No. 19-2142

In the
United States Court of Appeals
for the Seventh Circuit

SANDOR DEMKOVICH,

Plaintiff-Appellee,

v.

ST. ANDREW THE APOSTLE PARISH, CALUMET CITY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-11576.
The Honorable **Edmond E. Chang**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE SANDOR DEMKOVICH

KRISTINA BUCHTHAL ALKASS
(Counsel of Record)
PATTI S. LEVINSON
THOMAS J. FOX
LAVELLE LAW, LTD.
1933 North Meacham Road
Suite 600
Schaumburg, Illinois 60173
(847) 705-7555

Counsel for Plaintiff-Appellee

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

Short Caption: SANDOR DEMKOVICH V. ST. ANDREW THE APOSTLE PARISH, ET AL.

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Sandor Demkovich (an individual)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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n/a

Attorney's Signature: s/ Kristina B. Alkass Date: 8/26/2019

Attorney's Printed Name: Kristina B. Alkass

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 1933 N. Meacham Road, Suite 600
Schaumburg, IL 60173

Phone Number: 847 705 7555 Fax Number: 847 705 9960

E-Mail Address: kalkass@lavellelaw.com

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n/a

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n/a

Attorney's Signature: s/ Patti S. Levinson Date: 8/27/2019

Attorney's Printed Name: Patti S. Levinson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 1933 N. Meacham Road, Suite 600
Schaumburg, IL 60173

Phone Number: 847 705 7555 Fax Number: 847 705 9960

E-Mail Address: plevinson@lavellelaw.com

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Thomas D. Fox Date: 8/27/2019

Attorney's Printed Name: Thomas D. Fox

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 1933 N. Meacham Road, Suite 600
Schaumburg, IL 60173

Phone Number: 847 705 7555 Fax Number: 847 705 9960

E-Mail Address: tfox@lavellelaw.com

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JURISDICTIONAL STATEMENT

The Archdiocese's jurisdictional statement is not complete and correct. This action was originally filed in the United States District Court for the Northern District of Illinois, Eastern Division (the "District Court"). The District Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter in controversy arose under the laws of the United States. Specifically, Demkovich alleged causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*, and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12112 *et seq*. [D. Ct. Dkt. 16].

Additionally, Demkovich's lawsuit includes Illinois state law claims based on the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, and the Cook County Human Rights Ordinance, Sec. 42-30, which allege discrimination against Demkovich based on his gender, sexual orientation, marital status, and disability. The District Court has supplemental subject matter jurisdiction over those claims pursuant to 28 U.S.C § 1367. [D. Ct. Dkt. 16].

The Seventh Circuit Court of Appeals (this "Court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1292(b). On May 31, 2019 this Court granted the Archdiocese's petition under F.R.A.P. 5 for permission to appeal pursuant to the District Court's certification order dated May 5, 2019. [19-8012 App. Dkt. 4]. Specifically, the District Court's May 5, 2019 certification order addressed its prior September 30, 2018 Order, in which the District Court granted in part and denied in part the Archdiocese's

Motion to Dismiss Demkovich's Amended Complaint. [D. Ct. Dkt. 36, 73]; *see also United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000) (citation omitted) (saying that an appeal under § 1292(b) "brings up the whole certified order, rather than just the legal issue that led to certification").

Finally, it does not appear that a formal Notice of Appeal was filed in this case, but this Court's Notice of Docketing indicates that its May 31, 2019 Order granting the Archdiocese's petition should be construed as a Notice of Appeal to the District Court. [D. Ct. Dkt. 83].

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether all hostile work environment and employment discrimination claims by a minister, including those based on a minister's gender, sexual orientation, marital status, and disability, are barred as a matter of law by the ministerial exception, regardless of the nature of those claims and their connection to a religious organization's doctrine.

2) Whether the District Court properly denied the Archdiocese's Motion to Dismiss under Rule 12(b)(6) insofar as it requested dismissal of Demkovich's hostile work environment and employment discrimination claims based on his disability.

3) Whether the District Court properly granted the Archdiocese's Motion to Dismiss under Rule 12(b)(6) insofar as it dismissed Demkovich's hostile work environment and employment discrimination claims based on his gender, sexual orientation and marital status.

