2022

Employee Treatment: An Exception to the Ministerial Exception?

Hayley McLaughlin

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I. Introduction

The ministerial exception is a judicially-crafted doctrine based on the First Amendment and the need to allow religious organizations to select ministers independently.[1] It grants these organizations complete autonomy when it comes to the control of who will minister to the faithful and has been interpreted to allow religious organizations to hire and fire ministers for any reason.[2] This interpretation of the ministerial exception was solidified in July of 2020 when the Supreme Court expanded the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[3] The case signaled that the ministerial exception, which had previously been recognized by the Court in a unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[4] is here to stay, with greater immunity granted to religious organizations than ever before.[5]

The ministerial exception is a relatively new doctrine and was first recognized by the Fifth Circuit in *McClure v. Salvation Army* in 1972.[6] In *Employment Division, Department of Human Resources v. Smith,* the Supreme Court seemed to undercut the ministerial exception, holding that the Free Exercise Clause of the First Amendment requires a religious exception to a general law only if the government's actions in creating the law can be proved to stem from animus to religion.[7]

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[1] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting).
[2] *Id.*
[3] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[4] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
[5] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049.
[6] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).
[7] Employment Div. v. Smith, 494 U.S. 872 (1990).

Lower courts later saved the ministerial exception by shifting the focus of *Smith* to allow for churches to control internal affairs, such as selection of ministers.[8] Then, in a unanimous 2012 decision, the Supreme Court officially recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*.[9] The decision clarified that the ministerial exception is an affirmative defense rather than a jurisdictional bar, but left many open questions, including: how to determine which organizations can use a ministerial exception and how to define a minister.[10]

Most recently, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court expanded the ministerial exception to apply to any employee of a religious organization charged with the formation of religion in the mind of believers.[11] The majority in this decision again declined to adopt a "rigid formula" for determining who is a minister and stated that it was only deciding the "case before [it]."[12]

After the ruling, some scholars worried that *Guadalupe's* expansion of the ministerial exception allowed for a greater number of employees to be exempt from nondiscrimination protections.[13] While the Court may have expanded these protections in cases like *Bostock v. Clayton County*, which held that employees could not be discriminated against because of their sexual orientation or gender identity,[14] *Guadalupe* signaled that these protections may be

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[8] Caroline Mala Corbin, *Above the Law – the Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1970 (2007) ("The ministerial exception survives *Smith* primarily because lower courts claim there is a distinct constitutional right of church autonomy in internal ecclesiastical affairs.").
[9] *Hosanna-Tabor*, 565 U.S. 171.
[10] *See Id.*
[11] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).
[12] *Id.* at 2069.
[13] *See, e.g.*, Mark Walsh, *Supreme Court Narrows Employment Protections for Parochial School Teachers*, EDUCATION WEEK (July 8, 2020), https://www.edweek.org/education/supreme-court-narrows-employment-protections-for-parochial-school-teachers/2020/07 ("The ministerial exception is meant to apply only to genuine faith leaders . . . . It should not be exploited to justify discrimination against math, gym, and computer teachers, who clearly aren't ministers."); *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049, 2082 (Sotomayor, J., dissenting) (arguing that the decision would impact nonclerical employees at religious organizations).
[14] *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

temporary or illusory for many employees.[15] These are valid concerns, but there is still a route that courts can take to narrow the ministerial exception: by not applying it to situations involving treatment of employees where hiring or firing is not involved.

The two Supreme Court cases relating to the ministerial exception, *Guadalupe* and *Hosanna-Tabor*, dealt specifically with the firing of employees at religiously-affiliated schools and not with the *treatment* of employees during their tenure at these schools.[16] In other words, the Court in both cases held that the ministerial exception allowed religious schools to fire an employee deemed to be a "minister" for any reason in order to ensure that schools have sole discretion to determine who will minister to the faithful.[17] But these rulings did not directly address whether the exception applies to the treatment of employees during their tenure at the organization.[18]

The idea that the treatment of employees during their tenure at religious organizations may not fall under the ministerial exception is evidenced by the circuit court split relating to whether ministers at religious organizations can bring suits relating to their treatment while employed. For example, the Ninth Circuit held that while an employee's claims relating to her hiring and firing were foreclosed, she could bring claims relating to a hostile work environment.[19] But in *Skrzypczak v. Roman Catholic Diocese*, the Tenth Circuit articulated that a minister could *not* bring

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[15] *See* Erwin Chermerinsky & Howard Gilman, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/; Sharita Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/.

[16] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[17] *Id.* In *Our Lady of Guadalupe* and *Hosanna-Tabor*, the employees in question were teachers at religious schools and did not hold the title of "minister." *Id.*

[18] *Id.*

[19] Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004).

Title VII or Equal Pay Act claims against a church because the claims would interfere with the church's right to select and direct its ministers.[20]

Following the Court's decision in *Guadalupe*, many have expressed worry that the ministerial exception could be interpreted as allowing religious employers to avoid discrimination laws entirely, without any judicial recourse for harmed employees.[21] Justice Soyomayor's dissent reflected this worry when she expressed concern about the Court's shift in application of the ministerial exception from a factor-based approach to a "rubber stamp" of employment decisions made by religious employers.[22] While authors have explored how harassment cases should be treated by the court,[23] this Comment will explore the potential application of the ministerial exception to federal and state laws regulating working conditions, such as the FMLA, state sick leave laws, and pregnancy accommodations. Ultimately, it urges the Court to use forthcoming cases stemming from these laws to limit the ministerial exception to cases dealing with the hiring and firing of ministerial employees.

Part II will explore the history of the ministerial exception by focusing on the Supreme Court's rulings and interpretation. Part III will discuss the ministerial exception in relation to the treatment of employees and the split in circuit court decisions relating to cases of employee

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[20] Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238 (10th Cir. 2010).
[21] *See* Erwin Chermerinsky & Howard Gilman, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/; Sharita Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR, FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/. *But see* Ira C. Lupu & Robert W. Tuttle, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, TAKE CARE (July 8, 2020) https://takecareblog.com/blog/the-2020-ministerial-exception-cases-a-clarification-not-a-revolution (arguing that the Guadalupe decision does not give religious organizations immunity from secular laws, but rather protects their ability to make internal management decisions that impact their central mission without government interference).
[22] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2076 (2020) (Sotomayor, J., dissenting).
[23] *See* Ira C. Lupu & Robert W. Tuttle, *#Metoo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249 (2019); Jared S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U.L. REV. 303 (2015).

treatment at religious institutions. Part IV will explore areas of law that provide an opportunity to limit the ministerial exception: specifically, federal and state laws regulating working conditions. Such laws include the Family and Medical Leave Act, pregnancy accommodation and leave, and state sick leave laws, to show that the ministerial exception does not have to apply to these laws. Part V will conclude and urge the Court to use forthcoming cases stemming from laws relating to employee treatment to narrow the ministerial exception.

II. The History of the Ministerial Exception

The ministerial exception is constitutionally based, but prior to the Supreme Court's decision in *Hosanna-Tabor*, scholars and courts disagreed as to its constitutional basis. Some argued that the ministerial exception is grounded in the Establishment Clause.[24] The Establishment Clause refers to part of the First Amendment that reads: "*Congress shall make no law respecting an establishment of religion . . . .*"[25] Other scholars argued that the ministerial exception was grounded in the Free Exercise Clause,[26] which directly follows the Establishment Clause and reads "or *prohibiting the free exercise thereof . . . .*"[27] In *Hosanna-Tabor*, the Court cleared up the confusion by explicitly stating that the ministerial exception was rooted in *both* clauses.[28]

The ministerial exception, as recognized by the Supreme Court in *Hosanna-Tabor* and *Guadalupe*, is primarily focused on allowing religious organizations to autonomously determine

[24] *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789 (2004).
[25] U.S. CONST. amend. I (emphasis added).
[26] *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633 (2004).
[27] U.S. CONST. amend. I (emphasis added).
[28] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

who will "personify [its] beliefs," and protects a religious group's right to "shape its own mission *through its appointments*."[29]

The Court's carefully crafted wording in the only two ministerial exception cases it has encountered suggests that this exception is limited to decisions related to the hiring and firing of ministers, and therefore, may not apply to the *treatment* of employees.[30] This is because the *treatment* of employees is not related to decisions about who will serve as a minister—presumably, once a minister is hired, that decision has already been made. And because the treatment occurs during employment, termination would not be applicable.

Because the ministerial exception is a judicially-crafted doctrine, it contains ample nuance, therefore before exploring this argument further, one must start from the beginning in order to gain a strong understanding. Thus, in this section, Part A will discuss the creation of the ministerial exception in the lower courts, and Part B will explore the Supreme Court's acceptance and interpretation of the ministerial exception.

A. The Creation of the Ministerial Exception

Prior to the Supreme Court's recognition of the ministerial exception, lower courts looked to a line of Supreme Court decisions, which courts perceived to have common thread because "throughout these opinions there exist[ed] 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[31]

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[29] *Hosanna-Tabor*, 565 U.S. at 173 (emphasis added).
[30] In *Hosanna-Tabor*, for example, the Court did not consider any other type of actions that might be brought by a minister against a religious institution, and was careful to use language that limited its decision to the government inability to "contradict a church's determination of who can act as its ministers." *Id.* at 185.
[31] McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)). *See* Watson v. Jones, 80 U.S. 679 (1871); Gonzalez v. Roman Cath. Archbishop, 280 U.S. 1 (1929); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

McClure v. Salvation Army was the first case to recognize the ministerial exception.[32] *McClure*, and many early cases, focused primarily on the Free Exercise Clause of the First Amendment.[33]

Millie M. McClure was an ordained minister in the Salvation Army and sued her employer for sex discrimination in violation of Title VII.[34] McClure claimed that she was paid less than her male counterparts, did not receive benefits equal to those of her male colleagues, and that she was dismissed in retaliation for her complaints about this to her superiors and the Equal Employment Opportunity Commission.[35]

The court was tasked with deciding whether Title VII of the Civil Rights Act of 1964 "applie[d] to the employment relationship between a church and its ministers and, if applicable, whether the statute impinge[d] upon the religion clauses of the First Amendment."[36] The Salvation Army did not dispute McClure's account, but claimed that application of Title VII under the circumstances McClure presented would be a violation of the First Amendment because it was a church.[37] This was the first time a court considered "whether Title VII's statutory religious institution exemption applied to non-religious as well as religiously-based employment discrimination."[38]

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[32] *McClure*, 460 F.2d 553.
[33] *See McClure*, 460 F.2d at 560 ("[A]pplication of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment.").
[34] *Id.* at 555.
[35] *Id.*
[36] *Id.* at 554–55.
[37] *Id.* at 556.
[38] Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 497 (2001).

