When Rights Conflict: Protecting Employees in Religious Organizations from Hostile Work Environments as Smith Hovers in The Balance

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Introduction

The Religion Clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[1] have a long and storied history.[2] Our country was founded on a promise of religious freedom and the Supreme Court has wrestled with how to balance that freedom and other human rights for over two hundred years.[3] The protections present in the Religion Clauses do not mean that religious freedom takes prece-

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1 U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2 HOWARD GILMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 46-54, 97-126 (2020); *see also* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 647-55, 659-61.

3 GILLMAN & CHEMERINSKY, *supra* note 2 at 46-54, 97-126; *see also* Elizabeth Brown & Inara Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 AM. BUS. L. J. 55, 62 ("The First Amendment guarantees, among other things, both the right of free exercise of religion and the right to be free from government establishment of religion" – a balance within the Amendment itself).

dence over other human rights because that would elevate other types of discrimination. By failing to thoughtfully consider competing rights, the Supreme Court has chipped away at non-religious human rights in its application[4] of *Employment Division v. Smith*.[5]

For three decades, *Smith*'s[6] simple idea—rational basis scrutiny for neutral and generally applicable laws under the Religion Clauses—has controlled.[7] In recent years, however, the Supreme Court has consistently undermined this concept with direct and indirect application of *Smith* designed to bolster the rights of religious organizations at the expense of other human rights.[8] At the same time, the Court has expanded the definition of the ministerial exception[9] to allow religious organizations to exercise unfettered control over even more employees.[10]

This expansion of "religious rights" pushed *Smith's* applicability to the fringes.[11] In protecting the freedom of religious organizations, the Court created a much bigger problem—the growing limit on the rights of religious, and perhaps non-religious, employees within religious organizations.[12] To explain, religious organizations want to protect their independence in the employment arena, which the Supreme Court recognized, reaffirmed, and strengthened in the tangible job detriment venue for ministerial employees.[13] Whether hostile work environment claims, also called intangible job detriment claims, are barred because of the religious organizations' independence remains unsettled.[14]

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4 *See infra* Part II.

5 Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

6 *Id.*

7 *See id. See generally* Brown & Scott, *supra* note 3, at 75.

8 *See infra* Part II.

9 The ministerial exception is a legal doctrine that bars the application of Title VII to religious institutions' relationships with their ministers. This judge-made exception first arose in *Hosanna-Tabor Evangelical v. EEOC* and has been expanded recently in *Our Lady of Guadalupe School v. Morrissey-Berru*. *See* Hosanna-Tabor Evangelical Lutheran Chruch & School v. EEOC, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *see also infra* Part II.B.

10 *Morrissey-Berru*, 140 S. Ct. at 2069.

11 Vincent Martin Bonventre, *Supremely Divided: Court's Conservative Bent Intensifies*, 93 N.Y. ST. B.J. 8, 10-12; *see infra* Part II.

12 *Id.*

13 *Id.*

14 *See infra* Part III.

Hostile work environment claims differ substantially in claim and substance from tangible[15] job detriment claims.[16] These claims do not consider or require a significant change in employment status initiated by the employer. Tangible job detriment claims include, but are not limited by, the bookend decisions of hiring and termination, which religious organizations maintain significant independence over.[17] Religious organization employees, however, still maintain their human rights as a representative of themselves and the collective society.[18] One way employees' human rights can be maintained is through hostile work environment claims. Because religious organizations retain significant independence in tangible decisions, courts have a responsibility to protect employees' intangible claims, like hostile work environment claims.

This Article proceeds in four parts. Part I provides a brief overview of the current state of the law, specifically *Employment Division v. Smith* and its progeny. Part II reviews recent Supreme Court cases that expand and cement organizational religious rights at the expense of individual employee rights. Part III frames the dilemma between ministerial employees and their religious employers, specifically in hostile work environment intangible claims. Part IV applies a conflict of rights lens to hostile work environment claims, which protects both the rights of the religious organizations and the ministerial employees. This Article adds to the existing literature by recognizing and respecting current trends in upholding religious organizational protections while carving out important collective societal protections as represented by individual ministerial employees.

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15 A tangible employment action involves a significant change in employment status, like hiring, firing, a significant change in benefits, failure to promote, or a reassignment that involves significantly different responsibilities. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); *see also infra* Part III.

16 Rachel Farkas et al., *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 427-28, 452-57 (2019); Joanna Grossman, *Moving Forward, Looking Back: A Retrospective of Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1034-37 (2015).

17 *Ellerth*, 524 U.S. at 761; Farkas et al., *supra* note 16, at 426-27.

18 *See infra* Part IV.

BACKGROUND

I. *EMPLOYMENT DIVISION V. SMITH* AND ITS PROGENY—THE BRIEF OVERVIEW

The Supreme Court has long recognized and protected the free exercise of religion enshrined in the First Amendment.[19] For three decades, *Employment Division v. Smith* has shaped the conversation in the employment context.[20]

Prior to *Smith*, the Court used the compelling interest test from *Sherbert v. Verner*.[21] In *Sherbert,* the Supreme Court ruled that the government can restrict the free exercise rights of individuals only if the regulations survive what has become known as strict scrutiny—a steeper burden on states.[22] Sherbert, a Seventh-day Adventist, was discharged by her employer after she refused to work on Saturdays, the Sabbath in her religion.[23] The State then denied Sherbert unemployment benefits because she did not accept available work from three other employers who required her to work on Saturdays.[24] The Court held that the denial of unemployment benefits to Sherbert imposed a burden on her free exercise rights under the First Amendment.[25] The Court established a strict scrutiny-like standard stating that the State's assertion of administrative convenience did not meet a compelling governmental interest and was not the least restrictive means to achieve its burden.[26]

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19 U.S CONST. amend. I; Brown & Scott, *supra* note 3, at 62-64.

20 *Smith,* 494 U.S. at 872.

21 374 U.S. 398, 404-06 (1963).

22 *Id.* at 403.

23 *Id.* at 399.

24 *Id.* at 401.

25 *Id.* at 403-04.

26 *Id.* at 406-09. For a more comprehensive pre-*Smith* landscape, *see* Brown & Scott, *supra* note 3, at 62 ("In an early case considering whether the laws criminalizing polygamy could be applied to someone whose religious beliefs compelled it, the Supreme Court held that excusing a person from compliance with laws on the basis of religious belief impermissibly 'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.' (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)). Over a century later, in a case affirming the requirement that Amish employers pay social security taxes in violation of their faith, the Court observed that religious beliefs do not excuse people from compliance with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring)).

In *Smith*, the Court moved away from the compelling interest test.[27] It upheld the dismissal of claims by Alfred Smith and Galen Black, Native American drug rehabilitation counselors who were fired because they ingested peyote, a hallucinogen, as part of a religious ritual in the Native American Church.[28] The State of Oregon denied their application for unemployment benefits because they were terminated for work-related misconduct.[29] Smith and Black argued against their government benefits denial because the use of peyote was for religious purposes, a practice protected by the Free Exercise Clause.[30]

In a six to three decision written by Justice Scalia, the Supreme Court held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause, so long as they are neutral and generally applicable.[31] When a law is general and non-discriminatory, it is instead evaluated under the rational basis test.[32] Under this much more deferential standard, a law is constitutional if a rational or legitimate reason for it exists, while strict scrutiny requires the law to further an important or compelling government interest and be narrowly tailored to achieve that interest.[33]

Because the law in *Smith* was neutral and generally applicable, and because Oregon had a rational basis for outlawing the hallucinogenic drug, the Court concluded that the Free Exercise Clause did not exempt those who used the drug for religious reasons.[34] The *Smith* decision goes to great lengths to draw a distinction between laws that target religious groups and laws that incidentally affect religious groups.[35] Justice Scalia made clear that the Free Exercise Clause protects religious beliefs but does not shield religiously-motivated actions from laws—unless those laws target religion for disfavored treatment.[36]

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27 *Smith,* 494 U.S. at 872.

28 *Id.* at 874.

29 *Id.*

30 *Id.*

31 *Id.* at 890.

32 *Id.* at 884-85.

33 *Smith,* 494 U.S. at 884-85.

34 *Id.* at. 890.

35 *Id.* at 878-80, 882, 888-89.

36 *Id.* at 878-80. *Smith* generated criticism when it was decided, and it continues to be criticized today. *See* Fulton v. City of Philadelphia, 141 S. Ct. at 1930-31 (Gorsuch, J. concurring) ("It's not as if we don't know the right answer. Smith has been criticized since the day it was

The Court reaffirmed *Smith*'s basic holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[37] The Church of Lukumi Babalu Aye practiced Santeria, an Afro-Caribbean-based religion.[38] Santeria used animal sacrifice as a form of worship.[39] In this form of worship, an animal's carotid arteries are cut and the animal is eaten—except during healing and death rights.[40] Soon after the announcement of the establishment of a Santeria church in the area, the city council in Hialeah, Florida, adopted several ordinances[41] addressing religious sacrifice.[42] The ordinances prohibited possession of animals for sacrifice or slaughter, but included specific exemptions for state-licensed activities.[43]

decided. At least ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution . . . . The Court granted certiorari in this case to resolve its fate. The parties and amici responded with over 80 thoughtful briefs addressing every angle of the problem. Justice Alito has offered a comprehensive opinion explaining why Smith should be overruled. And not a single Justice has lifted a pen to defend the decision. So, what are we waiting for? We hardly need to "wrestle" today with every conceivable question that might follow from recognizing Smith was wrong."). In response to concerns about *Smith*'s broad limitations on religious freedom, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA) (intended to protect individuals' religious freedom from some government interference). *See* Brown & Scott, *supra* note 3, at 63. RFRA was passed with bi-partisan support and sought to extend pre-*Smith* case law that permitted burdens on religious freedom only to the extent that they served a compelling state interest and were narrowly tailored for that purpose. The text of RFRA itself refers directly to *Smith*. *Id.*; 42 U.S.C. § 2000bb(a)(4) (2012); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994-95).

37 Church of the Lukumi Babalu Aye, Inc., et al. v. City of Hialeah, 508 U.S. 520 (1993).

38 *Id.* at 525.

39 *Id.*

40 *Id.*

41 *Id.* at 526, 550-53, 555-56. Ordinance 87-52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." Application of this prohibition was restricted to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." There was an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." The city council further stated that they had "determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," and adopted Ordinance 87-71 which provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." Ordinance, 87-72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law."

42 *Id.* at 527

43 *Church of the Lukumi Babalu Aye*, 508 U.S. at 527-28.