STATEMENT OF THE CASE

Plaintiff-appellee Sandor Demkovich ("Demkovich") is a gay man who was formerly employed by Defendant-Appellants St. Andrew the Apostle Parish ("St. Andrew") and the Archdiocese of Chicago (collectively, the "Archdiocese"). *See* Amended Complaint [D. Ct. Dkt. 16], ¶ 7. St. Andrew is a Roman Catholic parish and church in Calumet City, Illinois, and operates out of the Archdiocese. *Id.* at ¶¶ 5-6. From September 2012 to September 2014, Demkovich was employed by the Archdiocese as a Music Director, Choir Director, and Organist. *Id.* at ¶¶ 8-9. Demkovich always met or exceeded the expectations of the Archdiocese while employed there. *Id.* at. ¶ 12.

Throughout his employment at the Archdiocese, Demkovich's immediate supervisor was St. Andrew's pastor, Reverend Jacek Dada ("Dada"). *Id.* at ¶ 11. Dada and the Archdiocese were always aware not only that Demkovich is gay, but that he was engaged to be married to his same-sex partner of fourteen years. *Id.* at ¶ 13.

During his two years of employment at St. Andrew, Demkovich witnessed numerous instances of abusive and harassing behavior from Dada as well as the Archdiocese's other employees, including (1) St. Andrew staff members referring to certain female parish members as "fucking bitches" in Dada's presence, (2) routinely referring to African-American and Mexican-American members of the community in derogatory and racist terms in Dada's presence, and (3) Dada himself referring to African-American members of the community in a derogatory manner. *Id.* at ¶ 14. While many

instances of this conduct occurred in Dada's presence, he consistently failed to take any corrective or remedial action, nor did any other Archdiocese officials. *Id.* at ¶ 14.

Demkovich himself experienced numerous instances of abusive and harassing behavior from Dada due to his gender, sexual orientation, and marital status. *Id.* at ¶ 15. For example, Dada frequently made insulting remarks toward Demkovich based on his gender and sexual orientation, including referring to Demkovich and his partner as "bitches." *Id.* at ¶ 16.

In addition, Demkovich suffers from diabetes and metabolic syndrome. *Id.* at ¶ 34. Throughout his employment with St. Andrew, Dada frequently harassed Demkovich about his weight. *Id.* at ¶ 35. Dada's conduct included (1) asking Demkovich on multiple occasions to walk Dada's dog so Demkovich could exercise and lose weight, (2) telling Demkovich he needed to lose weight because Dada didn't want to have to preach at Demkovich's funeral, (3) telling Demkovich on several occasions that it was cost prohibitive for St. Andrew to include Demkovich on its health and dental insurance plans due to his diabetes and weight, and (4) telling Demkovich he needed to "get his weight under control" to eliminate his need for insulin when Demkovich was unable to join Dada for dinner. *Id.* at ¶¶ 35-38.

On or about July 23, 2013, Demkovich informed Dada that he and his partner planned to marry in 2014. *Id.* at ¶ 17. After this, Dada's abusive and harassing behavior towards Demkovich became increasingly hostile as the date of his marriage approached,

and continued until Demkovich married his partner and was fired by Dada soon after. *Id.* at ¶¶ 18, 27, 33. For instance, Dada began to confront and harass St. Andrew's staff and parish members for any details they knew about Demkovich's anticipated wedding, and even enlisted other St. Andrew staff members to help him gather that information. *Id.* at ¶¶ 19-20. Further, Dada frequently referred to this anticipated matrimonial ceremony as a "fag wedding." *Id.* at ¶ 21.

As a result of the harassment and abuse Demkovich experienced, his personal and professional reputation was severely damaged, and he was ostracized both personally and professionally. *Id.* at ¶ 46. Further, Demkovich's physical and mental health deteriorated due to the Archdiocese's abusive and intimidating conduct, and he has suffered from, among other things, fatigue, significant weight gain, insomnia, and clinical depression. *Id.* at ¶ 47.