The court looked to the question of whether the application of Title VII to McClure's claims would violate the Establishment or Free Exercise Clause.[39] The court's analysis seemed to rest on the doctrine of religious autonomy.[40] The court recognized that the "relationship between an organized church and its ministers is its lifeblood . . . [a] minister is the chief instrument by which the church seeks to fulfill its purpose," and that "[j]ust as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection."[41]

Ultimately, the court held that applying Title VII to the relationship between McClure and the Salvation Army would be an unlawful encroachment by the State on the First Amendment and dismissed the minister's claim.[42] The court determined that Congress did not "intend through the non-specific wording of the applicable provisions of Title VII to regulate the employment relationship between church and minister."[43] This wording is credited as the first recognition of the "ministerial exception."[44]

Thirteen years after *McClure,* the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists* constitutionalized the exception.[45] In *Rayburn*, a woman sued the church under Title VII, claiming she was rejected from a pastoral position because of her "sex, association

[39] *McClure*, 460 F.2d at 558.
[40] *Id.* ("The Supreme Court has many times recognized that the First Amendment has built a 'wall of separation' between church and State.").
[41] *Id.* at 559.
[42] The Court Examined §702 of the Civil Rights Act, which gives some employment relations an exemption from Title VII protections. *Id.* at 558. McClure argued that the exemptions allowed religious organizations to only discriminate based on religion. *Id.* The court agreed that the legislative history supported this argument. *Id.* ("The language and legislative history of §702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.").
[43] *Id.* at 560–61.
[44] *See* Brief for Judicial Watch, Inc. as Amici Curiae Supporting Petitioners at 4, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (Nos. 19–267 & 19–348).
[45] Rayburn v. Gen. Conf. of Seventh Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) ("The 'ministerial exception' to Title VII first articulated in *McClure v. Salvation Army* . . .").

with black persons, . . . and opposition to practices made unlawful by Title VII."[46] The Fourth Circuit stated that churches were not "above the law," and could therefore be held liable for torts and breaches of contracts when the "decision does not involve the church's spiritual function."[47] When the decision does involve the church's spiritual function, though, the court explained that applying Title VII would create too close a relationship between the church and state, and that "state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with the church authority."[48]

This ruling was soon cast into doubt. Prior to *Employment Division v. Smith*, laws that substantially burdened the practice of religion were examined under strict scrutiny and violated the Free Exercise Clause unless the state was able to show a compelling state interest.[49] In *Smith*, however, the Supreme Court weakened Free Exercise Clause protection.[50]

In *Smith*, two individuals were terminated from their positions at a private drug rehabilitation facility due to work-related "misconduct."[51] That misconduct involved the ingestion of the drug peyote for sacramental purposes as part of a religious practice at the Native American Church.[52] The intentional possession of a controlled substance, such as peyote, was illegal under Oregon law.[53] When the individuals later tried to file for unemployment compensation, they were denied by the Employment Division of the Department of Human Resources of Oregon because the law did not allow employees that had been discharged for misconduct to collect

[46] *Id.* at 1165.
[47] *Id.* at 1171.
[48] *Id.* at 1164, 1170.
[49] Corbin, *supra*, note 8, at 1969.
[50] *Id.*
[51] Employ't Div. v. Smith, 494 U.S. 872, 874 (1990).
[52] *Id.*
[53] *Id.* at 875.

unemployment.[54] The individuals claimed this was a violation of the Free Exercise Clause because it interfered with their ability to practice religion.[55]

The Supreme Court rejected the plaintiffs' claim that the Free Exercise Clause required courts to grant exception to religious actions that were in contradiction to an otherwise valid law, and held that the Free Exercise Clause could not be utilized to challenge neutral laws of general applicability.[56] The Court also distinguished *Smith* from past Free Exercise Clause cases by stating that those cases had dealt with free exercise in combination with other constitutional protections, but in *Smith*, the Court was dealing with a free exercise claim on its own.[57]

Following this decision, lower courts nevertheless retained the ministerial exception by reasoning that the Court did not intend its holding to interfere with previous decisions relating to non-intervention in matters between a church and its personnel.[58] In other words, *Smith* was interpreted not as dismissing the ministerial exception, but rather as dealing only with an individual's ability to practice religion, leaving intact the church's autonomous ability to select its ministers.[59]

B. The Supreme Court and the Ministerial Exception

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[54] *Id.* at 874.
[55] *Id.*
[56] *Id.* at 890.
[57] Employ't Div. v. Smith, 494 U.S. 872, 882 (1990).
[58] *See* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 130–31 (2009); *see also* Charles A. Sullivan, *Contents: Clergy Contracts*, 22. EMPL. RTS. & EMPLOY. POL'Y J. 371, 382–83 (2018) ("[A]fter *Smith* some doubted the continued viability of the ministerial exception, but the circuit courts quickly put to rest any such debate by recasting the exception as predicated . . . [by a] line of authority that the lower courts read as immunizing churches from governmental interference in their internal governance"); Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1854 (2018) (Following *Smith*, "some commentators questioned whether the ministerial exception should survive. The D.C. Circuit, however, squarely held that *Smith* had no impact on the availability of the exception").
[59] *See* Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302–04 (11th Cir. 2000) ("The *Smith* decision focused on the first type of government infringement on the right of free exercise of religion—infringement on an individual's ability to observe the practices of his or her religion. The second type of governmental infringement—interference with a church's ability to select and manage its own clergy—was not at issue in *Smith*.").

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.*[60] At the time of this decision, all of the United States Circuit Courts had accepted the ministerial exception.[61] The Court's unanimous decision signaled that the ministerial exception would be a permanent addition to the rule of law in the United States.[62] This case dealt with whether a religious organization's freedom to *select* its ministers was "implicated by a suit alleging discrimination in employment."[63]

Hosanna-Tabor involved plaintiff Cheryl Perich, a "called" teacher at Hosanna-Tabor Evangelical Lutheran Church and School.[64] "Called" teachers were those "regarded as having been called to their vocation by God through a congregation."[65] Perich taught at the school for several years and became ill with what was later determined to be narcolepsy during her employment.[66] She began the 2004-2005 academic year on disability leave, but when she informed the school that she would be able to return in January of 2005, the school stated that it did not believe she was ready to return.[67]

The congregation voted to offer Perich a "peaceful release" from her employment, but when she refused to resign the school told her it no longer had a position for her.[68] Perich was eventually fired for "insubordination and disruptive behavior," and for threatening to take legal action against the school.[69] Perich filed a claim with the Equal Employment Opportunity

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[60] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
[61] Ira C. Lupu & Robert W. Tuttle, SECULAR GOVERNMENT RELIGIOUS PEOPLE 57 (2014).
[62] *See* Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception after Hosanna-Tabor*, 68 SMU L. REV. 1124, 1125 (2015).
[63] *Hosanna-Tabor*, 565 U.S. at 188.
[64] *Id.* at 168.
[65] *Id.* at 176.
[66] *Id.* at 178.
[67] *Id.*
[68] *Id.*
[69] *Hosanna-Tabor*, 565 U.S. at 179.

Commission (EEOC), arguing that she was fired in violation of the Americans with Disabilities Act of 1990.[70] The EEOC then sued the Hosanna-Tabor Evangelical Lutheran Church & School.[71]

Hosanna-Tabor claimed that it fired Perich because her "threats to sue the Church violated the Synod's belief that Christians should resolve their disputes internally," and that the First Amednment barred her suit.[72]

The Court agreed with the school, and for the first time acknowledged the ministerial exception when it stated, "[w]e agree that there is such a ministerial exception," and ruled that Perich was a minister for the purposes of the exception, and therefore the government had no ability to intervene in the school's decision.[73] In doing so, however, the Court refused to create a "rigid formula" for determining when an employee would qualify as a minister.[74] Instead, the Court focused only on the facts in front of it, and concluded that given the circumstances surrounding Perich's employment, she qualified as a minister.[75] And as "both Religious [Free Exercise and Establishment] Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers," the Court could not intervene. [76]

The Court distinguished *Hosanna-Tabor* from *Smith* by stating that "*Smith* involved government regulation of only outwardly physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the

[70] *Id.*
[71] *Id.* at 179-180.
[72] *Id.* at 180.
[73] *Id.* at 188, 181.
[74] *Id.* at 190.
[75] *Hosanna-Tabor*, 565 U.S. at 190–192.
[76] *Id.* at 181. Some argued following the *Hosanna-Tabor* decision that the Court's reasoning was more centered on the Establishment Clause than the Free Exercise Clause, because the Establishment Clause relies on the government's carving out of specific areas to be beyond government control. *See* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1266, 1280 (2017).

church itself."[77] Rather than focusing on precedential cases relating to the Free Exercise Clause, the Court focused on prior cases involving church property disputes that held that courts must defer to church decisions in matters of religious doctrine and that it "must respect the decisions of religious authorities on ecclesiastical questions."[78] This line of cases held that the church was barred from contradicting "a church's determination of who can act as its ministers."[79]

The Court also articulated that the government has no power to determine who "will minister to the faithful," and that any such interference would violate the Establishment Clause.[80] The Establishment Clause, the Court reasoned, therefore forbids the government from appointing ministers.[81] The Court did not take into account the reasoning behind Perich's firing because it did not matter; according to the Establishment Clause, if a person qualifies as a minister and is fired for any reason, the Court has no ability to interfere with this decision.[82]

The Court also determined that it would not have been able to grant the monetary relief Perich was seeking because that would effectively serve to punish the church for termination of a minister, which would also be prohibited by the First Amendment.[83] In recognizing the ministerial exception for the first time, the Court was careful to "express no views on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[84]

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[77] Hosanna-Tabor, 565 U.S. at 190.
[78] Lupu & Tuttle, *supra* note 76, at 1274.
[79] Hosanna-Tabor, 565 U.S. at 185.
[80] *Id.* at 195.
[81] *Id.* at 184.
[82] *See* Lupu & Tutle, *supra* note 78, 1283.
[83] *Id.* at 194. Perich was seeking "backpay, compensatory and punitive damages, and attorney's fees."
[84] *Id.* at 196. The Court did clear up one question related to the ministerial exception, though, when it concluded that the exception was an affirmative defense rather than a jurisdictional bar. *Id* at 195, n.4. The court explained that this was because the issue is whether the plaintiff is entitled to the relief they seek, not whether a court is able to hear the case. *Id.* This gave district courts the power to adjudicate ministerial exception cases, and gave courts discretion to determine whether a case can proceed, or is barred by the ministerial exception. Without clearer guidelines to determine who is or is not a minister, however, this has led to some confusion among lower courts when trying to decide whether or not to apply the ministerial exception. *See supra*, part III.