The Supreme Court sided with Lukumi Babalu Aye, holding that the ordinances were neither neutral nor generally applicable.[44] Therefore, the ordinances had to be justified by a compelling governmental interest, and they also had to be narrowly tailored to that interest.[45] But the ordinances failed that standard because they were applied exclusively to the church.[46] The ordinances were passed in response to establishment of a Santeria church in the area.[47] They singled out the activities of the Santeria faith and—in doing so—suppressed more religious conduct than necessary to achieve the council's stated ends. The council burdened only conduct tied to religious belief.[48] Because the ordinances targeted religious behavior, they did not survive the strict scrutiny.[49] *Church of the Lukumi Babalu Aye* was an extreme case, and the Court had no problem holding unanimously for the religious organization.[50] Other cases required more nuanced analysis.[51]

II. SUPREME COURT CASES THAT EXPANDED AND CEMENTED ORGANIZATIONAL RELIGIOUS RIGHTS AT THE EXPENSE OF INDIVIDUAL EMPLOYEE RIGHTS

The Supreme Court reviewed Title VII as it relates to gay and transgender people in *Bostock* and its companion cases.[52] *Smith* is

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44 *Id* at 546.
45 *Id.* at 531-32.
46 *Id.* at 532, 536.
47 *Id.* at 540.
48 *Id.* at 524.
49 *Church of the Lukumi Babalu Aye,* 508 U.S. at 534.
50 *Id.* at 522.
51 For example, in *Locke*, the Court grappled with whether the state of Washington's exclusion of a devotional theology degree from an otherwise-inclusive scholarship aid program violated the Free Exercise Clause. Locke v. Davey, 540 U.S. 712 (2004). The Court states that it was a "play in the joints" case—resting "between the Establishment and Free Exercise Clauses." *Id.* at 718 "Washington's program imposes neither criminal nor civil sanctions on any type of religious service or rite. It neither denies to ministers the right to participate in community political affairs, *see* McDaniel v. Paty, 435 U.S. 618, nor requires students to choose between their religious beliefs and receiving a government benefit, *see, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136." Ultimately, a divided Court held that a balance was achieved because the State was simply choosing not to fund a particular category of instruction. *Id.* at 721. The Court states that Washington's Promise Scholarship Program is inclusive in many ways. It permits students to attend religious schools so long as they are accredited, and students are also eligible to take devotional theology courses. Further, the Court states that nothing in the Washington Constitution's history or text or in the program's operation suggests religious animus.
52 Bostock v. Clayton Cty, 140 S. Ct. 1731, 1738 (2020).

never mentioned in *Bostock* because it does not directly deal with religious liberty.[53] In holding for the gay and transgender employees on a narrow definitional ground,[54] however, the Court placed certain Title VII protections well below others.[55]

Title VII prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin."[56] Employers violate Title VII when they intentionally fire, or otherwise take another adverse employment action against an individual employee, based in part on one of these protected classes.[57]

Bostock looked at the narrow question of whether "because of sex" covers gay and transgender people.[58] Before *Bostock*, circuits disagreed on whether "because of sex" extended this far.[59] Therefore, the only protection existing for gay and transgender people before *Bostock* was a patchwork of state and local law protection, but nothing comprehensive.[60]

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53 As this Article will argue later, it is impossible to ignore *Bostock* in the landscape of *Smith* and its progeny. Many scholars see *Bostock* as a huge win for the LGBTQ+ community – and it certainly is an important advancement. However, it is important to look at how the Court defined this right when moving forward because it will determine "who wins" in a conflict of rights situation. *See* Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021) (arguing that even though Bostock operates in binaries it is still a big win for the LGBTQ+ community).

54 *Bostock*, 140 S. Ct. at 1754.

55 *Id.* at 1740.

56 42 U.S.C. § 2000e-2(a)(1) (2021).

57 *Bostock*, 140 S. Ct. at 1740.

58 *Id.* at 1744.

59 *Id.* at 1737-38. In the combined cases – Clayton County, Georgia had fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league, Altitude Express fired Donald Zarda days after he mentioned being gay, and Aimee Stephens presented as a male when she was hired and then informed Harris Funeral Homes that she planned to "live and work full-time as a woman" and then was fired. All these employees sued, alleging Title VII sex discrimination. The Eleventh Circuit held that Title VII did not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits allowed the claims of Mr. Zarda and Ms. Stephens to proceed.

60 *See* RODNEY SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 10:47 (3d ed. 2021); Alex Reed & Merritt Melancon, *Legal Studies Professor Answers Questions About Historic Court Case,* Terry College of Business, (June 24, 2020), https://news.terry.uga.edu/articles/supreme_court_extends_civil_rights_protection_to_lgbtq_employees/; Delaney Hieger, *Patchwork Protections In Kansas: The Rise Of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 KAN. J.L. & PUB. POL'Y 128, 129-30 (2020); *Can LGBT People Be Legally Fired? U.S. Supreme Court Considers Three Cases That Could Take America Backwards* (July 2019), https://www.lgbtmap.org/file/2019SCOTUSTitle%20VIICases Brief.pdf.

According to *Bostock*, a viable Title VII claim based on sex requires intentional discrimination, no matter if reasons other than sex were a motivating factor.[61] It also does not matter if the employer treated women as a group the same when compared to men as a group.[62] In other words, when considering disparate treatment Title VII claims, the Court finds a statutory violation if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee.[63]

Bostock addressed only the narrow question of whether an employer who fires someone simply for being gay or transgender has discriminated against that individual "because of such individual's sex" in violation of Title VII, and holds that they do.[64] The Court stated that homosexuality and transgender status are distinct concepts from sex.[65] However, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex and the first cannot happen without the second.[66]

In many ways, this is a really important decision for LGBTQ+ individuals, and for society.[67] *Bostock* was the first time LGBTQ+ employment discrimination was protected in all fifty states.[68] But some concerning language exists in the opinion that could limit its scope, and if the Court does not strengthen human rights protections, could even walk back some of the broader Title VII protections.[69]

The six to three *Bostock* majority opinion, authored by Justice Gorsuch, used his classic textualist style of statutory interpretation to

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61 *Bostock*, 140 S. Ct at 1740-41 (In "disparate treatment" cases, the difference in treatment must be based on sex and the treatment must be intentional. It does not matter if there were other reasons for the disparate treatment). Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

62 *Bostock*, 140 S. Ct. at 1741.

63 *Id.*

64 *Id.* at 1744. In *Bostock*, the Supreme Court held that federal anti-discrimination law prohibits employment discrimination on grounds of sexual orientation and gender identity.

65 *Id.* at 1746.

66 *Id.* at 1747.

67 Spindelman, *supra* note 53, at 630.

68 *Bostock*, 140 S. Ct. at 1740; *see* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020); Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687 (2019).

69 Nancy C. Marcusa, *Bostock v. Clayton County And The Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223 (2020) (discussing the implications of bisexual erasure because of the Bostock opinion); Spindelman, *supra* note 53, at 633 (explaining that while *Bostock* "opens the door to future changes," it does so while buying into "bio-sex definitions from the opinion's start to its end.").

analyze the statute's language.[70] Justice Gorsuch found that the ordinary public meaning of Title VII's words and phrases mandate that an employer violates Title VII when it intentionally fires an individual employee based, at least in part, on sex.[71] As explained above, discrimination based on homosexuality or transgender status requires an employer to intentionally treat employees differently because of their biological sex—their sex at birth.[72] Essentially, if a person who is born a biological man and is sexually attracted to men instead of women is fired, but an employer would not fire someone born as a woman who is sexually attracted to men, that is discrimination. Similarly, if someone is born a biological woman and then decides to live as a man, the employer would be discriminating based on sex at birth if it treats the transgender man differently than a cis-gender man.

Justice Gorsuch provided two examples to illustrate this point. First, he presented the example of an employer with two employees, both of whom are attracted to men.[73] The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman.[74] If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague, again because of sex at birth.[75]

Gorsuch's next example applied this logic to transgender employees, presenting the situation of an employer with one transgender employee who was assigned male at birth but now identifies as a female, and one otherwise identical employee who was assigned female at birth.[76] If the employer retains only the latter employee, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[77] Justice Gorsuch explained that the individual

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70 Spindelman, *supra* note 53, at 561; Grove, *supra* note 68, at 266; Levin, *supra* note 68, at 698.

71 *Bostock*, 140 S. Ct. at 1741.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* (That is, if an employer permits its female employees to have sexual and romantic attractions to men but denies that same right to male employees; it is engaged in sex discrimination. It treats men differently than women).

76 *Id.*

77 *Bostock*, 140 S. Ct. at 1741.

employee's biological birth sex plays an unmistakable and impermissible role in the discharge decision.[78]

Although the logic underlying *Bostock* sounds promising, the decision reaffirms traditional gender roles in a harmful way.[79] It allowed Justice Gorsuch to apparently move LGBTQ+ rights forward while reaffirming traditional gender roles.[80] The majority goes to great lengths to reaffirm these traditional gender roles by cementing that "because of sex" is weighted wholly in the notion that people can be placed into two boxes: biological men and women.[81] Given Justice Gorsuch's documented religious and social beliefs,[82] this outcome is unsurprising.

Those two boxes do not work anymore—if they ever did.[83] By writing the opinion this way—and reaffirming the two boxes—more issues will arise with what is encompassed in "sex" and how courts deal with the gender spectrum moving forward.[84] Further, nowhere in *Bostock* was there any discussion beyond the definition of "sex" and "because of sex."[85] This limited discussion is significant because it illuminates the Court's hierarchy of rights. By placing sex-rights lower

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78 *Id.* at 1741-42.

79 *Id.*

80 *Id.* at 1740-43; Spindelman, *supra* note 53, at 632 (Explaining that while *Bostock* "opens the door to future changes," it does so while buying into "bio-sex definitions from the opinion's start to its end."); Marcusa, *supra* note 69, at 225, 234.

81 *Id.* at 1740-42; Spindelman, *supra* note 53, at 632; Marcusa, *supra* note 69, at 225 (Explaining that while *Bostock* "opens the door to future changes," it does so while buying into "bio-sex definitions from the opinion's start to its end.").

82 *See* Eric Citron, *Potential nominee profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), https://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/; Amy Howe, *Gorsuch on abortion, religion and reproductive rights,* SCOTUSBLOG (Mar. 9, 2017), https://www.scotusblog.com/2017/03gorsuch-abortion-religion-reproductive -rights/; Garrett Epps, *Gorsuch's Selective View of 'Religious Freedom'*, THE ATLANTIC (Mar. 20, 2017), https://www.theatlantic.com/politics/archive/ 2017/03/gorsuchs-selective-view-of-religious-freedom/520104/.

83 *Id.* Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021) (Explaining that while *Bostock* "opens the door to future changes," it does so while buying into "bio-sex definitions from the opinion's start to its end."); Nancy C. Marcusa, *Bostock v. Clayton County and The Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223 (2020).

84 *Bostock*, 140 S. Ct. at 1761. Justice Alito is troubled as well. He asserts that the majority is pushing a "theory that courts should 'update' old statutes so that they better reflect the current values of society. If the court finds it appropriate to adopt this theory, it should own up to what it's doing." (citations omitted); *Id.* at 1755-56 (Alito, J., dissenting). Justice Alito further stated that: "By proclaiming that sexual orientation and gender identity are 'not relevant to employment decisions,' the Court updates Title VII to reflect what it regards as 2020 values."

85 *Id.* at 1731.

on that hierarchy, *Bostock* could influence courts' decisions in conflicting rights cases, which require courts to balance what rights deserve more protection.[86]

With its narrow definition of "sex" and "because of sex," *Bostock* had a significant impact on where sex and religion fall in the hierarchy of rights. Two weeks later, the Supreme Court expanded the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru,*[87] and brought *Smith* into new focus without mentioning it by name.[88] Then in *Fulton v. City of Philadelphia,*[89] the Court was directly asked to overrule or tweak *Smith*.[90] Instead, the Court continued to undermine *Smith* by bolstering religious freedom and chipping away at other human rights.[91] The Court is now operating in a post-*Smith* world, even though the Court continues to sidestep direct examination of the *Smith* framework.

A. Bostock *Was About Religion*

In relying on a narrow definition of "sex" and "because of sex," *Bostock* had a significant impact on religion and the hierarchy of rights.[92] Justice Gorsuch wrote: "We are also deeply concerned with

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86 For an excellent, pre-*Bostock* discussion of the law and conflict of rights focused on LGBTQ+ employees and customers, *see* Brown & Scott, *supra* note 3 (looking at employment disputes centered on the conflicting moral and religious values of corporations, their employees, and their customers).