On December 22, 2016, Demkovich filed a Complaint against the Archdiocese, asserting claims under Title VII, the A.D.A., and related Illinois and Cook County statutes. *See* Complaint, [D. Ct. Dkt. 1]. On September 29, 2017, the District Court dismissed the original Complaint because the claims alleged therein involved Demkovich's wrongful termination, and were therefore barred by the ministerial exception. *See* September 29, 2017 Order [D. Ct. Dkt. 15]. However, the District Court granted Demkovich leave to amend his claims. *Id.*

On October 20, 2017, Demkovich filed an Amended Complaint, alleging hostile work environment claims based on gender, sexual orientation, marital status, and disability. *See* Amended Complaint [D. Ct. Dkt. 16][1]. Specifically, the Amended Complaint contained counts alleging the Archdiocese violated (1) Title VII of the Civil Rights Act of 1964, (2) Title I of the Americans with Disabilities Act of 1990, (3) the Illinois Human Rights Act, and (4) the Cook County Human Rights Ordinance. *See* Amended Complaint [D. Ct. Dkt. 16], ¶ 1.

On November 3, 2017, the Archdiocese filed a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim (the "Motion to Dismiss"), alleging the ministerial exception barred the entirety of Demkovich's Amended Complaint. *See* Motion to Dismiss [D. Ct. Dkt. 18]. The Archdiocese's Motion to Dismiss was fully briefed, and on September 30, 2018, the District Court ruled that while Demkovich's hostile work environment claims based on his gender, sexual orientation, and marital status should be dismissed, Demkovich's disability-based claims could proceed. *See* September 30, 2018 Order [D. Ct. Dkt. 36], 29. Specifically, the District Court noted that the Archdiocese's interpretation of this Court's decision in *Alicea-Hernandez v. Catholic Bishop of Chicago* ("*Alicea-Hernandez*"), *infra*, was overbroad and that the ministerial exception did not bar employment

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[1] As the Archdiocese recognizes, the Seventh Circuit has assumed a hostile work environment claim exists under the A.D.A. *See*, *e.g.*, *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005). Because the Archdiocese does not contest this assumption in its brief, it has waived the issue, and Demkovich will not address it either.

discrimination claims unless they involved a tangible employment action or otherwise created excessive entanglement with religion. *Id.* at 8-9. Put another way, the District Court ruled that there was no "categorical bar" to employment discrimination claims raised by ministers. *Id.* at 21.

On October 25, 2018, the Archdiocese filed a Motion to Reconsider the District Court's ruling to the extent it denied the Archdiocese's Motion to Dismiss. *See* Defendants' Motion to Reconsider [D. Ct. Dkt. 40]. On October 25, 2018, Demkovich filed his own Motion to Reconsider, asking the District Court to review its dismissal of his claims based on gender, sexual orientation and marital status. *See* Plaintiff's Motion to Reconsider [D. Ct. Dkt. 42]. On March 25, 2019, the District Court denied both Motions to Reconsider. *See* March 25, 2019 Order [D. Ct. Dkt. 66].

On March 6, 2019, the Archdiocese filed a notice of interlocutory appeal, asking this Court to reverse the District Court's ruling insofar as it allowed Demkovich's disability-based claims to proceed. *See* Notice of Appeal [D. Ct. Dkt. 55]. Additionally, on March 22, 2019, after the District Court indicated it would deny the Archdiocese's Motion to Reconsider, the Archdiocese filed a Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b), asking the District Court to certify a question to this Court regarding whether the ministerial exception bans "all claims of a hostile work environment by a plaintiff who qualifies as a minster, even if the claim does not challenge a tangible employment action." *See* Motion for Certification [D. Ct. Dkt. 64].

On May 5, 2019, the District Court granted the Archdiocese's Motion for Certification and stayed the case pending this Court's decision on appeal. *See* May 5, 2019 Order [D. Ct. Dkt. 73]. The Archdiocese then filed a Petition for Permission to Appeal Pursuant to Certification on May 15, 2019. *See* Petition for Permission to Appeal [19-8012 Dkt. 1]. On May 28, 2019, Demkovich filed an Answer and Cross-Petition for appeal. *See* Answer and Cross-Petition [19-8012 Dkt. 3]. On May 31, 2019, this Court granted the Petition for Permission to Appeal. *See* May 31, 2019 Order [19-8012 Dkt. 4].