Hosanna-Tabor was careful to use language that limited its decision to the government's inability to "contradict a church's determination of who can act as its ministers."[85] This focus suggests that the ministerial exception applies only to the hiring and firing of ministers, and not the treatment of employees during their tenure at the organization.

While the Court's affirmation of the ministerial exception was decisive, it also left several open questions in addition to how to determine who is or is not a minister. For example, the opinion did not clarify what type of religious organization can have a minister and used terms such as "church," "religious group," "religious organization," and "religious employer" interchangeably.[86] This means that there is no way to know or estimate how many individuals fall under the ministerial exception at any one time, and ministers have been found to exist in areas that have religious affiliations but are not exclusively religious, such as hospitals.[87] This is an ambiguity the Court must clarify in a future case.

Hosanna-Tabor also featured two concurrences. One, authored by Justice Alito, and joined by Justice Kagan, signaled the jurisprudence that was to come when Justice Alito wrote: "courts should focus on the function performed by persons who work for religious bodies" when determining whether the ministerial exception applies.[88] This is because the Constitution protects freedom of religion for all religions, many of which do not have the same type of ordination as Christian denominations, but must still be free to "choose the personnel who are essential to the performance" of key religious activities.[89] Justice Thomas also authored a concurrence and argued that the religion clauses of the First Amendment require courts to defer to religious organizations'

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[85] *Id.* at 185.
[86] *See* Murray, *supra* note 62, at 1132 n. 61 (noting that "the court uses 'church' over forty times, religious group seven times, religious organization seven times, religious institution one time, and religious employer two times."); *see also* Zoe Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181 (2014).
[87] *Id.* at 1142.
[88] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 198 (2012) (Alito, J., concurring).
[89] *Id.* at 711–12.

ministerial designations and that any attempt by courts to decide who qualifies as a minister is impermissible.[90]

But most importantly, by focusing on the exception's importance to the *selection* of ministers and a religious organization's autonomy to decide who will serve as ministers to the faithful through its hiring and firing of individuals, the Court left open the possibility that the exception does not apply in other cases: namely those dealing with treatment of employees during their tenure.[91] As noted, the Court specifically stated that it was not expressing any views on whether the exception would apply to suits "including actions by employees alleging breach of contract or tortious conduct by their religious employers."[92]

In July of 2020, the Supreme Court expanded the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru* to apply to any employee of a religious organization charged with the formation of the religion on the mind of parishioners.[93] For many, this expansion was cause for alarm, as it seemed to signal that the Court was paving the way to allow religious employers to avoid discrimination laws without having to provide religious reasons for doing so.[94] The *Guadalupe* court also made it clear that there was no test or oversight that the judicial system

[90] *Id.* at 710–11 (Thomas, J., concurring).
[91] Hosanna-Tabor, 565 U.S. at 188. The Court stated that an intrusion on a church's decision to hire or fire an unwanted minister would interfere with the "internal governance" of the organization, but this "internal governance" seems to be the decisions the church makes in relation to hiring and firing ministers, rather than the goings-on in the church's day to day governing policies. *Id.*
[92] *Id.* at 196.
[93] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S.Ct. 2049 (2020).
[94] *See* Erwin Chermerinsky & Howard Gilman, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/; Sharita Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/. *But see* Ira C. Lupu & Robert W. Tuttle, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, TAKE CARE (July 8, 2020), https://takecareblog.com/blog/the-2020-ministerial-exception-cases-a-clarification-not-a-revolution (arguing that the Guadalupe decision does not give religious organizations immunity from secular laws, but rather protects their ability to make internal management decisions that impact their central mission without government interference).

could provide for these decisions, which, according to Justice Sotomayor's dissent, provided a "rubber stamp" for these decisions.[95]

Guadalupe consisted of two combined lower court cases, one brought by Agnes Morrisey-Berru against her former employer, Our Lady of Guadalupe, and the other brought by Kristen Biel against her former employer, St. James School.[96]

In analyzing the case, the Court took extensive pains to discuss Morrisey-Berru's (as well as later Biel's) job functions. Morrisey-Berru was employed as a lay teacher at Our Lady of Guadalupe and taught all subjects.[97] Part of the school's stated mission was to promote Catholicism, and Morrisey-Berru's employment contract stated that all her duties were focused on this mission.[98] Morrisey-Berru taught religion, directed the yearly student passion play, helped students prepare for Mass, started class with a Hail Mary, led prayer with students, and was reviewed using a religious standard.[99] Because the curriculum involved the teaching of religion, the Court deemed her to be "her students' religion teacher."[100]

Morrisey-Berru brought her claim under the Age Discrimination in Employment Act of 1967 because she stated that the school had demoted and then fired her because of her age.[101] The school disputed this and claimed she was fired due to her inability to adopt to a new learning program.[102] The school claimed that its actions fell under the ministerial exception, but the Ninth Circuit disagreed, stating that, even though Morrissey-Berru had many religious duties, those

[95] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2076 (2020) (Sotomayor, J., dissenting).
[96] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056–57.
[97] *Id.* at 2078–79.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 2056.
[101] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2058.
[102] *Id.*

duties alone were not enough to qualify for the ministerial exception under the framework provided by *Hosanna-Tabor*.[103]

In Biel's case, Biel worked as a lay teacher at a Catholic primary school and taught every subject, including religion.[104] Like Morrisey-Berru she taught Catholicism, gave tests on religion every week, prayed with students every day, and was evaluated on religious criteria.[105] Biel sued the school under the Americans with Disabilities Act (ADA), claiming that she was fired because she had requested a leave of absence due to her need for medical care relating to her breast cancer diagnosis.[106] In Biel's case, the Ninth Circuit again held that Biel did not have a religious background or training, as Perich had in the *Hosanna-Tabor* case, and was not a minister.[107]

While the Court referred to the analysis outlined in *Hosanna-Tabor* to determine whether Morrisey-Berru and Biel were ministers, it expanded application of the ministerial exception by acknowledging that the significance of the factors it highlighted in *Hosanna-Tabor* were not necessary to create a ministerial exception.[108] In other words, the presence or absence of the title "minister" is not dispositive. The Court held that "what matters, at bottom, is what an employee

[103] Morrisey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019) (mem).
[104] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2058.
[105] *Id*.
[106] *Id*.
[107] Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018). In both *Biel* and *Morrisey-Berru*, the Ninth Circuit claimed to look at the totality of the roles the women played within their schools, but downplayed the importance their religious teaching played in the formation of the religion in the students' minds. *Id*.; Morrisey-Berru v. Our Lady of Guadalupe Sch., 769 Fed.Appx. 460 (9th Cir. 2019) (mem). Instead, the court chose to focus on the other factors that were considered in *Hosanna-Tabor*, including the fact that the teachers did not have as much training as Perich and did not hold themselves out as ministers, in order to find that the ministerial exception did not apply to either of them. *Id*.
[108] *Our Lady of Guadalupe Sch.*, 140 S.Ct. at 2063.

does,"[109] and declined to adopt a rigid structure to determine who is or is not a minister, stating that it was enough to decide "the case before [it]."[110]

The Court examined the importance of religious education in different religions and found it to be universally important,[111] and that educating youth in religious doctrine "lie[s] at the very core of the mission of a private religious school."[112] The Court then reasoned that, since both of these schools deemed teachers to play a vital role in the church's mission, and courts cannot second-guess such decisions, in both cases the ministerial exception applied.[113] It explained that, even though the ADA and Title VII have provisions allowing religious employers to "give preference to members of a particular faith in employing individuals to do work connected with their activities . . ." the exception noted in *Hosanna-Tabor* serves a different focus; it allows the institution to dismiss a minister that is not "performing essential functions in a satisfactory manner."[114] So because the religious organizations were schools that deemed teachers to be central to the schools' missions, the schools could fire teachers (or "ministers") for any reason, even if the termination would otherwise be a violation of discrimination laws.[115]

The Court held that the First Amendment's religion clauses prohibit interference with religious institutions' decisions relating to faith and doctrine.[116] The Court explained that the independence of these matters were of the utmost importance to religious institutions because it

[109] *Id.* at 2064. This holding shows a shift in the thinking of the Court toward Justice Alito's concurrence from *Hosanna-Tabor*, which stressed that when determining whether the ministerial exception applies, the focus should be on the employee's function within the religious organization. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 198 (2012) (Alito, J., concurring).
[110] *Our Lady of Guadalupe Sch.*, 140 S.Ct. at 2069.
[111] *Id.* at 2065.
[112] *Id.* at 2064.
[113] *Id.* at 2066.
[114] *Id.* at 2068.
[115] *Our Lady of Guadalupe Sch.*, 140 S.Ct. at 2068.
[116] *Id.* at 2060.

allowed institutions to remain autonomous with respect to "internal management decisions that are essential to the institution's central mission."[117]

This does not mean, however, that these institutions are immune from all secular laws.[118] Rather, a part of the autonomy granted to religious institutions is the freedom to *select* the people who will perform certain key roles within their organization.[119] This reinforces the decision and analysis in *Hosanna-Tabor*, where the Court stated that "depriving the church of control over the selection of those who will personify its beliefs" would constitute unacceptable judicial interference into a religious organization's internal governance.[120] In other words, the church should have full control to "shape its own faith and mission through its *appointments."*[121]

Unlike *Hosanna-Tabor*, however, *Guadalupe* was not a unanimous decision and included a strongly-worded dissent authored by Justice Sotomayor and joined by Justice Ginsburg.[122] The dissent objected to the teachers being labeled as "ministers" because they did not have the correct background, training, or functions to qualify as ministers.[123] The dissent noted that *leadership* was central to the *Hosanna-Tabor* decision, and was essential to the previous circuit cases before *Hosanna-Tabor.*[124] Without a leadership qualification, the dissent argued, the decision "invites the 'potential for abuse'" and expanded the ministerial exception as broadly as it could – ignoring statutory exceptions that already existed in favor of a judicially-created doctrine.[125]

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[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 173 (2012).
[121] *Id*. (emphasis added).
[122] *Id*. at 2075 (Sotomayor, J., dissenting).
[123] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2080–81 (2020) (Sotomayor, J., dissenting).
[124] *Id*. at 2075.
[125] *Id*. at 2077.