87 140 S. Ct. 2049, 2069 (2020).

88 *Id.*

89 141 S. Ct. 1868, 1876-77 (2021).

90 *Id.* at 1876-77.

91 *Id.* at 1877.

92 *See Bostock*, 590 U.S. at 1740; *Beyond Bostock: a discussion on health, religion, and LGBTQ discrimination,* GEORGIA STATE NEWS HUB (Sept. 25, 2020), https://news.gsu.edu/2020/09/25/beyond-bostock-a-discussion-on-health-religion-and-lgbtq-discrimination/ ("A big portion of the *Bostock* decision was devoted to inviting claims that Title VII burdens religion in violation of the Religious Freedom Restoration Act. . . . . The majority opinion invited employers to come back to the court for a religious exemption from the obligations of Title VII, sort of giving with one hand but taking with another for LGBTQ employees."); *see also* Erin Mulvaney, *LGBT Ruling Paves Way for Bathroom Religious Battles at Work,* BL (June 16, 2020, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/lgbt-ruling-paves-way-for-bathroom-religious-battles-at-work; Paige Smith & Robert Iafolla, *Texas Ruling Opens Route for Religious Carveouts to LGBT Rights,* BLOOMBERG LAW (Nov. 3, 2021, 11:37 AM), https://news.bloomberglaw.com/social-justice/texas-ruling-opens-route-for-religious-carveouts-to-lgbt-rights (discussing a Texas federal judge's recent decision that relies on *Bostock* to allow for-profit businesses to use religion as a shield against LGBTQ+ anti-discrimination claims). *Bostock* must also be read in connection with Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). In *Masterpiece*, Justice Gorsuch signaled in his concurring opinion that there should be sweeping

preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[93] He further states: "[W]hile other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."[94]

The Supreme Court has already recognized that for-profit corporations have protectable religious freedom.[95] With the trends recognized in this Article,[96] it is not a stretch to say that these claims will collide with the rights of lesbian, gay, bisexual, transgender, and queer or questioning LGBTQ+ employees.[97] The fate of individual LGBTQ+ employees remains unclear—at least for employees with supervisors who object to LGBTQ+ people on religious grounds. Courts will then need to consider whether *employees* with religious objections to other *employees* who are LGBTQ+—their co-workers—causes a "conflict of rights."[98]

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religious exemptions from discrimination laws. *See* 138 S. Ct. 1719, 1734-40 (2018) (Gorsuch, J., concurring). Maybe *Masterpiece* was different – it dealt with creating a specific cake versus buying something off the shelf – and *Masterpiece* was not employer/employee – it was public accommodations. The case was decided on the narrow grounds that the Colorado Civil Rights Commission did not employ religious neutrality. But it is one of the many recent decisions signaling that Free Exercise is going to trump other civil rights.

93 *Bostock,* 140 S. Ct. at 1754.

94 *Id.*

95 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), allows privately held for-profit corporations to be exempt from a regulation its owners religiously object to if there is a less restrictive means of furthering the law's interest. *Hobby Lobby* is a Religious Freedom Restoration Act of 1993 case, and it is the first time that the Court has recognized a for-profit corporation's claim of religious belief. It is limited to privately held corporations and the decision does not address whether such corporations are protected by the Free Exercise Clause of the First Amendment. *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that for-profit corporations could receive First Amendment protection).

96 *See infra* Parts II and III.

97 *See* Suneal Bedi, *Fully and Barely Clothed: Case Studies in Gender and Religious Employment Discrimination in the Wake of Citizens United and Hobby Lobby*, 2 HASTINGS BUS. L.J. 133 (2016) (through a case study approach, argues that *Hobby Lobby* and *Citizens United* might lead to perverse outcomes for employment discrimination). The present article explores religious organizations and their ministerial employees. As such, it does not fully develop the issue of the organization discriminating against the employee or customer because of their gender identity – or because of sex – as defined by *Bostock*. Noting here that many ministerial employees are members of the LGBTQ+ community – as was the case in Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 973 (7th Cir. 2021) (en banc).

98 *See* Craig Westergard, *LGBT Discrimination as Religious Discrimination: Ruse or Resolution?*, 26 BARRY L. REV. 45, 45, 55-57 (2020) (arguing that LGBT status is better placed for

The Court's consideration is important because *Bostock* does not protect the LGBTQ+ community in claims that pit these LGBTQ+ rights against the Religion Clauses of the First Amendment. As the Court continues to bolster important individual and organizational religious freedom without fortifying the frameworks that protect all human rights, it fails to protect all individual liberties.[99]

B. *The Ministerial Expansion*

Two weeks after the Supreme Court decided *Bostock*, the Supreme Court handed down another case dealing with human rights, *Our Lady of Guadalupe School v. Morrissey-Berru.*[100] Recent religious-organization employment cases like *Morrissey-Berru* have brought *Smith* into new focus without mentioning it by name.[101]

In *Morrissey-Berru* and its companion case, *St. James School v. Biel*, the Court revisited *Hosanna-Tabor's* ministerial exception.[102] The "ministerial exception," which stems from the First Amendment, precludes Title VII's application to claims that concern the employment relationship between a religious institution and its ministers.[103]

Federal trial judges dismissed both *Morrissey-Berru* and *St. James*, finding that the ministerial exception protected the schools.[104] The United States Court of Appeals for the Ninth Circuit reversed those rulings, allowing the cases to proceed.[105] The two claims at issue dealt with Catholic elementary school teachers.[106] One teacher alleged that she was terminated based on age discrimination under the

protection under the "sincere belief" religious protections than "because of sex" as defined by the Court, Title VII, and legislative history).

99 *See* Elizabeth Brown et al, *R Corps: When Should Corporate Values Receive Religious Protection?*, 17 BERKELEY BUS. L.J. 91, 92-96 (2020) (looking at the possible emergence of the religious corporation when values are considered religious, providing a test to determine these sincere "religious" beliefs, and discussing possible negative implications). This article recognizes the trend that courts are prioritizing organizational religious beliefs – and this is to the detriment of other human rights and to the detriment of individual ministerial employees. The authors explore some of the negative implications of taking advantage of this trend – including worsening the partisan divide in the United States.

100 140 S. Ct. 2049, 2049 (2020).

101 *Id.*

102 Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 181 (2012).

103 *Hosanna-Tabor Evangelical Lutheran Church and School*, 565 U.S. at 188.

104 *Morrissey-Berru,* 140 S. Ct. at 2058-60.

105 *Id.*

106 *Id.* at 2056-60.

Age Discrimination in Employment Act.[107] The other lawsuit was filed under the Americans with Disabilities Act after the teacher requested time off to treat her breast cancer.[108] Both schools maintained that the terminations were the result of the teachers not fulfilling their ministerial roles at the schools.[109]

The Supreme Court, in a seven to two opinion written by Justice Alito, held that both teachers were "ministers" as defined by *Hosanna-Tabor* and that a person can be serving important religious functions even if they do not hold the title or training of a religious leader, which was an expansion of *Hosanna-Tabor*.[110] Because they were determined to be ministers, the religious institutions were exempt from anti-discrimination laws.[111]

Justice Alito explained that the First Amendment's religious freedom protections forbid judges from interfering in the internal workings of religious institutions.[112] This, by itself, does not seem concerning when applied to actual ministers or religious leaders. But the cases dealt with teachers who spent most of their time on secular subjects like reading, writing, spelling, grammar, vocabulary, math, science, social studies, and geography.[113] And Morrissey-Berru, for example, taught only one course on the history of the Catholic Church, but did not otherwise have religious credential, training, or ministerial background.[114]

Alito said that "The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission."[115] He further wrote that, "Judicial review of the way in which religious schools discharge those responsibilities would under-

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107 *Id.* at 2056-58.

108 *Id.* at 2058-60.

109 *Id.* at 2056-60.

110 *Morrissey-Berru,* 140 S. Ct. at 2056-60.

111 *Id.* at 2066. Here is one of the places – just two weeks after *Bostock* – where the first limit in its application is clear. If there is a religious organization and a ministerial employee, rights recognized in *Bostock* will not apply. Perhaps unsurprising – except that there is a significant expansion of "ministerial employee" in *Morrissey-Berru.*

112 *Id.* at 2060-61.

113 *Morrissey-Berru*, 140 S. Ct. at 2080 (Sotomayor, J. dissenting).

114 *Id.* at 2078.

115 *Id*. at 2055.

mine the independence of religious institutions in a way that the First Amendment does not tolerate."[116]

Justice Thomas, joined by Justice Gorsuch, authored a concurring opinion that went further.[117] The concurrence argued that courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[118] Justice Thomas specifically referred to atypical religious organizations' right to shape their own faith and mission through their own ministerial definitions.[119]

Justice Sotomayor dissented, joined by Justice Ginsburg, arguing that the Court incorrectly classified the teachers as ministers, given that they taught primarily secular subjects, lacked substantial religious titles and training, and were not required to be Catholic.[120] Justice Sotomayor highlighted how the "ministerial exception" is a judge-made doctrine first recognized eight years ago in *Hosanna-Tabor*.[121]

Justice Sotomayor's concern that the First Amendment would be used to categorically bar certain anti-discrimination suits against religious employers rings true.[122] The decision affects employees other than teachers, like "coaches, camp counselors, nurses, social-service workers, in-house lawyers, media relations personnel and many others who work for religious institutions."[123] Justice Sotomayor further explained that "All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets."[124]

Morrissey-Berru gives religious organizations the freedom to discriminate because of age, disability, and presumably any other protected class based on religion even if the reason for discrimination seems completely irrelevant to the religious mission.[125] The release of *Bostock* and *Morrissey-Berru* within two weeks of each other seemed purposeful. Courts must read these cases together. *Morrissey-Berru* now broadly expands the ministerial exception grounded in the Free

116 *Id.*

117 *Id.* at 2069.

118 *Id.* at 2070-71 (Thomas, J., concurring).

119 *Morrissey-Berru,* 140 S. Ct. at 2070 (Thomas, J., concurring).

120 *Id.* at 2071-72 (Sotomayor, J., dissenting).

121 *Id.*

122 *See id.* at 2075-76.

123 *Id.* at 2082.

124 *Id.*

125 *Morrisey-Berru*, 140 S. Ct. at 2082.

Exercise Clause.[126] A church or religious school can decide unilaterally that a teacher or counselor or any other employee has some sort of ministerial function, and the court will defer.[127] No longer does it apply solely to actual ministers or religious leaders.[128]

C. *The Roberts Court Protects Religious Liberty Above All Else*

Finally faced with a clear issue in *Fulton v. City of Philadelphia,*[129] the Court was asked to overrule or tweak *Smith*.[130] Instead, the Court continued to undermine *Smith* by bolstering religious freedom and chipping away at other human rights. As such, the Court now operates in a post-*Smith* world, although the Court has not explicitly recognized it as such.