SUMMARY OF THE ARGUMENT

The Archdiocese asks this Court to hold that the ministerial exception has an unlimited scope regarding employment claims. As the District Court correctly noted, this is a far more expansive reading of the ministerial exception than is needed to protect religious organizations' First Amendment rights. Indeed, the Archdiocese's primary support for its position is a Tenth Circuit opinion that itself relies on an erroneous view of this Court's decision in *Alicea-Hernandez.*

This Court should reject the Archdiocese's interpretation of the ministerial exception, which serves to protect a religious organization's ability to (1) decide issues of religious doctrine, and (2) select and control its ministers. Neither of those interests are implicated by Demkovich's hostile work environment claims, and this Court should not extend the ministerial exception to preclude *all* hostile work environment claims by ministers. To rule as the Archdiocese requests would distort this Court's decision in

Alicea-Hernandez far beyond its intended meaning and would effectively give a religious organization free reign to commit or allow any form of harassment towards its ministers, no matter how egregious, even conduct that has no arguable connection with religious doctrine.

For two reasons, this Court should affirm the District Court's September 30, 2018 Order insofar as it allows Demkovich's disability-based claims to proceed, and reverse that Order insofar as it dismisses Demkovich's claims based on gender, sexual orientation, and marital status. First, as the Archdiocese acknowledges, the ministerial exception is not unlimited in scope. However, while the Archdiocese concedes certain common-law claims are not precluded by the ministerial exception, it then asks this Court to hold that *all* employment discrimination claims by ministers against a religious organization are barred as a matter of law. Such an interpretation flies in the face of the Supreme Court's reluctance in *Hosanna-Tabor v. E.E.O.C.* ("*Hosanna-Tabor*"), *infra* to adopt such a blanket rule.

This reading also goes far beyond the ministerial exception's purpose of protecting a church from government interference in its ability to choose who will minister its religious beliefs. Here, as alleged in the Amended Complaint, the Archdiocese created a hostile work environment permeated with abuse towards Demkovich throughout his employment due to his gender, sexual orientation, marital status and disability. At this stage of the case, those allegations must be construed in Demkovich's favor and the

Archdiocese cannot avoid further litigation merely by invoking the ministerial exception as an affirmative defense. This is particularly true given that the Archdiocese has yet to raise any possible religious justification for the hostility and harassment Demkovich experienced. The ministerial exception's purpose is not to shield religious organizations from misconduct they do not even attempt to claim has a religious basis, and the Archdiocese advocates for a perversion of the law in asking this Court to expand the scope of the ministerial exception in this manner.

Second, the Archdiocese's First Amendment rights will not be infringed if Demkovich's hostile work environment claims proceed because there is no meaningful risk that this case will create either substantive or procedural entanglement between the government and religion. Because the Archdiocese has failed to articulate any religious justification for the harassment and other tortious conduct alleged by Demkovich in his Amended Complaint, there are no competing religious views to choose between, and consequently, no risk of substantive entanglement. Nor is there any risk of meaningful procedural entanglement, rather, the "intrusion" the Archdiocese is concerned about is simply the discovery process that is part of any civil lawsuit.

The Archdiocese has already effectively conceded that being involved in a civil suit does not inherently create excessive entanglement with religion by noting that some common-law claims by a minister could proceed. Moreover, the Archdiocese again overlooks the purpose of the ministerial exception by arguing that allowing this case to

proceed into discovery would force this court into an inquiry into whether the Archdiocese's supervision of Demkovich was religious in nature. Notably, the Archdiocese has not actually claimed that the epithets and other harassing conduct aimed at Demkovich would have any religious basis. Instead, the Archdiocese asks this Court to hold that *any* conduct directed against Demkovich could have some religious basis, no matter how remote, and that there can be no judicial oversight whatsoever of what takes place in a religious organization's working environment when a minister is involved.

As noted above, this reading of the ministerial exception goes far beyond its purpose, and in this case, any judicial inquiry would examine specific conduct, not the motives for that conduct. The Archdiocese cannot be heard to say that this case forces a court to second-guess its supervision of ministers when it has not offered any religious basis for its alleged conduct that this court can second-guess.