But the failure to create a framework to determine who is a minister was not the only question the Court left open.[126] The Court also failed to answer whether the ministerial exception is applicable only to the hiring and firing of ministers at these religious organizations, or if it applies to the *treatment* of employees during their time at the organization.

Again, the careful wording of the Court in *Guadalupe* suggests that the ministerial exception applies only to hiring and firing, or the "selection" of persons playing key roles within the organization.[127] And as in *Hosanna-Tabor*, the *Guadalupe* court stated that it was only deciding the "case before it," and therefore, language that may appear to imply that the ministerial exception could apply in cases outside of the selection of ministers is by no means dispositive.[128] This opening is an opportunity for the Court to narrow the ministerial exception in a meaningful way.

The ministerial exception is a judicially crafted doctrine.[129] Judicial interpretation has shifted from the Free Exercise Clause focused application in *McClure* to the combined Free Exercise and Establishment Clause interpretation certified by the Supreme Court in *Hosanna-Tabor* and reiterated in *Guadalupe*. As the Court continues to shape the ministerial exception and

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[126] The Court once again failed to define exactly which organizations the ministerial exception applies to and again used terms like "religious organization," "religious institution," and "church" seemingly interchangeably. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[127] Again, as in *Hosanna-Tabor*, the Court referred to internal management decisions, but a careful reading of the text suggests that this refers to the religious organization's decision-making process in regard to who will serve as "ministers" of the organization and other key decisions "essential to the institution's central mission." Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020). This leaves open the possibility that the ministerial exception does not apply to the treatment of employees at religious institutions as long as the treatment is not deemed "essential" to the organization's central mission.

[128] For example, the court in *Demkovich v. St. Andrew the Apostle Par.* allowed a minister to bring a harassment claim against a religious institution. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision). The dissent in *Demkovich* disagreed and referenced the passage in *Guadalupe* that states a "church's independence on matters of 'faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." Demkovich v. St. Andrew the Apostle Par., 2020 U.S. App. LEXIS 27653 at *47 (7th Cir. August 31, 2020) (Flaum, J., dissenting) (quoting *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049, 2060). It should be noted, though, that *Demkovich* has been vacated to allow for a rehearing en banc. *Demkovich v. St. Andrew the Apotle Par.*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).

[129] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting).

clarify the ambiguities mentioned above, it can take advantage of opportunities relating to ministerial treatment to narrow the ministerial exception in a way that will allow for greater employee protections while safeguarding religious institutions' First Amendment rights.

III. The Ministerial Exception and Employee Treatment

The cases discussed above explicitly hold that the ministerial exception applies to hiring and firing by stating that religious institutions should be free to autonomously "select" ministers. Therefore, religious institutions can use the exception as an affirmative defense to all claims relating to employment decisions that are central to the institutions' missions. But, this same reasoning does not necessarily apply to cases dealing with *treatment* of employees, as employee treatment is not relevant to the *selection* of who conveys the faith.

In *Guadalupe*, the Court explained that the Religion Clauses protect religious institutions' rights to decide issues "'of faith and doctrine' without government intrusion," and that governmental intrusion in such matters was prohibited by the First Amendment.[130] The Court noted that the independence of these issues was linked to independence in matters of church government, but churches are not immune from secular laws.[131] Religious institutions do, however, have autonomy when it comes to "internal management decisions that are essential to the institution's central mission" which includes "selection of the individuals who play certain key roles."[132] The Court noted that the ministerial exception maintains religious institutions' independent authority to "select, supervise, and if necessary, remove a minister" to ensure that "a wayward minister's preaching, teaching, and counseling" do not "lead the congregation away from

[130] *Id.* at 2060 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012)).
[131] *Id.*
[132] *Id.*

the faith."[133] In both *Hosanna-Tabor* and *Guadalupe,* the Court had the opportunity to declare that the ministerial exception applies to situations outside of ensuring control over the message ministers preach to the faithful, but in both cases the Court focused on this reason alone. Because the treatment of ministers during their employment does not relate to a church's ability to control the message being preached to the faithful, and churches would presumably have already selected a minister for this purpose (or could fire them if they were not performing satisfactorily), suits relating to employee treatment should fall outside of the ministerial exception.

The circuit courts are split on this issue and whether the ministerial exception applies to cases that do not involve the hiring or firing of ministers but rather relate to ministerial treatment.[134] The Seventh and Ninth Circuits believe that these cases are permissible and do not invoke the ministerial exception, while the Tenth Circuit would apply the ministerial exception.[135] First, this Comment will discuss the reasons Circuit Courts have found that the ministerial exception does not apply to employee treatment by exploring the Ninth Circuit case *Elvig v. Calvin Presbyterian Church*, and the Seventh Circuit case *Demkovich v. St. Andrew the Apostle Parish*. It will then examine the Tenth Circuit's explanation for why the ministerial exception should apply to treatment as outlined in *Skrzypczak v. Roman Catholic Diocese*.

A. Circuit Split: Ministerial Exception Does Not Apply to Cases Involving Employee Treatment

The Ninth Circuits has held that employees are able to bring employment suits for actions taken by a religious institution that deal with the treatment of an employee during their employment so long as the claim does not relate to the hiring or firing of the employee.[136] The

[133] *Id.*
[134] *Compare* Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004). *with* Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238 (10th Cir. 2010).
[135] *Id.*
[136] Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004).

Seventh Circuit reached the same conclusion in a decision that has since been vacated and is awaiting rehearing en banc.[137] Even though this case is no longer precedential, the court's reasoning and still worth analyzing when considering employee treatment and the ministerial ministerial exception analysis and will be discussed.

1. *Elvig v. Calvin Presbyterian Church*[138]

Elvig v. Calvin Presbyterian Church was decided prior to *Hosanna-Tabor* and *Guadalupe* and upheld the ministerial exception in relation to adverse actions taken by a church against a ministerial employee.[139] The plaintiff, though, was allowed to bring suit for sexual harassment she suffered during her tenure as long as the remedies were limited to tort-type damages and excluded reinstatement or damages for lost wages.[140]

Monica McDowell Elvig was an ordained minister and the Calvin Presbyterian Church hired her as an Associate Pastor.[141] A Senior Pastor began to sexually harass Elvig, creating a hostile work environment; Elvig complained to the church, which investigated but ultimately did nothing.[142] The Senior Pastor's harassment got worse after Elvig complained to the EEOC, and the church put her on unpaid leave and ultimately fired her.[143]

Elvig brought claims against the church and her supervisor for violations of Title VII due to the sexual harassment she suffered, as well as state law claims for "defamation, negligent supervision and violations of the Washington Law Against Discrimination."[144] The Ninth Circuit held that plaintiff's claims against the church that related to hiring and firing were foreclosed by

[137] Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).
[138] Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004).
[139] *Id.* at 962.
[140] *Id.* at 966–67.
[141] *Id.* at 953.
[142] *Id.* at 953-54
[143] *Elvig*, 375 F.3d at 954.
[144] *Id.* at 954.

the ministerial exception but that she was able to bring her claims relating to hostile work environment.[145] The Ninth Circuit's reasoning centered on the idea that claims could be brought if the church did not claim "doctrinal reasons for tolerating or failing to stop the sexual harassment."[146]

The court also determined that she was able to hold the church vicariously liable for the harassment "unless the Church [could] satisfy the *Ellerth/Faragher* affirmative defense."[147] The plaintiff's claims for retaliatory harassment could also move forward because the harassment alleged (verbal abuse and harassment), was not a protected employment decision, although the court acknowledged that employer could be protected from Title VII liability by the First Amendment if it claimed the retaliatory actions were doctrinal.[148]

After this case, the church petitioned for review en banc, which was denied.[149] The decision to deny did contain a dissent, however, authored by Judge Kleinfeld, who argued that supervision of clergy should also fall under the ministerial exception because it is as important as decisions relating to hiring and firing of ministers.[150]

1. *Demkovich v. St. Andrew the Apostle Parish*

[145] *Id.* at 953.
[146] *Id.* at 963.
[147] *Id.* at 960.
[148] *Id.* at 951. In addition, since Elvig's state law claims were dismissed because of supplemental jurisdiction issues following the dismissal of the federal claims, the court held that the Elvig's state law claims should not have been dismissed, but that it would be up to the lower court on remand to determine whether the state law claims were subject to the ministerial exception. *Id.* at 968–69. As with federal laws, state laws could be subject to the ministerial exception if they "impinge on the church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers." *Id.* at 969.
[149] Elvig v. Calvin Presbyterian Church, 397 F.3d 790 (9th Cir. 2005).
[150] *Elvig*, 397 F.3d at 798–806 (Kleinfeld, J., dissenting).