In *Fulton*, after the City of Philadelphia learned that two of its foster care providers would not license same-sex couples, the City ceased referring children to these agencies.[131] One of those agencies, Catholic Social Services (CSS), and several of its foster parents, sued the City and requested a preliminary injunction.[132]

No same-sex couples had applied for certification from CSS.[133] The case arose because of a newspaper investigation and preemptive call from the City saying they would no longer refer to CSS.[134] Other agencies in Philadelphia do certify same-sex couples.[135] CSS states that if a same-sex couple were to seek certification from them, they would direct the couple to one of the more than twenty other agencies in the

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126 *See* Allison R. Ferraris, *The Expansive Scope of the Ministerial Exception After Our Lady of Guadalupe School v Morrissey-Berru*, 62 B.C. L. REV. E-SUPPLEMENT II. 280, 280 (2021) (arguing that the ministerial exception has expanded with significant implications, including loss of many employment anti-discrimination safeguards that Congress intended to provide. Although religious institutions have a First Amendment interest in maintaining autonomy in selecting their religious leaders and those who take on important religious roles, courts should not enable them to exploit that autonomy).

127 *See id.* at 294

128 *See id.* at 289-90; The open question is whether employers – more broadly – who have religious objections to LGBTQ+ people – for example – will be given an exemption from anti-discrimination laws. At least that is the signaling from the Supreme Court right now in the way these current Supreme Court opinions are written.

129 141 S. Ct. 1868 (2021).

130 *Id.* at 1868, 1876.

131 *Id.* at 1875.

132 *Id.* at 1876.

133 *Id.* at 1875.

134 *Id.*

135 *Id.*

City, all of which currently certify same-sex couples.[136] CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children.[137] The issue here for CSS is specifically with marriage.[138] They will not certify married gay and lesbian couples,[139] but they will also refuse to certify all unmarried couples regardless of sexual orientation.[140] Again, they do so because of the religious belief that marriage is between one man and one woman.[141]

The district court denied CSS's motion for preliminary injunction and rejected the argument that child welfare agencies have a right to discriminate because of their religious belief that marriage is a sacred bond between one man and one woman.[142] The Third Circuit affirmed the district court.[143] Both the district court and the court of appeals relied on *Smith* because the law was general and neutrally applied.[144] CSS appealed to the Supreme Court.[145]

At the Court, the issue was whether CSS had a right under the Free Exercise Clause to refuse to screen same-sex married couples for eligibility to be foster parents.[146] The contract between CSS and the City required non-discrimination with respect to sexual-orientation, among other things.[147] CSS objected, claiming that the contract burdened the organization's religious belief that marriage is between only one man and one woman.[148]

In a surprising decision, the Court unanimously held for CSS.[149] The majority opinion, written by Chief Justice Roberts and joined by five other justices, rested its holding on the narrow ground that the City's non-discrimination policies were not "generally applicable," and were therefore not bound by *Smith*.[150] *Smith*'s rational basis stan-

136 *Fulton,* 141 S. Ct. at 1875.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Fulton,* 141 S. Ct. at 1874.
142 *Id.* at 1876.
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Fulton*, 141 S. Ct. at 1875.
148 *Id.* at 1875-76.
149 *See id.* at 1871.
150 *Id.* at 1876-77.

dard only applies to neutral, generally applicable laws that incidentally burden religion.[151] Otherwise, the Free Exercise clause triggers strict scrutiny.[152] This distinction allowed the Court to apply the more rigorous strict scrutiny standard to the City's treatment of CSS.[153] The Court then determined that the City's exclusion violated CSS's free exercise rights.[154]

In the same vein as *Masterpiece Cakeshop*,[155] the Court avoided the hard question and ruled on narrow, arguably shaky, grounds.[156] The Court had the opportunity to overrule or tweak *Smith* and they did not do so.[157] In their separate concurrences,[158] Justice Gorsuch accused the majority of disingenuously refusing to engage the question of whether *Smith* should be overruled, and Justice Alito argued that *Smith* had been wrongly decided and should indeed be overruled.

Justice Barrett filed a concurrence, joined by Justices Kavanaugh and Breyer, which raised concerns about the uncertainty that would follow from the overruling of *Smith*.[159] They saw no reason to leap into that Free Exercise controversy in a case where all nine justices agreed that CSS should prevail.[160]

The majority's reasoning is attenuated because it tries to fashion a result out of inconsistent facts. The majority held that the case falls outside *Smith* because the City burdened the religious exercise of CSS

151 *Id.* at 1876.

152 *Id.*

153 *Fulton,* 141 S. Ct. at 1882.

154 *Id.*

155 *See Masterpiece Cakeshop,* 138 S. Ct. at 1723, 1725-27, 1729, 1732. The case dealt with Masterpiece Cakeshop, which refused to design a custom wedding cake for a gay couple based on the owner's religious beliefs. The Colorado Civil Rights Commission, under the state's anti-discrimination law, found that the bakery had discriminated against the couple. The bakery took the case to the Supreme Court. At issue was whether owners of public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion. Specifically, whether they should be granted an exemption from laws ensuring non-discrimination in public accommodations – here, by refusing to make a custom wedding cake for the marriage of a gay couple based on the owner's religious beliefs. In a 7–2 decision, the Court ruled on narrow grounds that the Commission did not employ religious neutrality, violating Masterpiece owner Jack Phillips's rights to free exercise. The Court reversed the Commission's decision and did not rule on the broader intersection of anti-discrimination laws, free exercise of religion, and freedom of speech.

156 *Fulton,* 141 S. Ct. at 1876-77.

157 *Id.*

158 *Id.* at 1883, 1926 (Alito, J., joined by Roberts, C. J., and Thomas, J.) and (Gorsuch, J. concurring joined by Thomas, J. and Alito, J.).

159 *Id.* at 1882-83 (Barrett, J., concurring).

160 *See id.* at 1871, 1883.

through policies that do not meet the requirement of being neutral and generally applicable, holding specifically that it was not generally applicable.[161] A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "'a mechanism for individualized exemptions.'"[162] Here, in the foster care contract, the City provided that a Provider shall not reject a child or family for Services based upon their sexual orientation unless an exception is granted by the Commissioner or the Commissioner's designee in their sole discretion.[163] The Court said that this allowance for discretion subverted general applicability.[164] Because of that, strict scrutiny applied.[165]

The Court found that the City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs.[166] A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests.[167] The Court accepted the City's compelling interest in enforcing its non-discrimination policies generally.[168] The question was whether it had an interest in denying an exception to CSS.[169]

The Court held that the City did not have such a compelling interest in refusing to contract with CSS.[170] CSS had sought an accommodation that would allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it did not seek to impose those beliefs on anyone else.[171]

The Court did not consider whether the City's actions also violated the Free Speech Clause.[172] The City could choose to rewrite the

161 *Id.* at 1878, 1881.

162 *Fulton,* 141 S. Ct. at 1877.

163 *Id.* at 1878.

164 *Id.*

165 *Id.* at 1882.

166 *Id.* at 1876.

167 *Id.* at 1881; *Smith,* 494 U.S. at 883-84 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."); *Sherbert,* 374 U.S. at 401, n. 4. *See also Lukumi,* 508 U.S. at 537.

168 *Fulton,* 141 S. Ct. at 1882.

169 *Id.* at 1881-82.

170 *Id.* at 1882.

171 *Id.*

172 *Id.* The Court also held that Philadelphia's Fair Practices Ordinance, which forbids interfering with the public accommodations opportunities of an individual based on sexual orientation, did not apply to CSS's actions here. The Ordinance defines a public accommodation to

contract to exclude the discretionary component or revise its Fair Practices Ordinance to clarify the coverage of foster care opportunities.[173] This would then force the Court to reach the *Smith* issue. Even if they choose not to do so, many existing government programs and other contracts provide for at least some exception-making, but do not in practice offer those exceptions to accommodate religious exercise.[174] In avoiding *Smith,* the Court has perhaps created another kind of uncertainty. The needle is moving on these religion cases. The Court is carefully avoiding an overhaul. But this slow, piecemeal approach is unpredictable and vague. This expansion of organizational religious rights—at the expense of individual employee rights—directly impacts the understanding and applicability of hostile work environment claims and the ministerial exception.

III. HOSTILE WORK ENVIRONMENT CLAIMS—MINISTERIAL EMPLOYEES AND THEIR RELIGIOUS EMPLOYERS

For workplaces to function properly, employers must be able to control their employees. Through "[t]angible employment actions . . . [t]he supervisor brings the official power of the enterprise to bear on subordinates."[175] Employment discrimination law is built on the recognition that employers have these powers to control their employees

include a provider "whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." The Court rejected the City's argument that the Ordinance, which prohibits discrimination in "public accommodations opportunities" based on, among other grounds, an individual's sexual orientation, constituted a relevant, generally applicable law. The Court construed the Ordinance as not covering foster parenting as a "public accommodation," because the relevant service of certification as a foster parent involved a high degree of selectivity. Both the U.S. district court and the U.S. COA had determined that the Fair Practices Ordinance DID cover the opportunity to serve as a foster parent. So, this holding that foster services do not constitute a 'public accommodation' under the City's Fair Practices Ordinance is a matter of statutory interpretation. However, it also spurs an interesting conversation about what is and is not public accommodation – so this is not a public accommodation but something like an Uber is – and why is that. This also pushes the question about discrimination by photographers-for-hire or other service providers like that – and where the line is drawn. Have things changed since courts first started defining public accommodation laws? How courts define a public accommodation will directly intersect with this line between discrimination and religious freedom in more and more direct ways.

173 *Id.* at 1929-30 (Gorsuch, J. concurring).

174 *See Fulton*, 141 S. Ct. at 1880.

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

and requires "an official act of the enterprise."[176] Employers need control to ensure proper function of the workplace and religious organizations need control to put their missions into effect. When supervisors make tangible employment decisions, organizations are held accountable because the supervisor is an agent of the organization.[177] *Ellerth* reiterates that when these tangible decisions are discriminatory, employers are held accountable for that as well as outside of the ministerial context.[178]

Hostile work environment claims present a unique and challenging issue for courts, even outside the religious organization context. These claims involve different elements than tangible job detriment claims and can involve a wide range of behavior that may or may not fall within the scope of employment.[179] Hostile work environment claims are, at their base, tortious.[180] They are, by definition, based on actions that are not necessary for effective supervision of employ-

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176 *Id.* ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records and may be subject to review by higher level supervisors.").

177 *Id.*

178 *Id.*

179 *Id.* at 757. An employer cannot be held liable for conduct related to sexual harassment as "sexual harassment by a supervisor is not conduct within the scope of employment." An employer can be liable for their own negligence in causing or failing to respond to the harassment, or when the supervisor takes tangible employment action against the employee. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 900 (7th Cir. 2021) (Hamilton, J., dissenting) (citing *Ellerth,* 524 at 759-61); *see also* Faragher v. City of Boca Roton, 524 U.S. 775, 789-90 (1998). In general, 'sexual harassment by a supervisor is not conduct within the scope of employment,' so the employer cannot be held liable for that conduct. *Ellerth*, 524 U.S. at 757. However, 'an employer can be liable, nonetheless, where its own negligence is a cause of the harassment,' *id.* at 759, or where the supervisor takes tangible employment action against the employee. *Id.* at 760-61; accord, *Faragher,* 524 U.S. at 789-90. If no tangible employment action is taken, these rules treat harassment as a tort committed by a supervisor against an employee but acting outside the scope of the supervisor's employment. Defendants here argue in effect that their power as employers to take tangible employment actions against ministerial employees does not give them enough power to select, supervise, and control those employees. But the Supreme Court's leading case on the subject teaches that a hostile work environment, by definition, simply is not a permissible means of exerting (constitutionally protected) 'control' over employees and accomplishing the mission of the business or religious organization. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993). The conduct plaintiff alleges here is classic tortious harassment under Supreme Court case law. *Demkovich*, 3 F. 4th at 900.