Further, the ministerial exception is an affirmative defense. It does not operate as a ban on litigation against religious organizations, but rather a limitation on such litigation. While the Archdiocese concedes that the ministerial exception allows litigation brought by some of its employees, it then effectively argues that none of the actions taken against its employees are grounds for litigation since they would inevitably involve conduct or supervision by a minister. This would nullify the purpose of the ministerial exception itself. If any inquiry into the actions taken by a church is barred, then no suit against a church could proceed. Just as the ministerial exception operates as a limit to

who can sue, it must also operate as a limit, not a ban, on what a church can be sued for. The ministerial exception is a ban on litigation over ministerial acts – those that have a religious purpose. Actions that are not ministerial in nature must not be protected from judicial oversight.

Finally, the District Court eliminated the risk of procedural entanglement by indicating it will protect the Archdiocese's First Amendment rights by intervening if it becomes clear the case cannot proceed without implicating the Archdiocese's ability to select and control its ministers. Other courts have similarly noted that a district court's control over the discovery process can allow a case to proceed without running afoul of the ministerial exception, and this is a far better approach than the Archdiocese's proposed "bright-line rule" that all employment discrimination claims by ministers are barred. While the Archdiocese is afforded certain protections as a religious entity, it cannot completely shield itself from all litigation based on its employment of ministers by asserting, without support, that "any" inquiry into its conduct, here the repeated harassment of Demkovich and the Archdiocese's failure to prevent the same, will violate its constitutional rights.

Accordingly, this Court should affirm the District Court's September 30, 2018 Order insofar as it allowed Demkovich's hostile work environment claims based on his disability to proceed, and reverse that Order insofar as it dismissed Demkovich's claims based on his gender, sexual orientation, and marital status.

ARGUMENT

I. Standard of review

The Order being reviewed by this Court is the District Court's decision to grant in part and deny in part the Archdiocese's Motion to Dismiss Pursuant to Rule 12(b)(6). *See* September 30, 2018 Order [D. Ct. Dkt. 36]. This Court should apply a *de novo* standard of review when reviewing motions to dismiss under Rule 12(b)(6). *Newman v. Metropolitan Life Ins. Co.*, 885 F.3d 992, 998 (7th Cir. 2018). Further, the scope of the ministerial exception is a question of law, which should similarly be decided by this Court on a *de novo* basis. *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992).

Additionally, it is worth noting that this Court has jurisdiction over the entire September 30, 2018 Order being appealed. *See Edwardsville Nat'l Bank and Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987) (saying the certified question "is the reason for the interlocutory appeal, but the thing under review is the order"); *see also United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000) (saying an appeal "brings up the whole certified order, rather than just the legal issue that led to certification"). Indeed, the Archdiocese acknowledged the same in seeking appellate review by this Court. *See* Petition for Permission to Appeal [19-8012 Dkt. 1] at 6, n.2.

II. The ministerial exception does not bar all cases by a minister against a religious organization, and the concerns underlying the ministerial exception are not implicated by Demkovich's hostile work environment claims.

The Archdiocese argues that the ministerial exception protects a religious organization from virtually any inquiry whatsoever into its operations when a minister is involved. Indeed, the Archdiocese claims it should be above judicial scrutiny for *all* employment claims made by its ministers, no matter how egregious the allegations within those claims. This Court should reject the overly broad definition of the ministerial exception demanded by the Archdiocese, which goes far beyond the purpose of the ministerial exception – protecting a religious organization from government scrutiny into its selection of who will minister its faith.

The ministerial exception is an affirmative defense, and not a jurisdictional bar. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012). When analyzing the ministerial exception, this Court has noted that its protections "do not place the internal affairs of religious organizations wholly beyond secular jurisdiction." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006), *overruled on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4. Instead, the ministerial exception serves only to protect religious organizations from government scrutiny in the context of ecclesiastical matters. *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Put another way, a church is not "above the law," and its employment decisions "may be subject to Title VII scrutiny, where the

decision does not involve the church's spiritual functions." *Id.* Even after *Hosanna-Tabor*, courts have held that tort claims are not barred by the First Amendment "so long as adjudicating the cause of action does not require a court to judge the validity of religious beliefs or interfere with *ecclesiastical* decision making regarding self-governance or employment." *Ohno v. Yasuma*, 723 F.3d 984, 1006 (9th Cir. 2013) (emphasis added).