The most recent case dealing with the ministerial exception, *Demkovich v. St. Andrew the Apostle Parish*, was decided after *Guadalupe*.[151] Although this decision was vacated in December of 2020 to allow for a rehearing en banc, and therefore holds no precedential value, the Seventh Circuit's reasoning is still useful in analyzing the application of the ministerial exception to employee treatment.[152] Here, in a 2-1 panel decision, the Seventh Circuit determined that a homosexual worker could bring harassment claims against his religious employer for the harms he suffered during his employment. [153]

The plaintiff, Sandor Demkovich, was gay and was hired by St. Andrew the Apostle Parish as its music director but fired two years later.[154] At the time he was hired, he was dating his future husband and suffered from obesity, diabetes and metabolic syndrome. [155] During his employment, Demkovich's supervisor engaged in verbal attacks related to Demkovich's sexual orientation and disabilities, which created a hostile work environment.[156] As Demkovich's wedding grew closer, the attacks became more common and increasingly harsh.[157]

After Demkovich's wedding, his supervisor demanded that he resign, and fired Demkovich when he refused.[158] Demkovich sued, alleging hostile work environment claims under Title VII and the Americans with Disabilities Act (ADA).[159] Both parties agreed that Demkovich was a minister within the definition of *Hosanna-Tabor* and *Guadalupe*.[160] The lower court

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[151] Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).
[152] *Demkovich v. St. Andrew the Apotle Par.*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).
[153] *Demkovich*, 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).
[154] *Id.*
[155] *Id.* at 721.
[156] *Id.*
[157] *Id.*
[158] *Demkovich*, 973 F.3d at 721.
[159] *Id.*
[160] *Id.* at 723.

certified the question of whether the ministerial exception bars all ADA and Title VII claims brought by ministers even if the claim does not involve tangible employment actions.[161] Tangible employment actions have been defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[162] The court also assumed that the "plaintiff would be able to establish a basis for employer liability under Title VII and the ADA,"[163] and the parties agreed that the supervisor's conduct was "motivated by his and the Church's religious beliefs."[164]

Demkovich's majority opinion started with a quote from *Guadalupe* and explicitly stated that the Supreme Court's decision in that case, as well as *Hosanna-Tabor*, did not allow federal employment discrimination laws to be enforced in cases dealing with a religious organization's hiring and firing of "ministerial employees."[165] Demkovich argued that, while this was true, the First Amendment does not give complete immunity to religious organizations for hostile environment claims.[166] The Seventh Circuit majority agreed that the church was not free to subject Demkovich to abuse during his employment and his claims related to his treatment could move forward.[167]

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[161] *Id*. Demkovich originally brought claims for discrimination and wrongful-termination, which the court dismissed without prejudice because it held that the claims were barred by the First Amendment. Demkovich v. St. Andrew the Apostle Par., No. 16-cv-11576, 2019 WL 8356760, at *1 (N.D. Ill. May 5, 2019). He then refiled his suit, focusing on hostile work environment claims. *Id*. The court did not dismiss claims relating to disability and the Archdiocese filed a motion to certify a § 1292(b) interlocutory-appeal question. *Id*. The question was: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?" *Id*. at *2. A motions panel approved this broad, legal question because it was not fact-bound and an immediate appeal could materially advance the end of the suit. *Id*. at 3.
[162] Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998).
[163] *Id*.
[164] *Id*.
[165] *Id*. at 720.
[166] *Demkovich*, 973 F.3d at 724.
[167] *Id*. at 733

The question in this case, then, was whether the exception should apply to cases in which there is no tangible employment action, such as hiring and firing, which The Seventh Circuit answered in the negative.[168] The court acknowledged that its decision might cause "entanglement" issues, but explained that religious organizations' ability to control tangible employment actions provided protection to the organizations under the Free Exercise Clause.[169] The entanglement that may arise under the Establishment Clause could then be balanced in a way that would not allow for complete immunity from hostile-environment cases but would also allow for religious liberty.[170]

The court stated that procedural entanglements could occur when a religious organization is subject to "legal process designed to probe the mind of the church."[171] It then elaborated that these should not be an issue in hostile work environment claims, though, since religious organizations have been sued by non-ministerial employees in cases like this without issue.[172]

The Seventh Circuit explained that substantive entanglements happen when the government must choose between competing religious theories.[173] This is a more difficult issue but still does not bar these claims based on the ministerial exception.[174] To violate the Establishment Clause, "entanglement must be 'excessive,'" and in this case it was not.[175] The

[168] *Id.* In this decision, the court seemingly contradicted its own decision in *Hernandez v. Catholic Bishop of Chicago*, where it stated, "The 'ministerial exception' applies without regard to the type of claims being brought." *Id.* at 724 (quoting Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003)). The court explained, though, that this sentence was written to apply to tangible employment actions, and is therefore not inconsistent with the current decision. *Id.* at 724.
[169] *Id.* at 733–34.
[170] *Id.* at 720.
[171] *Demkovich*, 973 F.3d at 732.
[172] *Id.* at 732-733.
[173] *Id.* at 733.
[174] *Id.* at 734.
[175] *Id.* at 734 (quoting Agostini v. Felton, 521 U.S. 203, 233 (1997)).

church was free to fire the plaintiff, and the ministerial exception would have applied to that action.[176] But, the court was not looking at a tangible employment action, nor was it trying to determine a matter of church doctrine.[177] The abuse that the court was asked to look at would be considered abuse under neutral standards that could be enforced for non-ministerial employees and should be available to ministerial employees as well.[178]

The court emphasized that the ability "to ensure that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone.'"[179] Because this case does not deal with the plaintiff's firing, it falls outside of the scope of *Hosanna-Tabor* and *Guadalupe*, both of which specifically stated that the Court was dealing only with the case before it and did not address challenges relating to employee treatment.[180]

The court acknowledged that, since the ministerial exception is judicially crafted, and therefore a matter of constitutional law, the question is whether the "exemption is *necessary* under the First Amendment."[181] The court answered an affirmative "no" in relation to the Free Exercise Clause.[182] Hostile environment claims are basically tortious, and courts recognize them as such because the behavior that creates these environments is not essential for the control of employees.[183] The court examined the tort-law origins of hostile environment claims and how previous cases demarcated a "line between tangible employment actions and hostile environments to set different standards for employer liability."[184]

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[176] *Id*. at 734.
[177] *Demkovich*, 973 F.3d at 734.
[178] *Id*. at 734.
[179] *Id*. at 722 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 294-95 (2012)).
[180] *Id*. at 727.
[181] *Id*. at 727 (quoting Bollard v. Cal. Providence of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999).
[182] *Id*.
[183] *Demkovich*, 973 F.3d at 727.
[184] *Id*. at 728.

The court asserted that the ministerial exception allows for religious organizations to use tangible employment actions to control ministerial employees. It does not, however, give religious organizations the ability to subject ministers to abuse with impunity.[185] And there is no constitutional necessity to bar hostile work environment claims brought by ministerial employees.[186] The defense tried to assert that tangible employment actions alone did not provide sufficient power to select and control ministers, but the court stated that hostile work environments are "not a permissible means of exerting (constitutionally protected) 'control' over employees."[187] The ministerial exception exists out of constitutional necessity, but the court concluded that it is not constitutionally necessary to allow employers to control ministerial employees using harassment.[188]

As for the possibility that the harassment was based on religious doctrine, the court ruled the conduct of a religious employee can be imputed to the church as an employer only if the church embraced the policy as its own.[189] *Hosanna-Tabor* did not "extend constitutional protection to tortious conduct. Combined with the Court's understanding of hostile work environments as essentially tortious in nature, hostile work environment claims by ministerial employees are allowed so long as they do not challenge tangible employment actions."[190]

The Seventh Circuit also noted that *Hosanna-Tabor* cemented a ministerial exception for employers, not individual employees, as employers are the ones who take tangible employment actions and are able to be sued under Title VII.[191] This fits with the Seventh's Circuit's holding in that individuals are the ones that create hostile work environments, and these harms are often

[185] *Id.* at 729.
[186] *Id.* at 728.
[187] *Id.* at 728.
[188] *Id.* at 728.
[189] *Demkovich*, 973 F.3d at 729.
[190] *Id.* at 729.
[191] *Id.* at 729.

outside the scope of employment.[192] And while yes, it is important for a church to have the ability to select its own ministers, it is equally important to allow for the protections of employees, who are sometimes subject to terrible treatment.[193] The ministerial exception is judicially crafted based on constitutional necessity, but there is nothing in the First Amendment to imply that employees of religious organizations should be subject to abuse, or that religious organizations would be exempt from all statutory protections because this behavior is not essential to a church's ability to control (through tangible actions) ministers.[194]

The court also referred to *Smith*, where the Supreme Court stated that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[195] As *Hosanna-Tabor* explicitly stated, it did not conflict with *Smith* because *Smith* dealt with government regulation of physical acts (which the government could do), while *Hosanna-Tabor* dealt with government regulation of church decisions impacting the faith and mission of the church (which the government is not permitted to do).[196] Since the Seventh Circuit was not dealing with matters impacting the faith and mission of the church here, the ministerial exception would not apply. Thus, statutes relating to claims such as hostile work environment can still apply to religious organizations.[197]

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[192] *Id.* at 729.
[193] *Id.* at 731.
[194] *Id.* at 735.
[195] *Demkovich*, 973 F.3d at 735 (quoting Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990)).
[196] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189–90 (2012).
[197] There was also a disagreement between the majority and the dissent about whether this decision was consistent with the prior Seventh Circuit case *Alicea-Hernandez v. Catholic Bishop of Chicago*. *Demkovich*, 973 F.3d 718, 725 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020). The majority stated that it was consistent because in *Alicea*, the plaintiff did not bring a hostile work environment claim, and that she had sued the Archdiocese of Chicago for sex and national origin discriminations as well as constructive discharge. *Id.* at 724. The majority stated that the question the court was presented with in *Demkovich* was not present in *Alicea*, and that the dissent's use of the quotation from that opinion was out of context. *Id.* at 724-25. In *Alicea*, the court stated:

The dissent, authored by Judge Flaum, strongly disagreed with this holding and stated that he would hold "that the ministerial exception bars each of Denkovich's employment discrimination claims."[198] Flaum complained that the outline the majority provided to future courts was unworkable because there was no clarification as to how to proceed when tangible work environment claims and intangible claims overlap.[199] The dissent observed that the majority's list of tangible employment actions was indeterminate and incomplete, and it did not address how suits alleging these actions would trigger the ministerial exception and dismissal of the entire claim, as Seventh Circuit did in *Alicea*.[200]

Flaum expressed the view that the ministerial exception stems from the church autonomy doctrine, which is rooted in the religion clauses of the First Amendment, and "prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance and polity."[201] Therefore, he stated, "[T]he ministerial exception should bar

> The question for us to answer therefore is whether Alicia-Hernandez's position as Hispanic Communications Manager can functionally be classified as ministerial. Alicea-Hernandez suggests that we also need to look to the nature of her claims and whether the discrimination in questions was exclusively secular. Here she is mistaken. The "ministerial exception" applied without regard to the type of claims being brought.