180 *See Ellerth,* 524 U.S. at 756; *Faragher,* 524 U.S. at 793-94. Creation of different standards for holding employers liable for hostile work environments because management does not need supervisory control to create/facilitate a hostile environment.

ees.[181] Courts look at the employer's negligence in supervising the supervisor or co-worker.

In *Ellerth* and *Faragher*, the Supreme Court provided a framework for assessing an employer's hostile work environment liability.[182] Under this framework, there are two alternative ways in which a plaintiff may establish an employer's liability for sexual harassment. First, an employer is vicariously liable for a hostile environment that "culminates in a tangible employment action."[183] A tangible employment action involves a significant change in employment status, like hiring, firing, a significant change in benefits, failure to promote, or a reassignment that involves significantly different responsibilities.[184]

When there is no tangible employment action, an employer may be liable for a hostile work environment created by a supervisor or a co-worker.[185] If the hostile work environment is caused by a supervisor, the employer's liability would be vicarious.[186] If the hostile work environment is caused by a co-worker, the employer's liability would be direct.[187] In both instances, the employee must show that they were subject to unwelcome behavior sufficiently severe or pervasive enough that the conditions of employment were changed into an abusive work environment.[188]

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[181] *See Ellerth*, 524 U.S. at 756-57; *Faragher*, 524 U.S. at 793-94.

[182] *Ellerth,* 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

[183] *Ellerth,* 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

[184] *Ellerth,* 524 U.S. at 761 (holding that a tangible employment action is one that constitutes "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.").

[185] *See id.* at 760.

[186] *See id.* at 761-62.

[187] *Id.* at 760; *see also* Vance v. Ball State University, 133 S. Ct. 2434, 2443 (2013) (holding that a harasser does not qualify as a supervisor unless they have the power to "take tangible employment actions against the victim"—the power to hire and fire). For a more comprehensive discussion of supervisory (sexual) harassment *see* Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1070-71 (2018) (Employers are strictly liable for a supervisor's tangible employment actions "because only supervisors have the delegated power to inflict such harm on subordinates" including hiring, demotion, discharge, and reassignment. With intangible actions, employers have an affirmative defense which is, at least partially, intended as a deterrent for allowing severe and pervasive conduct to continue. The two elements are: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.").

[188] Grossman, *supra* note 16, at 1034-37.

The plaintiff has the burden to show that the behavior is unwelcome.[189] Generally, if the plaintiff instigated or contributed to it, they will not recover.[190] The behavior must also be sufficiently severe and pervasive enough that a reasonable victim would find it hostile or abusive.[191] The plaintiff must also have subjectively experienced the harassment as abusive and hostile.[192] Finally, the alleged harasser must have targeted the victim because of their protected class.[193] In sexual harassment cases, the plaintiff must have been targeted because of their sex.[194]

A hostile work environment is based on the totality of the circumstances.[195] Courts consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[196]

In the case of supervisory hostile work environments, the employer can raise the *Ellerth-Faragher* affirmative defense.[197] This defense requires the employer to show they (1) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior;" and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[198]

This defense puts a premium on employers' proactive education about harassment and rewards employers who create and follow specific and comprehensive policies. Typically, employees who fail to use

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189 Davis, *supra* note 187, at 1068.

190 *See Faragher,* 524 U.S. at 807-08.

191 Davis, *supra* note 187, at 1068.

192 *Id.*

193 *See* Miller v. Dep't of Corr., 115 P.3d 77, 87 (Cal. 2005); Elezovic v. Ford Motor Co., 697 N.W.2d 851, 853 n.4 (Mich. 2005); Nava v. City of Santa Fe, 103 P.3d 571, 574 (N.M. 2004); Lively v. Flexible Packaging Ass'n, 830 A.2d 874, 888 (D.C. 2003); McElroy v. State, 637 N.W.2d 488, 498-99 (Iowa 2001); Goins v. W. Group, 635 N.W.2d 717, 725 (Minn. 2001); Cincinnati Bar Ass'n v. Young, 731 N.E.2d 631, 639-40 (Ohio 2000); Veco, Inc. v. Rosebrock, 970 P.2d 906, 910 (Alaska 1999). *See also* Davis, *supra* note 187, at 1067-69.

194 *See* Davis, *supra* note 187, at 1067-69.

195 *Harris,* 510 U.S. at 23.

196 *Id.*

197 *Ellerth,* 524 U.S. at 764-65; *Faragher,* 524 U.S. at 807 ("[W]e adopt the following holding in [both cases] . . . . When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . .").

198 *Faragher,* 524 U.S. at 807.

a complaint procedure provided by the employer will satisfy an employer's burden under prong two.[199]

If the alleged harasser is not a supervisor, the employer is directly liable when the employer knew or should have known about the harassment and was negligent in responding to prevent and correct the offending behavior.[200] In *Vance v. Ball State University,*[201] the Court stated that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place."[202] The Court said that "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent."[203] Also important is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed."[204]

In non-supervisory cases, the plaintiff has the burden to show that the employer had knowledge and that they were negligent in their response.[205] This burden of proof makes these cases harder for employees to prove and win.[206] As will be discussed in the next section, courts are split in their treatment of religious employees' hostile work environment claims.

A. *Hostile Circuit Split*

The breakdown of *Smith* continues to inform courts' treatment of religious employees' hostile work environment claims. Previously, there was a circuit split between the Ninth and Tenth Circuits. In *Elvig v. Calvin Presbyterian Church,*[207] the Ninth Circuit held that the ministerial exception does not categorically bar ministers' hostile work

199 *Ellerth,* 524 U.S. at 765; Faragher, 524 U.S. at 808; "Federal Highlights," Digest of EEOC Law (Vol. XI, No. 6), https://www.eeoc.gov/federal-sector/federal-highlights-3.

200 *Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/harassment (last visited Dec. 7, 2021).

201 570 U.S. 421 (2013) (rejecting in part the EEOC's definition of supervisor and finding an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.").

202 *Id.*

203 *Id.* at 422.

204 *Id.* at 449.

205 *Id.* at 424.

206 *Id.* at 450.

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

environment claims where the religious employer denies or disavows the conduct.[208] The Tenth Circuit reached the opposite conclusion in *Skrzypczak v. Roman Catholic Diocese of Tulsa*,[209] holding that the ministerial exception bars all hostile work environment claims. A variety of federal district and state courts are split as well.[210] *Elvig* and *Skrzypczak* were both decided before *Morrissey-Berru* expanded the ministerial exception.[211] The Supreme Court has not directly addressed the issue.[212]

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208 *Id.* at 963.

209 Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010).

210 Circuits addressing the issue: The Tenth Circuit holds that hostile work environment claims are barred by the ministerial exception. *See Skrzypczak*, 611 F.3d at 1243-46. The Ninth Circuit holds they are not. *Elvig,* 375 F.3d at 969, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999); Werft v. Desert Sw. Annual Conf. of United Methodist Church, 377 F.3d 1099, 1101-04 (9th Cir. 2004) (per curiam). Cases allowing ministerial employees to pursue hostile environment claims: *see* Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996, 1007 (D. Kan. 2004) (relying on Elvig, Bollard, McKelvey and Black, the Court finds that the First Amendment does not preclude plaintiff from stating a claim for sexual harassment); Prince of Peace Lutheran Church v. Linklater, 421 Md. 664, 689, 28 A.3d 1171, 1177 (2011) ("Ms. Linklater's claims derive from the alleged sexual harassment by [a fellow employee] and Pastor Lusk and the alleged statements that publicly discredited her. She is not challenging any employment decisions regarding her termination in March 2001. Numerous courts have recognized that tort claims based on harassment are not barred by the First Amendment. In as much as Ms. Linklater's claims do not implicate any employment decisions or religious beliefs of Prince of Peace, the First Amendment's ecclesiastical exception will not bar her causes of action as they relate to Pastor Lusk and Prince of Peace); McKelvey v. Pierce, 800 A.2d 840, 844 (2002) (The First Amendment does not immunize religious institutions and their members from every legal claim. [E]ach case [requires] a fact-sensitive, claim-specific analysis that takes into account doctrinal and intrusion and entanglement); Van Osdol v. Vogt, 908 P.2d 1122, 1129 (Colo. 1996) (In holding that ministerial tangible employment claims are barred, recognizes that intangible hostile environment claims are not, "does not even bar ministers from bringing employment discrimination claims that do not stem directly from a hiring or discharge decision"); Black v. Snyder, 471 N.W.2d 715, 720-21 (Minn. App. 1991).

211 *Morrissey-Berru,* 140 S. Ct. at 2049.

212 "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Hosanna-Tabor*, 565 U.S. at 196. In *Hosanna-Tabor,* the Supreme Court unanimously held that the First Amendment Religion Clauses insulate religious institutions from liability for employment discrimination against ministers. The case involved retaliation against Cheryl Perich, a religious schoolteacher, who had complained to the EEOC about an alleged disability-based failure to reinstate. Perich's employer then fired her in response to her EEOC Complaint. Perich has been on disability leave and, after being cleared by her doctors to return to work, was told that the school had already hired someone else. Perich then threatened to file suit, and so the school fired her for "insubordination and disruptive behavior." Perich sued for unlawful dismissal under the Americans with Disabilities Act. The Court held that the Establishment Clause and the Free Exercise Clause operate together to create an affirmative defense to

Plaintiff Monica Elvig was an ordained Presbyterian minister who brought sexual harassment and retaliation claims under Title VII against her employer Calvin Presbyterian Church, North Puget Sound Presbytery, and her supervisor Pastor Ackles.[213] The district court dismissed Elvig's complaint, concluding that her Title VII claims fell within the scope of the "ministerial exception" to Title VII, thus barring the claims.[214]

The Ninth Circuit reversed and remanded holding that Elvig's sexual harassment claim could succeed if she proved that she suffered a hostile work environment and if the Defendants could not prove that Elvig unreasonably failed to take advantage of available measures to prevent and correct that hostile environment.[215] The Court further held that Elvig's retaliation claim could succeed if she proved that she suffered retaliatory harassment in the form of verbal abuse and intimidation because of her complaints to the Church and the U.S. Equal Employment Opportunity Commission.[216]

While stating that the Church's tangible employment actions would be protected, the Court said that "insulating the Church's employment decisions does not foreclose Elvig from holding the Church vicariously liable for the alleged sexual harassment itself, which is not a protected employment decision."[217] The Court reasoned that in "Title VII actions against secular employers, plaintiffs who suffer tangible employment actions but cannot connect those actions to harassment may nonetheless recover for the harassment itself if their employers cannot satisfy the *Ellerth-Faragher* affirmative defense."[218]

The Tenth Circuit disagreed stating that a hostile work environment claim brought by a minister is not a claim by a minister appropriate for court intervention because it implicates a church's spiritual functions.[219] Monica Skrzypczak began work as the director of the Department of Religious Formation for the Roman Catholic Diocese

ministerial employees' employment discrimination claims when they involve judgment about fitness for ministry. In Perich's case, her pedagogical duties and her status as an ordained teacher made her a ministerial employee as a matter of law. *Id.*

213 Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 962.