Consequently, this focus limits the ministerial exception's scope to questions of church doctrinal issues and the selection and supervision of a church's ministers. *See McCarthy v. Fuller*, 714 F.3d 971, 975-76 (7th Cir. 2013) (saying a court cannot "take sides on issues of religious doctrine" and that its involvement is limited to deciding whether "there is an authoritative church ruling on an issue"); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1101 (9th Cir. 2004) (saying the ministerial exception is rooted in a church's "unfettered freedom in its choice of clergy"). When an employment discrimination action against a church does not touch upon religious matters, those church's internal policies and procedures can be subject to judicial scrutiny. *See E.E.O.C. v. Mississippi College*, 626 F.2d 477, 487 (5th Cir. 1980); *see also Guinan v. Roman Catholic Archdiocese*, 42 F. Supp. 2d 849 (S.D. In. 1998).

This is because the protections afforded by the ministerial exception are an application of the First Amendment, which generally protects the right to adhere to one's religious beliefs, as well as the right to act according to those beliefs. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). While the first right is absolute, the latter right by

its nature cannot be, because "conduct remains subject to regulation for the protection of society." *Id.* Even the Tenth Circuit, on which the Archdiocese primarily relies for support, has stated that the church autonomy doctrine, which encompasses the ministerial exception, "is not without limits," that it "does not apply to purely secular decisions," and that before it can be implicated, a court must make a "threshold inquiry [into] whether the alleged misconduct is 'rooted in religious belief.'" *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 657 (10th Cir. 2002), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). For example, the First Amendment is not violated when a dispute is resolved by neutral principles of law. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

Here, the Archdiocese concedes that the ministerial exception does not shield religious organizations from lawsuits based on "religion-neutral common law rights," such as breach-of-contract claims or tort claims that do not touch upon ecclesiastical concerns. *See* Appellant Brief at 24; *see also Ogle v. Hocker*, 279 Fed. Appx. 391, 396 (6th Cir. 2008) (holding that the intentional infliction of emotional distress claim filed by a minister was not barred by the church autonomy doctrine because it would not interfere with church doctrine or practice). However, despite recognizing that principle, the Archdiocese asks this Court to establish a rule precluding *any* employment discrimination claims against religious organizations by ministers. Such a decision would preclude claims wholly unrelated to ecclesiastical issues or a religious organization's ability to select and supervise its ministers.

Here, the ministerial exception does not bar Demkovich's claims because they are unrelated to those two areas. Instead, Demkovich's claims center on alleged tortious conduct that created a hostile work environment, including numerous derogatory comments by Dada to Demkovich regarding his sexual orientation, diabetes, and weight. *See* Amended Complaint [D. Ct. Dkt. 16], ¶¶ 35, 37-38. The Archdiocese cannot plausibly argue, and to its credit, does not attempt to argue, that any of those actions are part of its religious doctrine or related to its selection or supervision of ministers.

Moreover, if the ministerial exception bars all claims related to the Archdiocese's employment relationship with Demkovich, even those that, as here, are unrelated to the religious aspects of his employment, it would follow that Demkovich is barred from any claims that a non-ministerial employee harassed and abused him, and that the Archdiocese took no remedial action. This interpretation of the ministerial exception would give the Archdiocese blanket tort immunity regarding its ministers and goes far beyond the rationale of the ministerial exception – protecting a church from intrusions on ecclesiastical matters.

Indeed, even when a church employer raises the ministerial exception as an affirmative defense, courts can make a permissible inquiry regarding whether the plaintiff employee qualifies as a minister under the four-part test set forth in *Hosanna Tabor*. A court's inquiry as to whether the allegations forming a hostile work environment claim arise from actions of the employer with a religious justification (ministerial acts), or

non-ministerial actions without any such religious justification are no more intrusive than the evaluation of whether the plaintiff is a minister. Put another way, the question of whether alleged conduct has a religious justification is no more intrusive than the question of "who is a minister" that is already allowed under *Hosanna-Tabor*.