Id. at 724-25. This wording, the majority stated, referred to a discussion on whether there was a distinction "between actions taken with secular motives and those with religious motives." *Id*. at 725.

The dissent, authored by Judge Flaum, argued that *Alicea* was still controlling, and disagreed with the majority's view that the case did not involve a hostile work environment claim. *Id*. (Flaum, J., dissenting). Judge Flaum argued that the humiliation associated with unfair working conditions met the legal standard for a hostile work environment claim. *Id* at 736. Flaum also argued that because they held the "ministerial exception barred all of the plaintiff's employment discrimination claims" in *Alicea*, "including her hostile work environment claim," that the court should follow suit here as well. *Id*. He claimed a plain reading on its own of the sentence from *Alicea* emphasized above, that "the 'ministerial exception,' applied without regard to the type of claim being brought," should be used and that the First Amendment provided religious institutions with the ability to control ministers, which meant that a church was able to oversee supervision, management, and communication with its ministers without government interference. *Id*. at 736.

[198] *Demkovich*, 973 F.3d at 742 (Flaum, J., dissenting).
[199] *Id*. at 737.
[200] *Id*.
[201] *Id*. at 793 (quoting Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 655 (10th Cir. 2002).

Demkovich's claims not withstanding whether the Church asserts a religious justification for the alleged conduct."[202]

Judge Flaum argued that the Free Exercise Clause protects a religious organization's ability to control its ministers in areas including supervision, management, discipline, and communication.[203] Attempting to regulate any part of the relationship between a church and its ministers would, in Judge Flaum's view, infringe on a church's free exercise rights.[204] Allowing these claims would also threaten the free exercise rights of other churches, who may alter ministerial relations and matters in an effort to avoid any potential litigation.[205]

Judge Flaum also criticized the majority for not fully appreciating the degree of government entanglement with religion that hostile work environment claims bring, which is prohibited by the Establishment Clause.[206] In order to analyze hostile work environment claims, Flaum explained, courts would have to determine if the work environment within the church was appropriate, and evaluate every step taken by the church to respond to ministerial claims.[207] This investigation would be wholly inappropriate, and by allowing ministers and non-ministers alike to bring these claims forward, the court is missing the entire point of the ministerial exception, which is to allow churches complete control over who ministers to their faithful.[208]

While this decision has been vacated for rehearing en banc, it shows that courts are open to the possibility that the ministerial exception may not apply to the treatment of ministers during their employment at a religious organization.

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[202] *Id.*
[203] *Demkovich*, 973 F.3d at 739.
[204] *Id.*
[205] *Id.* at 740.
[206] *Id.*
[207] *Id.* at 740-41.
[208] *Id.*

The Seventh and Ninth Circuit have held that the ministerial exception does not include all tangible employment actions.[209] According to these courts' reasoning, the ministerial exception may not apply to suits dealing with the *treatment* of ministers during their employment with a religious organization, but rather should only be applied to suits related to the hiring and firing of these employees.[210] While the author believes that this is the correct interpretation of the doctrine, and urges the Court to follow this line of cases to help protect the rights of workers to a safe and sustainable work environment, the Tenth Circuit, as will be discussed below, has come to a different conclusion.

B. Circuit Split: Ministerial Exception Does Apply to Cases of Employee Treatment

The Tenth Circuit has reached the opposite conclusion of the Ninth and Seventh Circuit, and has held that cases dealing with employee treatment at religious organizations triggers the ministerial exception.

1. *Skrzypczak v. Roman Catholic Diocese*[211]

Skrzypczak v. Roman Catholic Diocese was decided just a few years after *Elvig*, but the Tenth Circuit reached the seemingly opposite conclusion from the Ninth Circuit. In *Skrzypczak*, the court held that a minister could not bring a Title VII or Equal Pay Act claim against a church because it would interfere with the church's right to select and direct its ministers.[212]

[209] *Compare* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020) *with* Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238 (10th Cir. 2010).
[210] *Id*.
[211] Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238 (10th Cir. 2010).
[212] *Id*.

Monica Skrzypczak was the "director of the Department of Religious Formation for the Roman Catholic Diocese of Tulsa," which qualified her as a minister because she had "responsibilities that furthered the core of the spiritual mission of the Diocese."[213] She received positive performance reviews, but was terminated. After her termination, Skrzypczak sued the Diocese and its bishop for gender and age discrimination under Title VII, violations of the Age Discrimination in Employment Act and the Equal Pay Act, and state claims for emotional infliction of emotional distress, and breach of contract.[214]

The Tenth Circuit explicitly agreed with the en banc dissent in *Elvig*, and stated that it was following the precedent set by *Alicea* in the Seventh Circuit.[215] The court articulated that allowing hostile work environment claims would "infringe on a church's 'right to select, manage, and discipline clergy free from government control and scrutiny' by influencing it to employ ministers that lower its exposure to liability rather than those that best 'further religious objectives.'"[216]

In dicta, however, the court agreed that churches *could* be held liable for tort and contract disputes.[217] The court also conceded that the church could be subject to Title VII issues as long as employment decision did not relate to the church's spiritual function.[218] Nevertheless, the court did not allow these claims to proceed due to concern that allowing these ministerial claims would cause "substantive and procedural entanglement with the Church's core functions."[219]

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[213] *Id*. at 1240 & 1243.
[214] *Id*. at 1241.
[215] *Id*.at 1245.
[216] *Skrzypczak*, 611 F.3d at 1245. Interestingly, in *Demkovich*, which followed this case, the Seventh Circuit explicitly refuted the Tenth Circuit's interpretation of *Alicea* here and stated that it did not read the case quite so broadly. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020).

[217] *Id*. at 1245.
[218] *Id*.
[219] *Id*.

In addition, the Tenth Circuit articulated that barring these types of claims provided clarity for future suits of this type and expressed worry that the Ninth Circuit's decision in *Elvig* would cause confusion in its application.[220] As an example of the confusion and arbitrary application of the ministerial exception the court worried a decision like *Elvig* could cause, the Tenth Circuit referenced the Ninth Circuit case of *Werft v. Desert Southwest Annual Conference,* in which the court held that "while claims for hostile work environment based on sexual harassment are not . . . subject to the ministerial exception, claims for hostile work environment based on the failure to accommodate a disability '*are* a part of the minister's employment relationship with the church'" and fall under the exception.[221]

The court held that because any Title VII claim will "improperly interfere with the church's right to select and direct its ministers free from state interference," Skrzypczak's claims for hostile work environment, disparate impact because of gender, and gender discrimination were barred by the ministerial exception.[222] The Court also articulated that because activities like setting ministerial salaries are a "matter of church administration and government," Skrzypczak's claims under the Equal Pay Act were also barred by the ministerial exception.[223]

The Tenth Circuit, then, stands in clear opposition to the Ninth Circuit's, and for now, the Sevent Circuit's, decisions relating to ministers' rights to bring suit for issues relating to their treatment as employees.[224] The Tenth Circuit, alleging issues with entanglement, held that these claims are barred, while the Seventh and Ninth Circuits (with the Ninth Circuit disputing the Tenth

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[220] *Id.* at 1245.
[221] *Id.* at 1245 (quoting Werft v. Desert Southwest Annual Conference, 377 F.3d 1099, 1103 (9th Cir. 2004)).
[222] *Id.* at 1246.
[223] *Id.* at 1246. Because the federal claims were dismissed, the lower court was correct in dismissing the state law claims as well because without the federal claims it did not have jurisdiction under 28 U.S.C. §1367(c)(3). *Id.*
[224] *Compare* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020) *with* Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238 (10th Cir. 2010); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004).

Circuit's interpretation of its previous case law) have held that these claims can be brought and do not fall under the ministerial exception.[225]

IV. The Need to Limit the Ministerial Exception with Respect to Employee Treatment

Supreme Court case law has given the ministerial exception fairly wide leeway, but upon closer inspection, the exception can be read to apply only to religious organizations dealing with employment claims relating to the organization's ability select its ministers through hiring and firing decisions. Because the treatment of ministers during their employment does not involve hiring and firing, cases dealing with employee treatment should fall outside of the scope of the ministerial exception. Treatment of those deemed to be "ministers" during their employment does not deal with the right of the employer to select or control who will minister to the faithful. There is a very fine line here, though, as to whether the claims deal with the selection and control of ministers or the church's ability to govern itself.

However, this leaves open the question as to whether neutral laws that deal with employee treatment, and not selection of ministers, are barred under the ministerial exception when applied to employees considered to be ministers. There have been very few cases dealing with this issue, and none have come after the expansion of the ministerial exception under *Guadalupe* or the additional Seventh Circuit's decision in *Demkovich*. Because the ministerial exception is a constitutional mandate, the question is whether the First Amendment bars these statutory regulations of religious employers. If these issues were to make their way to the Supreme Court, the Court should follow the same analysis as the Seventh and Ninth Circuits and allow the cases to proceed.