218 *Id.*

219 *Skrzypczak*, 611 F.3d 1238 (10th Cir. 2010).

of Tulsa.[220] She was clearly a ministerial employee as her responsibilities included supervising the Diocesan Resource Libraries, the Office of Religious Formation, Pastoral Studies Institute, and Office of Youth and the Young Adult Ministry.[221] She also taught or facilitated numerous religious courses at the Institute.[222] Skrzypczak sued the Diocese and the Bishop of the Diocese alleging several claims involving gender and age discrimination.[223] Specifically, she brought claims under Title VII of the Civil Rights Act for gender discrimination, disparate impact based on gender, and hostile work environment.[224] She also brought federal law claims for violation of the Age Discrimination in Employment Act and the Equal Pay Act, as well as two state law claims for breach of contract and intentional infliction of emotion distress.[225]

The Tenth Circuit noted that "[o]f course churches are not—and should not be—above the law," and that they "may be held liable for their torts and upon their valid contracts."[226] Interestingly, the court stated that a church's employment decision "may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."[227] In a somewhat twisted and fascinating turn of words, the court found that a hostile work environment claim by a minister cannot be such a claim.[228] There is no discussion of when Title VII could be implicated. A logical assumption is that the Tenth Circuit would categorically deny all ministerial employees from Title VII protection. The court does indicate that there are situations that "may be subject

220 *Id.* at 1240.

221 *Id.*

222 *Id.*

223 *Id.* at 1241.

224 *Id.*

225 *Skrzypczak*, 611 F.3d at 1241.

226 *Id.*

227 *Id.* at 1244-45 (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 722 F.2d 1164, 1171 (4th Cir. 1985)).

228 *Id.* at 1238 ("Nevertheless, we are not inclined to agree with the Ninth Circuit's reasoning that a hostile work environment claim brought by a minister does not implicate a church's spiritual functions. Rather, we believe that allowing such a claim may, as Judge Trott stated in his dissent from *Elvig,* 'involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy.' *Elvig,* 375 F.3d at 976 (Trott, J., dissenting); *see also* Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (holding that review of church personnel decisions 'would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of a particular case religious doctrine and canonical law support the decision the church authorities have made'")).

to Title VII scrutiny, where the decision does not involve the church's spiritual functions" but it is difficult to ascertain what those may be if not a hostile work environment claim. The court fails to explain its reasoning in its sparse analysis. Further, as the *Skrzypczak* case was decided before *Morrissey-Berru,* it is unclear if the analysis would be different.

The Seventh Circuit is the first circuit court post-*Fulton* to address whether the ministerial exception applies to intangible or hostile work environment claims.[229] *Demkovich v. St. Andrew the Apostle Parish*[230] concerned a hostile work environment claim based on minister-on-minister harassment.[231] Deepening the split among the circuits, the Seventh Circuit ultimately joined the Tenth Circuit in holding that hostile work environment claims are barred under these circumstances, further narrowing the reach of the ministerial exception.[232]

In his lawsuit, Demkovich claimed that the priest at his church subjected him to a hostile work environment based on disability, including metabolic syndrome, and that he was harassed and then fired in violation of Title VII because he entered into a same-sex marriage.[233] A district judge dismissed the sexual orientation claim on the grounds that it had a religious basis but allowed the disability claim to go forward.[234] A panel of the Seventh Circuit upheld the disability

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

230 *Id.*

231 *Id.*

232 *Id.* at 984-85. In *Morrissey-Berru*, the Court expanded the ministerial exception in the context of tangible employment action because both teachers were terminated. The Supreme Court has not yet addressed intangible employment claims. Specifically, a hostile work environment claim based on minister-on-minister harassment. *Demkovich*, 3 F.4th at 984-85. One discrimination claim was based on age (Age Discrimination in Employment Act) and the other was based on the Americans with Disabilities Act – the teacher had requested time off to treat her breast cancer. In both those situations, the teachers were terminated – so the court was looking at tangible employment action. In holding that the ministerial exception applied, the court said that people can be serving important religious functions even if they do not hold the title or training of a religious leader and that the selection and supervision of the teachers is at the core of their mission. *Morrissey-Berru* broadly expanded the definition of who qualifies as a minister for purposes of that exception, the two teachers were teaching secular subjects. The dissent noted that the expansion would affect employees other than teachers, like coaches, camp counselors, nurses, social service workers, in-house lawyers, media relations personnel, and many others. *Morrissey-Berru*, 140 S. Ct. at 2082.

233 *Id.* at 973.

234 *Id.* at 973.

claim and revived the sexual orientation claim, and the church sought en banc review.[235]

The en banc court disagreed with the panel and said the ministerial exception barred all Demkovich's claims, citing concerns about excessive entanglement in the religious sphere.[236] They held that the ministerial exception gives religious organizations an absolute right to decide what ministers they employ. Writing for the majority, Justice Brennan stated, "[i]t would be incongruous if the independence of religious organizations mattered only at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment)."[237]

Judge David Hamilton dissented in the *Demkovich* en banc decision, joined by Judges Rovner and Wood.[238] Judge Hamilton noted that religious organizations are still subject to ordinary torts and criminal laws and argued that the majority's conclusion drew an "oddly arbitrary line" for hostile work environment claims.[239] He said that the ministerial exception should be evaluated case by case, rather than by creating an absolute bar that applies "regardless of how severe, pervasive, or hostile the work environment is, regardless of whether the hostility is motivated by race, sex, national origin, disability, or age, and regardless of whether the hostility is tied to religious faith and practice."[240]

Demkovich deals with a core ministerial employee, the music minister by parish priest.[241] Considering *Morrissey-Berru's* ministerial exception expansion, Judge Hamilton rightly notes that the stakes are now much higher for future decisions about who should be deemed a "ministerial" employee.[242] *Morrissey-Berru* shows that in-house law-

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235 *Id.* at 983.

236 *Id.* at 985. Whether a governmental regulation creates entanglement concerns generally depends on the mission of the organization at issue, the essence of the regulation's intrusion into religious administration, and the culminating interconnection between the government and the religious organization. *See* Lemon v. Kurtzman, 403 U.S. 602, 614-15 (1971). When claims involve core questions internal governance, the inevitable danger of governmental entanglement precludes judicial review. *See generally* L. Tribe, American Constitutional Law § 14-11 (2d ed. 1988).

237 *Demkovich,* 3 F.4th at 979.

238 *Id.* at 985.

239 *Id.* at 985-88 (Hamilton, J., dissenting).

240 *Id.* at 985.

241 *Id.* at 977-78.

242 *Id.* at 995 (Hamilton, J., dissenting).

yers, coaches, media personnel and the like could also be affected.[243] A sufficient difference exists between tangible and intangible employment actions—enough to warrant differential treatment. A strong interest exists in protecting the religious interests of religious employers, interests that recent caselaw has strengthened.[244]

Religious organizations are already being counseled on how to make more of their positions ministerial by distributing religious duties to as many staff members as is reasonably appropriate to increase the perception that employees who have those duties are ministers.[245] Judge Hamilton noted that the combination of the majority's holding in this case with efforts to expand the categories of employees deemed "ministerial" threatens to leave many without basic employment protections.[246]

The majority posited that it would be incongruous to treat the beginning of employment, the hiring, and the end of the ministerial relationship differently than the middle of the relationship—where these intangible hostile environment claims typically arise.[247] The majority's concern misunderstands the employment relationship and it further shifts the balance of power to completely ignore all but religious liberty. The hostile environment claim is wholly different in substance than a tangible job detriment claim, which typically includes hiring, firing, and so on.[248] As such, allowing religious organization

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243 *Morrissey-Berru,* 140 S. Ct. at 2082.

244 *Id.* at 2049; *Fulton,* 141 S. Ct. at 1868; *Bostock*, 140 S. Ct. at 1731 (as discussed *infra*); Tandon v. Newsom, 593 U.S. 1249 (2021), the Supreme Court granted an injunction against state regulations, which limited gatherings within churches to slow the spread of the COVID-19 virus; Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), the Supreme Court held that the Trump administration had authority under Obamacare to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections; Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021), case arose when Georgia Gwinnett College, a public institution, prohibited an evangelical student named Chike Uzuegbunam from distributing religious literature outside limited designated areas. Supreme Court allowed nominal damages because of potential violations of First and 14th Amendment speech and religious rights. Opinion suggests that the current Supreme Court is very open to hear cases from those who believe that government institutions have impinged upon their First and 14th Amendment speech and free-exercise rights.

245 *Demkovich,* 3 F.4th at 995 (Hamilton, J., dissenting).

246 *Id.*

247 *Id.* at 979.

248 Grossman, *supra* note 16, at 1041-42 (discussing how the Court held in *Faragher* and *Ellerth* that employers are automatically liable for supervisory harassment culminating in a tangible employment action. Alternatively, supervisors are seldom acting within the scope of employment when they engage in harassing behavior. Here, supervisors often act "for personal motives, motives unrelated and even antithetical to the objectives of the employer" but are typi-

employees to pursue hostile work environment claims would not interfere enough with organizational religious liberty to justify a complete takeaway of the rights of the employee. Further, the *Demkovich* dissent noted that the defendants had acknowledged in briefs and at oral argument that a religious employer could be held civilly liable for a supervisor's criminal or tortious conduct toward a ministerial employee, or for a pattern of racial abuse and harassment.[249] In such cases, the supervisor's and the employer's First Amendment rights would not be violated.[250] As the Judge Hamilton rightly notes, if these criminal and tort cases are not a problem, "then it is hard to see why a statutory case based on the same conduct would *necessarily* violate the First Amendment, whether or not the supervisor claims a religious motive."[251]

Religious organizations maintain complete freedom in hiring, and if a poor match, firing.[252] To allow the abuse of an employee under the guise of religious liberty misunderstands free exercise and freedom. As such, allowing religious organization employees to pursue hostile work environment claims would not interfere enough with organizational religious liberty to justify complete takeaway of the rights of the employee. The religious organizations can ultimately fire an employee that does not meet their mission—even for a discriminatory reason.[253] The religious organization does not need the intangible protection, but the employee does.

The Tenth Circuit's argument in *Skrzypczak*, that religious organizations would suffer improper interference because they may choose to employ ministers that lower their exposure to liability, is

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cally aided by the existence of the agency relation, which is an independent basis for imposing vicarious liability (quoting *Ellerth*). The article further notes that when no tangible employment action is taken, employers may raise an affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." In these cases, claims are governed by a negligence standard "holding employers liable only when they knew or should have known of the harassment but failed to take prompt and effective remedial action.").

249 *Demkovich,* 3 F.4th at 994 (Hamilton, J., dissenting).

250 *Id.*

251 *Id.*, Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

252 *Demkovich,* 3 F.4th at 976; *Hosanna-Tabor,* 565 U.S. at 177-79; *Morrissey-Berru,* 140 S. Ct. at 2056-59.

253 *See Morrissey-Berru,* 140 S. Ct. at 2056-59.

unpersuasive.[254] Although it is possible that some organizations may make a different decision in their entry-point hiring decision, which would be their choice, protected by their religious freedom, this same religious freedom cannot be extended to allow religious organizations to then abuse their employees in management and discipline.[255] At some point, freedom from "government control and scrutiny" starts to look like freedom to abuse.[256]

The central purpose of the ministerial exception is the religious organizations' need and right to control their religious employees free from interference.[257] As such, religious organizations have the power to hire, train, supervise, promote, and even terminate their ministers.[258] They can do all these things free from interference, even when the actions might seem otherwise discriminatory.[259]

Religious employers enjoy a broad range of discretion in selecting, supervising, promoting, and even terminating their ministers.[260] All these tangible decisions involve significant and necessary control that directly intersects with religious freedom.[261] Religious employers do not need the additional umbrella control to abuse, through their agents, the employees they retain. If a current minister does not align with the organization's mission, they can simply be let go.