Further, the Archdiocese's reliance on *Hosanna-Tabor* is misplaced in arguing for blanket protection against employment discrimination claims. Specifically, the Archdiocese cites *Hosanna-Tabor* for its language that the ministerial exception ensures the church alone has the right to "select and control" its employees. *See Hosanna-Tabor*, 565 U.S. at 188-89. However, the facts of *Hosanna-Tabor* were far different from those here. In *Hosanna-Tabor*, the Supreme Court held the ministerial exception barred a claim that the plaintiff was wrongfully terminated, and there were no harassment or hostile work environment claims at issue. *Id.* at 179. Further, the Supreme Court deliberately refrained from adopting the broad, "bright-line rule" the Archdiocese seeks from this Court. *Id.* at 196 (saying it was expressing "no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers"). This Court should exercise the same restraint shown in *Hosanna-Tabor* and reject the Archdiocese's assertion that *all* employment discrimination claims by ministers against religious organizations are barred without any further inquiry into the facts.

i. **Demkovich's allegations, when read in their most favorable light, do not implicate the concerns protected by the ministerial exception.**

In addition to asking this Court to adopt an overbroad interpretation of the ministerial exception, the Archdiocese ignores that at the pleading stage, Demkovich's allegations should be construed in his favor. Given this deferential standard, the Archdiocese has failed to show that the ministerial exception bars Demkovich's hostile work environment claims as a matter of law.

When evaluating a Rule 12(b)(6) motion to dismiss, a court "must take the [plaintiff's] allegations as true, no matter how skeptical the court may be." *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009). Here, when construed in a light favorable to Demkovich, the allegations in his Amended Complaint do not touch upon religious matters or the Archdiocese's selection of its ministers. Notably, the Archdiocese does not claim the ability to harass and abuse its ministers is necessary to exercise its right to select and govern them. Nor does the Archdiocese argue that fostering an abusive work environment may be deemed an ecclesiastical matter.

Rather than make those arguments, the Archdiocese claims any judicial inquiry would amount to an attack on its religious rights. However, the Archdiocese's religious positions, including those on homosexuality or gay marriage, are now wholly irrelevant to this lawsuit. The allegations in the Amended Complaint do not relate to any religious doctrine, but rather the tortious actions of the Archdiocese's employees that created a hostile work environment. Specifically, Demkovich alleges that, among other things, he

and his husband (then fiancé) were referred to as "bitches" by Dada, that their marriage ceremony was referred to as a "fag wedding" by the same, and that the Archdiocese maintained a hostile environment that caused Demkovich mental suffering. *See* Amended Complaint [D. Ct. Dkt. 16], ¶¶ 16, 22, 40-47.

While the ministerial exception could arguably be implicated when a religious organization makes an "honest assertion that a particular practice is a tenant of its faith," the Archdiocese has made no such assertion. *See Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 660 (7th Cir. 2018). Nor has the Archdiocese disavowed or offered any religious justification for its employees harassing Demkovich and using epithets against him based on his gender, sexual orientation, marital status, or disability. Instead, it brazenly asserts that it does not even have to offer a religious justification for this conduct. *See* Appellant Brief at 21-22. Presumably this is because the Archdiocese could not credibly justify this conduct, which would be indefensible in any other employment setting. Indeed, it is difficult to fathom the context in which calling Demkovich and his partner "bitches" and similar epithets is consistent with the Archdiocese's religious doctrine.

This is even clearer when considering Demkovich's claims based on his disability, which do not have any conceivable link to religious beliefs or Demkovich's ability to spread those beliefs as a minister. *See* Amended Complaint [D. Ct. Dkt. 16], ¶ 84. For example, the Archdiocese could not credibly argue a priest such as Dada would have a

religious purpose for teasing and harassing Demkovich about his body weight. Simply stated, the issues before this Court have nothing to do with the Archdiocese's religious doctrine, and instead focus on whether the ministerial exception protects the Archdiocese from all judicial scrutiny, including the tortious acts alleged in the Amended Complaint.