[225] *Id*.

To better examine this issue, consider the following fictional fact pattern, which will explore the ministerial exception as it relates to the treatment of ministers in areas of law that have not previously been discussed: specifically, federal and state laws regulating working conditions. In exploring these areas of law, the author seeks to provide the Court with examples of possible opportunities to limit the ministerial exception. Such laws include the Family and Medical Leave Act, pregnancy accommodation and leave, and state sick leave laws, which if applied correctly to ministerial employees, would help to protect rights of workers while simultaneously ensuring the First Amendment rights of religious organizations.

This section will begin by explaining a fictional fact pattern in which a minister experiences several issues relating to their treatment by a religious organization during their employment. It will then explore fictional claims brought by the minister for wrongful termination, the Family Medical Leave Act, state pregnancy accommodation claims, and state sick leave laws, to illustrate how these laws could and should be interpreted as falling outside of the ministerial exception. New Jersey state law is applied, but the same basic analysis should apply to state law claims in other jurisdictions. Lastly, because the counterarguments for each claim would be similar, the counterarguments will be addressed together in section 5.

A. Potential Application of the Ministerial Exception to Claims

This section will outline three scenarios in which a "minister" brings a claim relating to their treatment as an employee. Scenarios like the ones below have not yet made their way to the Supreme Court and present an opportunity for the Court to narrow the ministerial exception in a way that protects religious organizations' First Amendment rights while ensuring that ministers are given protection against injurious treatment by employers.

Ms. Davis is hired by a large religious school in New Jersey as a teacher. Both Davis and the church agree that Davis is a minister because of the important role she plays in the formation of religion in the minds of her students.

As part of her job responsibilities, Davis is responsible for setting up assemblies, which requires her to carry chairs heavy tables around the school, climb ladders, and work long hours on the nights before assemblies to ensure everything is in place. During Davis's employment, she becomes pregnant, is no longer able to safely perform those duties, and asks for an accommodation. The church denies her request, despite the availability of other tasks Davis could perform and other employees who could temporarily take over these tasks. Davis continues performing these tasks. She is injured in performance of these duties and goes into labor early.

Later, while still employed by the school, Davis's daughter becomes sick and requires surgery. Davis requests unpaid time off to help with her daughter's recovery under the Family Medical Leave Act (FMLA). The church denies this request for a non-religious reason, and Davis's daughter suffers a harm because of it.

All the stress from her daughter's illness causes Davis to get sick. Davis takes a day off from work using sick leave. The church later refuses to pay her for this day.

Following all these actions, Davis is upset with the treatment she is receiving at work and decides to file claims against the school alleging that it violated state sick leave, state pregnancy accommodation laws, and committed interference under the Family and Medical Leave Act. As a result of her suit, the school fires Davis. Davis then adds wrongful termination to her claims. None of the decisions made by school relating to Davis's treatment were made for doctrinal reasons.

Each claim is broken up into its own section below. Because Davis is a minister, the question of whether the ministerial exception applies to these claims is triggered; if Davis were not a ministerial employee, the ministerial exception would not apply.[226]

1. Davis's Wrongful Termination Claim

Unfortunately for Davis, the case law here is clear, and because she is a minister, the church can fire her for any reason.[227] The ministerial exception was created for exactly this purpose: to allow religious organizations absolute freedom to control who ministers to the faithful, and the State has no power to intervene.[228] Following the Supreme Court precedent set in *Guadalupe* and *Hosanna-Tabor,* the church would be protected from this claim.[229]

2. Davis's Famile and Medical Leave Act Claim

The Family and Medical Leave Act of 1993 (hereinafter "FMLA") was created with several purposes in mind, including a desire to preserve family integrity and allow employees to take reasonable leave to care for themselves or family members with medical issues while simultaneously accommodating employers' interests.[230] There are no explicit carveouts in the FMLA, as there are in Title VII, relating to religious entities. According to the statute, "any person engaged in commerce or in any industry affecting commerce that employs 50 or more employees" serves as an employer under the FMLA.[231] The FMLA also states that it "shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right

[226] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).
[227] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).
[228] Hosanna-Tabor, 565 U.S. at 173.
[229] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (2020); *Hosanna-Tabor*, 565 U.S. at 186.
[230] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §2601.
[231] *Id*. While this may exclude many churches, given the employee count, similar state laws may have lower coverage limits. For example, in New York state, most private employers with more than one employee are required to have Paid Family Leave insurance to implement the state's Paid Family Leave policy. NEW YORK STATE PAID FAMILY LEAVE, https://paidfamilyleave.ny.gov/employer-responsibilities-and-resources (last visited Feb. 10, 2021).

provided under" the FMLA.[232] Interference with an employee's use of the FMLA includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave."[233]

In the case of Davis, the church's decision not to allow her to use FMLA leave appears to be a clear violation of the FMLA. But to establish a claim that the church interfered with her ability to use FMLA leave, Davis would have to establish:

> (1)[]she was an eligible employee under the FMLA; (2) the defendant was an employer subject to the FMLA's requirements; (3) the plaintiff was entitled to FMLA leave; (4) the plaintiff gave notice to the defendant of his or her intention to take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled under the FMLA.[234]

And unlike an FMLA claim for retaliation, an FMLA interference claim is not about discrimination, rather it is "only about whether the employer provided the employee with the entitlements guaranteed by the FMLA."[235] Davis's claim, then, would center on her treatment as an employee, and the analysis would focus on whether the ministerial exception would apply.[236]

In Davis's FMLA action, the court would not be dealing with the religious institution's ability to control who will minister to the faithful through hiring or firing. Instead, the court would evaluate whether the ministerial exception applies to FMLA interference claims, which center around the treatment of the minister during employment.

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[232] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §2615(a)(1).
[233] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §825.220(b).
[234] Capps v. Mondelez Global, LLC, 847 F.3d 144, 155 (3d Cir. 2017).
[235] *Id.* (quoting Callison v. City of Phila., 430 F.3d 117, 120 (3d Cir. 2005).
[236] There has been one case dealing with FMLA and the ministerial exception, but the court in that case ultimately decided that the ministerial exception served as a judicial bar and held that the court did not have jurisdiction to hear the case. Fassl v. Our Lady of Perpetual Help Roman Cath. Church, 2005 U.S. Dist. LEXIS 22546 (EDPA, October 4, 2005). Following *Hosanna-Tabor's* declaration that the ministerial exception is an affirmative defense rather than a jurisdictional bar, this analysis is now outdated. The court did hold, however, that the ministerial exception would apply in FMLA claims, but this case is distinguishable because it focused on tangible employment actions, not employee treatment. *Id.*

Applying the ministerial exception to claims of FMLA interference is not necessary to protect the church's rights under the First Amendment. The government forcing a church to allow its employees to take temporary leave would not interfere with the church's ability to select its own ministers, so it would not conflict with the Free Exercise Clause. Entanglement Clause issues might be slightly more complicated, but would ultimately allow for the claim to be brought.

As the court noted in *Demkovich*, procedural entanglement is not likely to be an issue because "religious employers have long been subject to employment discrimination suits by their non-ministerial employees."[237] Also, as in *Elvig*, because these allegations involve a "purely secular inquiry," the court would not need to interpret any sort of religious doctrine, which also weighs toward not applying he ministerial exception for procedural entanglement purposes.[238] Substantive entanglement is slightly more difficult to determine because courts must not choose between two or more competing religious theories, but can decide on matters relating to questions of property, torts, or other areas of law. Here, the court would only be called upon to determine a secular matter, as none of the factors Davis must prove are religious, and the court must therefore determine only whether the church provided Davis the entitlements guaranteed in the FMLA. So, the issue of substantive entanglement should weigh toward allowing the suit to move forward.

This reasoning appears to be supported in *Guadalupe*, which stated that the ministerial exception was based on the insight that religious institutions must be free to select individuals who play key roles in the institution's central mission in order to keep "matters of church government" independent.[239] Religious organizations must still answer to some secular laws, but have "autonomy with respect to internal management decisions that are essential to the institution's

[237] *Id.* at 732.
[238] Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004).
[239] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 186 (2012)).

central mission."[240] And while the Court stated that churches must have independence to select and *supervise* ministers without State interference, it reasoned that this was because "without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."[241]

Enforcing FMLA interference claims by ministers against churches would not contradict any of these statements by the Court. Allowing employees unpaid time off to deal with family health emergencies, as proscribed by law, would not impact or interfere with a church's "central mission," nor would it interfere with the formation of the faith within the congregation.

An FMLA interference claim like Davis's would present an opportunity for the court to narrow the ministerial exception by finding that this case would not invoke the ministerial exception, and that this minister would be able to bring claims for the harm she suffered by the hands of her employer due to her *treatment*.

3. Davis's Pregnancy Accommodation Claim

Pregnancy discrimination in New Jersey is covered under the state's Law Against Discrimination.[242] Because Davis agrees she is a minister, the analysis would not center on determining her ministerial status, but instead would center on whether the ministerial exception would apply to pregnancy accommodation and leave laws.

As with the FMLA claim above, there is reason to believe that the ministerial exception would not apply to pregnancy accommodation because giving an employee time off to deal with pregnancy-related issues is not central to the mission of the church, nor does it interfere with the church's ability to *select* its ministers.

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[240] *Id*. at 2060.
[241] *Id*.
[242] New Jersey Pregnant Workers Fairness Act, N.J. Stat. §10:5-12 (2020).