B. Smith *Hanging in the Balance*

The *Demkovich* majority relied on *Smith*, stating that the *Hosanna-Tabor* Court "did not foreclose recognition of the ministe-

254 *Skrzypczak,* 611 F.3rd at 1245.

255 *Elvig*, 397 F.3d at 803-04 (order denying petition for rehearing) (Kleinfeld, J., dissenting) ("We are also persuaded that such an approach could, as Judge Kleinfeld argued in his dissent from the denial of rehearing of *Elvig,* infringe on a church's "right to select, manage, and discipline [its] clergy free from government control and scrutiny" by influencing it to employ ministers that lower its exposure to liability rather than those that best "further [its] religious objective[s]."). *Skrzypczak,* 611 F.3rd at 1245.

256 *Skrzypczak,* 611 F.3rd at 1245.

257 *Morrissey-Berru,* 140 S. Ct. at 2060.

258 *Id.* at 1055.

259 *Id.* at 2056-59. One teacher alleged that she was terminated based on age discrimination (Age Discrimination in Employment Act) and the other lawsuit was filed under the Americans with Disabilities Act after the teacher requested time off to treat her breast cancer.

260 *Id.* at 2060-61 ("courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions" and "[i]n *Hosanna-Tabor*, the Court recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations").

261 *Id.*

rial exception" because it was a law of general applicability.[262] This is the only time *Smith* is cited in *Demkovich*.[263] However, *Smith* looms in the balance as the Supreme Court, federal circuit courts, and other courts decide these cases dealing with employees' rights with respect to religious organizations.[264]

In *Fulton*, several Justices expressed frustration[265] that *Smith* was not overruled, while Justice Barrett noted that reconsidering *Smith* would invite more problems than solutions even though she is also concerned about it as precedent.[266] At least four Justices are operating under the assumption that *Smith* is not good law, but the Court is not quite ready to deal with the implications of a full overhaul.[267] This is a more dangerous chipping away of rights without a clear, understandable standard. The Court is in a post-*Smith* world even though the Supreme Court has not explicitly recognized it as such.[268]

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262 *Hosanna-Tabor,* 565 U.S. at 190 ("'Smith involved government regulation of only outward physical acts,' while the minister's termination in *Hosanna-Tabor* 'concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself.'"); *Demkovich,* 3 F.4th at 980.

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

264 *Id.*

265 "In Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits, or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to Smith, provides no protection. This severe holding is ripe for reexamination." *Fulton,* 141 S. Ct. at 1883 (Alito, J. concurring). "The Court granted certiorari to decide whether to overrule Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990). As Justice Alito's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning and has proven unworkable in practice." *Fulton*, at 1927 (Gorsuch, J. concurring). Justice Alito's concurrence was joined by Justices Thomas and Gorsuch and Justice Gorsuch's concurrence was joined by Justices Alito and Thomas.

266 Justice Barrett notes: "Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced." *Fulton,* 141 S. Ct. at 1882-83 (Barrett, J. concurring).

267 *Id.*

268 *Id.* at 1883.

ANALYSIS

I. CONFLICT OF RIGHTS LENS—PROTECTING THE RIGHTS OF BOTH THE RELIGIOUS ORGANIZATIONS AND THE MINISTERIAL EMPLOYEES

Ministerial employees cannot check all rights at the religious organization's door.[269] The employee—individually and as a representative of society—also retains some basic human rights. How the Court defines these rights is progressively important in cases of sexual abuse and harassment by clergy—as the implications therefrom become increasingly common.[270] Religious organizations importantly maintain significant independence in tangible employment decisions,[271] and so courts must strive to protect employees with these intangible claims. The religious organizations can ultimately fire an employee that does not meet their mission, and they can do so even for a discriminatory reason.[272] The religious organization does not need the intangible protection, but employees do. Intangible hostile work environment claims need protection—yet this protection remains precarious with only the Ninth Circuit recognizing it in *Elvig v. Calvin Presbyterian Church*.[273] Further, *Elvig* was decided before *Morrissey-Berru* expanded the ministerial exception.[274] The Supreme Court has not directly addressed whether hostile work environment claims will be protected in ministerial disputes.[275] However, the Court has already begun the process of scaling back certain fundamental rights while securing others.[276] If rights are truly fundamental, however, how do they change and become scaled into a hierarchy?

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269 And as an umbrella over all of this, the Free Exercise Clause of the First Amendment states that United States citizens may accept any religious belief and the government may not interfere in this practice.

270 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).

271 *Morrissey-Berru,* 591 U.S. at 2060-61.

272 *See id.* at 2056-59.

273 375 F.3d 951, 951 (9th Cir. 2004).

274 *See supra* Part III.A.

275 *Hosanna-Tabor*, 565 U.S. at 196.

276 *Smith*, 494 U.S. 872 (1990); *See infra* Part II.

Each religious employee has their own individual rights, but they are also part of a group.[277] The autonomy of the individual must be weighed against the shared community values and what might be considered the common good.[278] But the autonomy of the group must be considered as well.[279] Religious employees have protectable collective interests as a community of employees that might be different than that of their religious employees. Taking this one step further, religious employees share community values as reflected in a statute like Title VII.[280] Further complicating it, each employee has individual autonomy within the group of ministerial employees. All these rights require protecting and balancing.

A. *Rights-Based Ethics*

One way to explore protecting employees' rights is through the lens of deontology and rights-based ethics. Probably the most famous philosopher of deontological rights-based ethics is Immanuel Kant, who built on the work of John Locke.[281] Kant, an eighteenth-century philosopher, maintained that each person has a worth that must be respected.[282] Because of this worth or dignity, it is wrong for others to use other people against their will. Kant summarized this view by stating that people must only treat others as an end and not simply as a means.[283] Essentially, another person may never be used only to advance one's own interest.[284] By treating another person as an end is to give that person respect and to allow them the freedom to choose

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277 *Smith*, 494 U.S. at 879.

278 *Id.* at 914.

279 *Id.*

280 42 U.S.C. § 2000e-2(a)(2).

281 *See* Jeffrey K. Gurneyal, *Crashing into the Unknown: An Examination of Crash-Optimization Algorithms Through the two lanes of Ethics and Law* 79 ALB. L. REV. 183, 217-20 (2015-2016).

282 R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 271 (2002); Immanuel Kant, *Groundwork of the Metaphysics of Morals* 38 (Mary Gregor ed. (1785)); *See also* Thomas E. Hill, Jr., *Humanity as an End in Itself*, 91 ETHICS 84, 84 (1980).

283 Kant, *supra* note 282, at 36.

284 *See* Gurneyal, *supra* note 281, at 215-20.

for themselves.[285] People acting as rational beings are "ends in themselves."[286]

Rights-based ethics considers whether the action would respect the basic rights of each of the individuals involved.[287] Kant looks at the positive and negative impacts on the freedoms of the individuals involved.[288] Using a person as a means is wrong, and actions that violate someone else's rights are wrong.[289]

Rights-based ethics also looks at the rights themselves as positive or negative. A positive right is a justified claim on others—essentially what people are entitled to.[290] Positive rights impose a duty on someone to do something.[291] Negative rights are rights not to be subjected to the action of another person; they impose a duty on someone not to do something.[292] Attention to rights ensures that the freedom and well-being of everyone will be protected when others threaten that freedom or well-being.

When rights are set up as positive and negative, the problem becomes clear. Someone's rights may require someone else to do something. Or put another way, when there are two or more sets of rights there can be a significant conflict.[293] However, Kantian ethics does not require an individual approach:

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285 Wright, *supra* note 282, at 298-301.

286 According to Kant, there are three reasons why people are ends in themselves: (1) People have practical reason and the ability to think about and choose which actions we would like to do, what goals they have, and so on. (2) People have autonomy. People create law for themselves and determine their own ends through practical reason. Autonomy is essentially free will. (3) Human beings have intrinsic value, not mere instrumental value. Human beings always have intrinsic value, they can have instrumental value as well. Basically, they can help others and get something out of others. *Id.* at 315.

287 *Id.*

288 *Id.* at 297-98.

289 Wright, *supra* note 282, at 295-300 (looking at workplace sexual harassment through the Kantian formula). *See also* Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1084 (1999) ("Kantians might want to argue that the obvious source of the injury from sexual harassment is the affront to the dignity of women that such harassment implies, and this is unrelated to their rank in any status hierarchy").

290 *Id.* at 315-16.

291 Universal healthcare—under a rights-based ethics approach would look something like this: everyone should have basic healthcare because healthcare is a human right.

292 The right not to be jailed or have your liberty taken away without due process.

293 *See* Brown & Scott, *supra* note 3, at 94. Brown and Scott recognize and discuss that allowing discrimination (in providing services to the LGBTQ+ community) can result in a "powerful cumulative impact." They further discuss the conflict between common fundamental rights and another person's religious beliefs. *Id.* at 108. Brown and Scott propose a "Fourteenth

> Kant's theory maintains that to act morally is always to act for the sake of a person, or more precisely, for the sake of humanity in someone's person. In following a categorical imperative, the determining ground of the will is the objective worth of humanity or rational nature, as an object of respect. From this standpoint, all conduct is regarded fundamentally from the standpoint of what it expresses about the agent's attitude toward humanity. Morally good conduct expresses respect for humanity as an existent end, while bad conduct is bad because it expresses disrespect or contempt for humanity.[294]

John Rawls, whom some would call a modern Kantian, defines Kant's view of humanity as follows:

> Kant means by humanity those of our powers and capacities that characterize us as reasonable and rational persons who belong to the natural world . . . . These powers include, first, those of moral personality, which make it possible for us to have a good will and a good moral character; and second, those capacities and skills to be developed by culture: by the arts and sciences and so forth.[295]

Humanity as defined by Kant looks through a lens of rationality, innate human self-worth, and dignity.[296] Kant believed in people's ability to make these rational choices freely regarding what is deeply valuable or worthy.[297] Kant, like Rawls, believes that "[t]he worth of

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Amendment right to a workplace and marketplace free from discrimination as one means of resolving competing claims in the workplace." *Id.* at 111-12.

294 Jennifer Ann Drobac, *I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675 (quoting Allen W. Wood, *Kant's Ethical Thought* 116 - 117 (1999); *see also* Wright, *supra* note 282, at 271 (quoting Immanuel Kant, Groundwork of the Metaphysics of Morals 38 (Mary Gregor ed. & trans. 1998) (1785)).

295 Wright, *supra* note 282, at 274.

296 *Id.*

297 *See* Christine M. Korsgaard, *Creating the Kingdom of Ends* 110, 114 (1996) ("In the Groundwork, Kant interchanges the terms 'humanity' and 'rational nature.'"); *See* Barbara Herman, *The Practice of Moral Judgment* 238 (1993). *See* Henry E. Allison, *Kant's Theory of Freedom* 221 (1990); *See* LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 196 (Barbara Herman ed. 2000)); *See* Wright, *supra* note 282, at 274 ("Raising a terminological issue, Allen Wood has observed that '[s]trictly speaking . . . Kant ascribes dignity not to 'humanity' but to 'personality,' that is, not to rational nature in general but to rational nature in its capacity to be morally self-legislative.' Wood, *supra* note 294, at 115. Some of the discussions above simply focus on humanity insofar as it is capable of rational moral willing. This article sets Wood's distinction aside"); *See* Drobac, *supra* note 294, at 67 (quoting and discussing Allen W. Wood, *Kant's Ethical Thought* 120 (1999)) ("Kant further distinguished humanity in his discussion of 'personality.'

all rational beings is equal."[298] And "[a] person born to poverty is not lower on some scale of crucial moral worth than a person born to wealth."[299] Further, respect for a person and their humanity is necessarily encompassed in this rationality.[300] Moral conduct through "The Formula of the End in Itself" requires treating humanity with underlying respect and dignity as an underlying principle.[301]

When courts label certain civil rights as second tier, as is seen in recent Supreme Court jurisprudence, conflict of rights situations become even more fraught.[302] Rights are scaled with some considered more important than others. The current path is most concerned with ensconcing religious freedom in the First Amendment while leaving other basic human rights to fend for themselves in statutory protection.[303] While this trend is present and concerning, the availability of intangible employment claims provides an important and necessary protection for ministerial employees.

