to a church's mission.[249]

The Supreme Court, in *Hosanna-Tabor* and *Our Lady*, did not determine whether harassment claims could bypass the ministerial exception.[250] Those cases only addressed whether an employee constitutes a minister within the meaning of the ministerial exception.[251] Because the Supreme Court never explicitly decided the issue, courts should look to the reasonable balance struck by the Ninth Circuit in *Bollard* as a guide.[252] Courts should weigh the constitutionally-protected

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

246. *Id.*; *see also* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (explaining that courts determine whether entanglement is excessive by looking to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority").

247. Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985); *see also* Middleton v. United Church of Christ Bd., No. 20-4141, 2021 U.S. App. LEXIS 34852, at *8 (6th Cir. 2021) (expressing concerns over entanglement that would entail a court conducting an inquiry into a "church's true motivation").

248. *See Rayburn*, 772 F.2d at 1169.

249. See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("[I]ndependence of religious institutions in matters of 'faith and doctrine' . . . does not mean that religious institutions enjoy a general immunity from secular laws . . . .").

250. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (holding that the Court only ruled that the ministerial exception barred a minister's discrimination suit challenging the decision to fire her); *see also Our Lady*, 140 S. Ct. at 2066 (explaining that the plaintiffs, although not given the title of minister, were still barred by the ministerial exception under a single consideration of whether their roles were "vital . . . in carrying out the mission of the church").

251. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 986–87 (7th Cir. 2021) (Hamilton, J., dissenting) (emphasizing that the *Hosanna-Tabor* and *Our Lady* decisions determined whether the plaintiffs had minister status rather than "whether the ministerial exception should extend to hostile environment claims").

252. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999) (recognizing that harassment claims had no bearing on a religious institution's freedom to select ministers). *But see* Orr v. Christian Bros. High Sch., No. 21-15109, 2021 U.S. App. LEXIS 34810, at *4 (9th Cir. 2021) (explaining that the Ninth Circuit would ordinarily dictate that the harassment claim would overcome the ministerial exception, but the allegations and employment decisions were so intertwined that the claims had to be dismissed).

rights of religious institutions against the valuable civil rights of employees. Courts can achieve this balance by acknowledging conduct that reflects a church's selection of clergy as "one . . . core matter of ecclesiastical self-governance with which the state may not constitutionally interfere."[253] However, while this principal authority lies with religious institutions, the Free Exercise Clause and the Establishment Clause should not serve as blanket protections to dismiss lawsuits just because a minister is the "target as well as the agent of the harassing activity."[254] Further, courts should recognize that a religious institution's ability to choose and manage employees is not necessarily called into question when an employee files suit under an employment discrimination statute.[255]

When looking at the conduct, without assessing religious intent or belief, courts should use the difficult standard for sexual harassment amounting to a hostile work environment. This standard requires the harassment leading to a hostile work environment to be so "'severe or pervasive' as to alter the conditions of [the victim's] employment and create an abusive working environment."[256] This stricter "severe or pervasive" standard still protects religious employers from weak or baseless claims while preserving ministers' rights to have their claims heard in court. Therefore, careful analysis of these circumstances would adequately filter out merely offensive conduct and touch upon conduct that truly amounts to a hostile work environment while avoiding intrusion into religious management choices.

IV. CONCLUSION

Within the last 60 years, Congress has openly demonstrated an awareness of workplace discrimination and promulgated laws to protect employees of various backgrounds from abusive conditions through enacting provisions like Title VII of the Civil Rights Act of 1964.[257] However, these antidiscrimination provisions have been in tension with concerns over religious freedom and autonomy.[258] Antidiscrimination laws like Title VII have included a ministerial exception precluding an employee designated as a minister from pursuing civil rights lawsuits related to tangible employment actions like hiring or firing, among

253. *Bollard*, 196 F.3d at 946.
254. *Id.* at 947.
255. *See id.*
256. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).
257. *See* 42 U.S.C. § 2000e-1 et seq.
258. *See supra* Section II.C.2.

others.[259] However, while the Supreme Court has not explicitly decided whether ministers may bring lawsuits based on intangible employment actions like harassment claims on the basis of an employee minister's sexual orientation,[260] several circuit courts of appeals have taken the liberty to dismiss those claims as well.[261] In the current state of this area of employment law, a greater number of individuals may qualify for minister status and thus lose the ability to bring civil rights claims. Consequently, many ministers who experience workplace harassment cannot obtain relief even though the Court never explicitly declined to adjudicate intangible employment actions.[262]

Therefore, in striking a balance between religious freedom and civil rights, a more workable standard would first suggest that the Supreme Court use a narrower test for determining minister status by either reapplying the *Hosanna-Tabor* standard or creating a new, easily-applicable standard.[263] Second, if an employee does meet this narrower standard and qualifies as a minister, they should still be able to pursue harassment claims separately by applying a compelling interest test, like that of RFRA.[264] In applying that test, the heavy burden rests on the individual alleging discrimination to prove a compelling reason for restricting religious conduct.[265] Lastly, if courts choose not to apply RFRA, courts should subject the minister's harassment claims to the "severe or pervasive" standard of sexual harassment claims that amount to a hostile work environment to filter merely offensive comments or remarks from those that severely impact an employee's wellbeing and productivity in the workplace.[266]

These suggestions support both civil rights and religious freedom. On one end, harassment claims can be heard in a court rather than dismissed. Conversely, religion obtains protection because the standards are difficult enough that only the most egregious claims are filtered through them.[267] If a religious employer's conduct makes it through the

259. *See* 42 U.S.C. § 2000e-1(a); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (noting that the ministerial exception requires that courts refrain from becoming involved in employment disputes between religious institutions and their ministers).

260. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 986 (7th Cir. 2021) (Hamilton, J., dissenting).

261. *See* Koenke v. St. Joseph's Univ., No. 19-4731, 2021 U.S. Dist. LEXIS 3576, at *12 (E.D. Pa. Jan. 8, 2021).

262. *See supra* Section III.A.

263. *See supra* Section III.A.

264. *See* 42 U.S.C. § 2000bb-1(b)(1)–(2); *see supra* Section III.C.

265. *See supra* Section III.C.

266. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *see supra* Section III.D.

267. *See supra* Sections III.C–III.D.

difficult threshold, entanglement in religious employers' choices of internal governance is arguably absent, as religion has likely been used as a shield for bullying and bigotry in the workplace. In other words, there is a difference between statements conveying religious belief and statements that taunt, tease, or bully. Therefore, the ministerial exception allows the unencumbered operation of religious institutions, but it should not serve as a catch-all provision to escape the consequences of blatantly offensive discriminatory conduct. The beauty of the United States lies in its accepting approach to securing religious freedoms and protecting those of diverse backgrounds. Religion and civil rights can coexist in a way that respects religious freedom from government influence while helping to expose abusive conduct against employees designated as ministers.