The New Jersey Law Against Discrimination states that:

> an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as . . . assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operation of the employer.[243]

In NJ, to prove failure to accommodate under the NJLAD,

> a plaintiff is required to demonstrate: that '(1) [s]he is a disabled person within the meaning of the ADA [or NJLAD]; (2) [s]he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and [3] [s]he has suffered an otherwise adverse employment decision as a result of the discrimination.'[244]

The plaintiff must also show that the employer did not engage in the participatory process by demonstrating that (1) the employer was aware of the plaintiff's disability; (2) the plaintiff requested accommodations for her disability; (3) the employer failed to make a good faith effort to help the plaintiff obtain accommodations; (4) the plaintiff could have been accommodated if not for the employer's failure to demonstrate good faith.[245]

In Davis's case, Davis would only need to show that the church failed to make a reasonable accommodation in response to her request, which requires a secular analysis. *Elvig* is helpful here, as like *Elvig,* the analysis is looking at what the church did (or did not do) in response to Davis's complaints, which can be subject to secular legal analysis.[246] The question of whether Davis can carry her burden of proof that she was protected by the New Jersey Law Against Discrimination

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[243] New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(s) (2020).
[244] Ologundudu v. Manorcare Health Servs., 2017 U.S. Dist. LEXIS 207235 at *14 (D.N.J. 2017) (quoting Stith v. N.J. Tpk. Auth., 2017 U.S. Dist. LEXIS 41931, at *3 (D.N.J. March 21, 2017).
[245] *Id*.
[246] Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004).

and the church did not make a good faith effort to accommodate her does not require any religious analysis; nor does the questions of whether the church can prove an affirmative defense if she can carry her burden. And Davis's case is like *Elvig*, where the court stated that there was no First Amendment basis for protecting the church from its duty to protect employees from harassment when such protection was not contradictory to the church's doctrinal prerogatives or impact its protected ministerial decisions (like hiring and firing).

A claim for pregnancy accommodation does not relate to hiring or firing, which are the only type of actions the Supreme Court has explicitly held is protected by the ministerial exception.[247] This issue is complicated by the fact that courts have acknowledged that the placement of ministers within a church is a purely ecclesiastical decision; however, that is distinguishable here because the decision as to the placement of Davis has already been determined and the analysis would center on Davis's *treatment* by the church in regards to her pregnancy. And as the court noted in *Demkovich*, a church is presumably interested in ensuring employees perform to the best of their abilities in order to maximize the employees' output, which allows the employer to function at its highest potential.[248] And as the harassment the employee was subject to in *Demkovich* was found to be unnecessary to control the employee because it would interfere with the employee's performance to an unreasonable degree, the same can be said for Davis. Not only does refusing to accommodate her pregnancy not allow her to perform her job to the best of her abilities, but it also puts unnecessary stress on Davis, which would impact her performance negatively.

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[247] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

[248] Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020), .

Because the school's decision not to accommodate Davis's pregnancy is not a doctrinal decision and does not involve a hiring or firing decision, the court could find that the ministerial exception would not apply to this case, and should embrace this line of thinking to narrow the ministerial exception.

4. Davis's State Sick Leave Claim

The New Jersey Paid Sick Leave Act went into effect in 2018, and provides that *all* New Jersey employers of *all* sizes must provide up to 40 hours of paid leave to all full or part time employees.[249] The statute also outlines how the time should begin to accrue and states that employers will pay employees for sick leave at the same rate the employee typically earns, and that employees shall not be required to work additional time to make up for the time they used their sick leave.[250] An employer under the Act appears to include religious institutions, as an employer is defined as "any person, firm, business, education institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the State, including a temporary help service firm."[251]

If Davis were to use a sick day and the church were to later refuse to pay her, the ministerial exception should not apply. While it is true that the church can determine the wages of its ministers, and the church is free to fire ministers with impunity, it should not be able to use the ministerial exception to unilaterally withhold pay that a minister had otherwise earned. Here again the claim has no impact on the church's selection of its ministers; rather the claim is asking that the church

[249] New Jersey Paid Sick Leave Act, N.J.S.A. 34:11D-2 (2018).
[250] *Id.* Interestingly, in California, a similar law was created a few years ago, and while the Methodist Church acknowledged these sick leave laws applied to them, the FAQ's about the law they sent to their churches state that it applies to all employees except clergy due to the ministerial exception. Healthy Workplace, Healthy Families Act of 2014 Paid Sick Leave Frequently Asked Questions from Churches, California-Nevada Conference of the United Methodist Church, https://www.cnumc.org/files/pdf_documents/treasurers_office/sick-pay-faqs-for-churches.pdf. The author believes this is an incorrect application of the ministerial exception.
[251] New Jersey Paid Sick Leave Act, N.J.S.A. §34:11-D-1 (2018).

fulfill its obligation to its employees under the statute. And just as with the FMLA claim above, because Davis would only be trying to apply a statute as written, invoking the ministerial exception must be shown to be necessary in order to protect the church's First Amendment rights.

Here, it would not be necessary to invoke the ministerial exception to protect the church's First Amendment rights. As with the inquiries above, the decision to withhold earnings from an employee who has earned them is not an action that is necessary for the church to remain autonomous in the selection of its ministers. And a church's decision to withhold earnings from a minister would not help it to ensure that a minister does not preach, teach or counsel in a manner that is contradictory to the church's tenets, which the Court has stated is the central reason for the church to have independence on matters "of faith and doctrine."[252]

Davis is already acting as a minister, so presumably the choice of minister has already been set. And if the church did not want Davis to take a sick day, or thought that doing so would go against doctrine, it could have fired her without being subject to the court's review using the ministerial exception. In *Skrzypczak*, the court referenced *McClure* when it held that the minister plaintiff could not bring Equal Pay Act claims against the church because "determination of a minister's salary" is protected by the ministerial exception.[253] The difference here, though, is that while the church is able to determine its ministerial wages free from court review, in Davis's case the court would not be determining wages. Rather, the court would be determining whether the church is able to withhold earned wages.

A court forcing a church to pay its minister earned wages would not violate the Establishment Clause because the entanglement would not be excessive; the court is not telling a

[252] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.
[253] Skrzypczak v. Roman Cath. Diocese, 611 F.3d 1238, 1246 (10th Cir. 2010) (quoting McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

church how much to pay its minister, rather it is enforcing a neutral, secular law, and would not need to interpret or analyze any sort of doctrine to be able to do so. Forcing the church to pay a minister previously earned wages would also not violate the Free Exercise Clause because this in no way impacts the church's selection of its minister.

If the Court encounters a case relating to state sick leave claims it should use the opportunity to narrow the ministerial exception and hold that the exception does not apply to these claims.

5. Counterargument: The Ministerial Exception Applies to All Ministerial Employment Decisions at Religious Organizations

The counterarguments to the analysis rendered for each claim above would largely be the same, as the claims center around the idea that because employee treatment during employment is separate from hiring and firing, which are the only actions the Supreme Court has held to be subject to the ministerial exception, it is possible for courts to find that these claims are not subject to the ministerial exception.

One counterargument could be that, while the Supreme Court did not explicitly hold that only cases relating to hiring and firing of ministers fall under the ministerial exception, so other employment decisions, such as pregnancy accommodation, state sick leave, and FMLA claims may fall under the exception as well. This is, as the author has noted, a plausible interpretation. But, it is a weaker interpretation than the one outlined in this paper.

In *Guadalupe*, the Court notes that the ministerial exception comes from the idea that states cannot interfere in religious institutions' decisions regarding "matters 'of faith and doctrine.'"[254] The Court stated that it was necessary for churches to have the authority to "select, supervise, and

[254] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186).

if necessary, remove a minister without interference by secular authorities," but that the purpose of the ministerial exception was to ensure that churches are able to ensure that the "preaching, teaching, and counseling" of its religion are consistent with the church's beliefs.[255] The Court also articulated that this does not mean that religious employers have "a general immunity from secular laws," but rather, helps to "protect their autonomy with respect to internal management decisions that are *essential* to the institution's central mission."[256]

Control over "preaching, teaching, and counseling" can be done through hiring and firing processes, and so there is no need for the ministerial exception to apply to cases of employee treatment, as outlined above. Granting employees secular rights that are protected under the law, such as pregnancy accommodation, sick leave and FMLA leave has no relation to preaching, teaching, or counseling, and suits relating to these types of claims require no interference in or interpretation of religion on the part of the judicial system.

This may mean that Judge Flaum was right in his dissent in *Demkovich* when he proclaimed that the majority's decision could create a "perverse inventive for religious employers" to fire their ministerial employees who may have claims related to their treatment, or treat them so badly that it causes a constructive discharge, because in those cases the employer would be protected using the ministerial exception.[257] This may seem unfortunate, but religious employers can already fire ministers for any reason, so this interpretation of the ministerial exception does not grant religious organizations new incentives. Rather, it helps to protect employee rights while also ensuring that the church's First Amendment rights remain intact, with the complete ability to control the person who ministers to their faithful.

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[255] *Id.* at 2060–61
[256] *Id*. (emphasis added).
[257] Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718 (7th Cir. 2020) (2-1 decision), *vacated for rehearing en banc*, 2020 U.S. App. LEXIS 38613 (7th Cir. Dec. 9, 2020) (Flaum, J., dissenting).

Davis would be barred from bringing a wrongful termination claim, as the church has absolute power to hire and fire ministers for any reason to control who preaches to their followers. There are areas of law, though, that have not yet been addressed fully by the Court system relating to federal and state laws regulating working conditions. Using a fictional fact pattern to illustrate the strongest interpretation of the law, the author showed how the Family and Medical Leave Act, NJ state pregnancy accommodation and leave, and NJ state sick leave law should be applied to ministerial employees. This interpretation of the ministerial exception would help to protect workers' rights while simultaneously ensuring the First Amendment freedoms of religious organizations.

V. Conclusion

The Court's recent expansion of the ministerial exception in *Guadalupe* can be seen as troubling, given the leeway that it allows to religious institutions to hire and fire those who are deemed to be "ministers" for any reason. The Supreme Court's holdings in the two ministerial exception cases it has heard, though, have left room to narrow the exception by allowing cases involving the *treatment* of ministers to fall outside the scope of the ministerial exception, as the Seventh and Ninth Circuit Courts have done. Cases related to employee treatment should not be interpreted as involving religious institutions' ability to select and control who ministers to their faithful because the treatment occurs while the minister is employed and does not involve any decisions relating to the "faith and doctrine" of the church. When a case relating to treatment of ministers makes its way to the Court, the Court should take advantage of the opportunity to narrow the ministerial exception and strengthen employment protections for ministers by hold that the ministerial exception does not apply to employee treatment.