The loss of human dignity when intangible hostile work environment claims are not protected, pitted against important organizational religious freedoms, is difficult to unpack. A Kantian rights-based lens would examine the freedoms or interests at stake and decide which of the two is the more crucial for securing human dignity and look at which is more essential to maintaining our dignity as people.

Hostile work environments fail to respect the dignity and the humanity of the affected employees.[304] As such, the entire theory pro-

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According to Allen Wood, '[p]ersonality seems 'higher' than humanity in that it has essential reference to moral value, moral responsibility, and the 'positive' concept of freedom, where humanity includes none of these. But Kant has at least two reasons for choosing humanity rather than personality as the end in itself.' Wood concluded that the capacity for rational choice, and not the virtuosity of a particular choice or obedience to moral laws, comprises the fundamental value of human beings.").

298 Wright, *supra* note 282, at 274 (quoting Allen W. Wood, Kant's Ethical Thought 132 (1999)).

299 *Id.* (acknowledging that while people are equal in worth, they are not equal in the opportunities given to them by society that are necessary to develop their rational capacities).

300 Drobac, *supra* note 294, at 725.

301 *Id.*

302 *See supra* Part II.

303 *See, e.g.,* Dobrac, *supra* note 294, at 679.

304 *Id.* at 727-28. (discussing how Professor Wright applied a Kantian ethics lens to adult sexual harassment and found that all forms of sexual harassment clearly violated the Kantian formula. Drobac argues that the harasser's end can vary and may not even consider his end a target – and still there is a violation); *see also* Wright, *supra* note 282, at 300-01 ("A faithful Kantian will instead see sexual harassment as . . . tending to inhibit the otherwise possible development of the target's capacities for rational deliberation and choice on the job. Sexual harass-

tecting a hostile work environment claim would fail under rights-based ethics or otherwise. Religious organizations have significant power and control in the hiring decision. They can screen, interview, select, and train their chosen employees. Once these employees are on the job, the religious organizations have the freedom to terminate employment for any ministerial employee, as expanded by *Morrissey-Berru*, even if the reason would be otherwise discriminatory outside the religious organization context.[305] One could argue that even these tangible decisions are subject to abuse. Religious organizations can already evade civil rights laws simply by claiming that virtually any employee is somehow fulfilling an important religious function.[306]

Intangible employment claims push into even murkier ethical territory. Allowing religious organizations to defend against a hostile work environment with a ministerial exception defense would suggest that—at least in some cases—the severe and pervasive hostility[307] is a part of the religious mission. As stated in *Faragher*, "[A] pervasively hostile work environment of sexual harassment is never [one would hope] authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment."[308] By allowing ministerial employees to pursue hostile environment cases, courts can maintain protection of the organizational religious liberty while preserving some balance for the individual employee's basic human rights. Allowing these claims protects both the individual employee and prevents collective injustice.

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ment also fails to minimally cooperate with the victim's morally permissible projects, chosen by her in her own way."). Drobac and Wright are looking at sexual harassment, which encompasses hostile work environment and is more expansive than hostile work environment.

305 *Morrissey-Berru,* 140 S. Ct. at 2056, 2066; *Demkovich,* 3 F.4th at 995 (Hamilton, J., dissenting).

306 *Id.*

307 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HARASSMENT, https://www.eeoc.gov/harassment (last visited Dec. 2021).

308 The *Faragher* majority reversed the Court of Appeals and the full text of this quote is as follows, "In the case before us, a justification for holding the offensive behavior within the scope of Terry's and Silverman's employment was well put in Judge Barkett's dissent: '[A] pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment.'" *Faragher,* 524 U.S. at 798.

B. *Prevent Collective Injustice by Protecting Individual Rights*

A rights-based approach ensures that freedom and well-being of individuals are protected even when they are in the minority.[309] But rights-based ethics also requires society and humanity to look at collective injustice as represented by the individual employee's rights.[310] Courts must be careful not to emphasize the individual at the expense of the community in the balance of rights. As such, the courts have the responsibility to avoid collective injustice through the individuals in these cases.

A conflict of rights approach would not preclude the religious employer from raising a doctrinal defense.[311] Faced with such a situation, courts will have to carefully weigh the competing interests of religious liberty and employee's rights as they do in other cases involving contract claims and the like.[312] In such a case, courts will defer to the religious organization if the facts reasonably support an assertion that a supervisor is maintaining an environment within the scope of their ecclesiastical duties. In this way, courts would essentially add a third element to the *Ellerth-Faragher* defense in ministerial cases.[313]

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309 *See* Wright, *supra* note 282, at 295-300.

310 *Id.*

311 *Id.*

312 In his dissent in *Demkovich,* Judge Hamilton notes that breach of contract claims by ministerial employees are not categorically barred even though they implicate the First Amendment. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 987 n.1 (7th Cir. July 9, 2021) (en banc) (Hamilton, J., dissenting) ("They call for case-by-case consideration of whether the claim may be decided without intruding into doctrinal or ecclesiastical territory. For illustrations of this approach, *see, e.g.,* Petruska v. Gannon Univ., 462 F.3d 294, 310-12 (3d Cir. 2006), and Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1359-61 (D.C. Cir. 1990). For treatments after *Hosanna-Tabor, see, e.g.,* Gregorio v. Hoover, 238 F. Supp. 3d 37, 48-49 (D.D.C. 2017); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 615-21 (Ky. 2014); Sumner v. Simpson Univ., 238 Cal. Rptr. 3d 207, 217-22 (Cal. App. 2018).").

313 In supervisory hostile work environment, the employer can raise the *Ellerth/Faragher* affirmative defense requiring the employer to show that they (1) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." This defense rewards employers who have created specific and comprehensive policies (that they follow) and puts a premium on employer's proactive education about harassment. Employees who fail to use a complaint procedure provided by the employer will usually satisfy an employer's burden under prong two. If the alleged harasser is not a supervisor, the employer is directly liable when the employer knew or should have known about the harassment and was negligent in responding to prevent and correct the offending behavior. In these cases, the plaintiff has the burden to show that the employer had knowledge and that they were negligent in their response. *Ellerth,* 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

In fact, the hostile environment claim itself provides a significant amount of protection to the religious organization in that plaintiffs must prove overwhelmingly that an employer has allowed an abusive environment to fester.[314] It is the employee's burden to show based on the totality of the circumstances that the conduct is severe or pervasive, that it has unreasonably interfered with their work performance, and that it is abusive and hostile, among other things.[315]

The majority in *Demkovich* fears allowing religious employees to pursue hostile environment claims because it would "undercut a religious organization's constitutionally protected relationship with its ministers [and] cause civil intrusion into, and excessive entanglement with, the religious sphere."[316] They go on to state that "[a] judgment against the church would legally recognize that it fostered a discriminatory employment atmosphere for one of its ministers. So, the church, like any other employer, must have necessarily failed in its supervision and control, either directly or indirectly. And if Demkovich succeeds in his suit, it means his ministerial work environment "'was so pervaded by discrimination that the terms and conditions of employment were altered.'"[317]

The religious organization would only be liable if they had *so failed in supervision and control* that they *fostered* a discriminatory environment *so pervaded by discrimination* that the *terms and conditions of his employment were altered*.[318] The *Demkovich* majority then further misconstrues *Hosanna-Tabor* as expanded by *Morrissey-Berru*.[319] First noting that religious groups rely on and put their faith in their ministers, the majority states that "[a] minister is the 'chief instrument' for a religious organization to fulfill its purpose.' . . . Only through a minister does a religious organization speak in its own voice and spread its own message."[320] Except now, *Morrissey-Berru* has vastly expanded the scope of the ministerial exception, undermining the reasoning behind much of the majority's opinion.

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314 *Id.*

315 *See supra*, Part III; *Harris*, 510 U.S. at 23; *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 807-08.

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

317 *Id.* (internal citations omitted),

318 *Id.*

319 *Id.*

320 *Id.* (citing McClure v. Salvation Army, 460 F.2d 553 at 559 (5th Cir. 1972); *Hosanna-Tabor*, 565 U.S. at 188).

CONCLUSION

The Supreme Court continues to chip away at *Employment Division v. Smith*,[321] in a devastating but piecemeal fashion without a clear plan in place to replace *Smith*. As courts move forward in this post-*Smith* world, a conflict of rights lens would guide them in protecting the rights of employees while still ensuring that they are protecting religious organizations' independence.

Courts continue to bolster the rights of religious organizations, both traditional and for-profit, while forgetting the rights of the individuals who work at these organizations, many of whom are religious themselves.[322] As a baseline protection, courts must allow ministerial employees to pursue hostile work environment claims to maintain some sense of dignity in the workplace.

Religious organizations can ultimately hire, train, and mentor ministerial employees to align with their mission. When an employee does not fit, the organization can fire a ministerial employee even for a discriminatory reason. The religious organization does not need sweeping protection from hostile work environment claims. The religious organizations can ultimately fire an employee that does not meet their mission, even for a discriminatory reason.[323] The religious organization does not need the intangible protection, but the employee does.

Hostile work environment and intangible job detriment should not meet the baseline claim necessary for a religious organization to maintain its independence. The hostile environment claim is wholly different in substance than in a tangible job detriment claim, and allowing religious organization employees to pursue hostile work environment claims would not interfere enough with organizational religious liberty to justify complete takeaway of the rights of the employee. Without the protection of the hostile work environment claim, religious employers are given free rein to allow and approve abusive work environments under the guise of religious freedom.

A true reading of the conflict of rights lens cautions that protecting the ministerial employee would ensure the freedom and well-being

321 *Smith*, 494 U.S. at 872.

322 U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGE STATISTICS: 21-2099 RELIGIOUS WORKERS, ALL OTHER, https://www.bls.gov/oes/current/oes212099.htm (last visited Dec. 8, 2021).

323 *See Morrissey-Berru*, 140 S. Ct. at 2049.

of religious organizations while maintaining the dignity of ministerial employees. Religious organizations still benefit from the difficult plaintiff's burden and the favorable *Ellerth-Faragher* defense,[324] which can be bolstered with additional ecclesiastical considerations.

Because the religious organizations importantly maintain significant independence in tangible decisions, courts must strive to protect employees with these intangible claims. Ministerial employees are part of a collective injustice as to employees' rights, which employers should not abuse in the employment relationship. As such, the courts have the responsibility to protect society and humanity through the individuals in these cases. By allowing hostile environment cases, courts maintain protection of the organizational religious liberty while maintaining some balance for the individual employee's basic human rights.

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324 *Ellerth,* 524 U.S. at 765; *Faragher,* 524 U.S. at 807-08.