Further, a suit "under an employment discrimination statute does not mean that the aspect of the church-minister employment relationship that warrants heightened constitutional protection - a church's freedom to choose its representatives - is present." *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *see also Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990). Demkovich's allegations have no relation to the Archdiocese's selection and supervision of its ministers, and the Archdiocese cannot avoid judicial scrutiny merely because Demkovich's claims fall under the same statutes as civil actions that do lie within the scope of the ministerial exception.

Put another way, the Archdiocese is not entitled to blanket protection of its conduct, particularly when it does not even attempt to justify that conduct based on religious beliefs. Instead, this case requires "a nuanced analysis in order to avoid trenching on religious freedom without entirely eviscerating 'Congress' "otherwise fully applicable command[]' to protect employees from sex discrimination." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 956 (9th Cir. 2004), citing *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). Simply stated, the Archdiocese's

religious beliefs are not at issue, given that the Archdiocese itself does not argue they justify the specific tortious acts alleged throughout the Amended Complaint.

Moreover, not only does the Archdiocese ignore that Demkovich's pleadings should be construed in his favor at the pleading stage, it asks this Court to interpret the offensive statements Demkovich alleges as the Archdiocese's protected religious speech. While the Archdiocese cites *Grussgott v. Milwaukee Jewish Day Sch., Inc.* for the proposition that a court should defer to the Archdiocese's designation of what constitutes religious activity, the Archdiocese has *not* claimed the harassing and abusive conduct described throughout the Amended Complaint is religious activity. Even if it did, this would be the subterfuge the *Grussgott* court warned would negate the need for a court's deference, since the epithets and other tortious acts Demkovich alleges are on their face not justified by any religious purpose. *See Grussgott*, 882 F.3d at 660.

To its credit, the Archdiocese has not attempted to make that justification. However, in improperly asking this Court to simply assume the Archdiocese had a religious purpose for making the numerous derogatory statements alleged by Demkovich, it attempts to hide a pattern of bigoted conduct under the cloak of religious freedom. For example, in *Hosanna-Tabor*, the ministerial exception barred the plaintiff's suit because judicial inquiry would require the Court to examine whether the church's asserted reason for firing the plaintiff was a pretext for discriminating against her based on her disability. *See Hosanna-Tabor*, 565 U.S. at 194-95. Here, however, the Archdiocese

has not asserted any reason for harassing its ministers, and states only that its right to self-governance allows it to "supervise[], manage[], discipline[], and even communicate[] with" its ministers however it pleases. *See* Appellant Brief at 11. As noted by the *Elvig* court, the First Amendment does not require ministers to "surrender all rights to protection" against harassment, nor does it require churches to become sanctuaries for harassment that has no relation to church doctrine. *See Elvig*, 375 F.3d at 969. This Court should similarly reject the Archdiocese's request for a blanket prohibition on hostile work environment claims.

The Archdiocese's argument that the District Court's ruling allows plaintiffs to "plead around" the ministerial exception is similarly unavailing. The allegations in Demkovich's Complaint and Amended Complaint differ drastically in that Demkovich withdrew his claim that he was wrongfully terminated, but amended his claim to note the hostile work environment he experienced while employed at the Archdiocese. *See* Complaint, [D. Ct. Dkt. 1]; Amended Complaint [D. Ct. Dkt. 16]. These are entirely different claims, and would-be plaintiffs will either be able to plead a plausible hostile work environment claim, or they will not. To the extent the Archdiocese is suggesting Demkovich or other plaintiffs would make false allegations to avoid the ministerial exception, this Court should disregard that argument because the Archdiocese has provided no evidence that such perjury would occur.

Finally, it is worth noting that in asking this Court to assume a religious purpose for the conduct at issue in this case, the Archdiocese ignores the purpose of the ministerial exception. Specifically, the ministerial exception serves to prevent a court from interfering with a church's selection and control of its ministers. *See Hosanna-Tabor*, 565 U.S. at 194-95. The ministerial exception protects specific actions and renders irrelevant the underlying reason for that action by barring any inquiry into the same. *Id.* Here, however, the Archdiocese attempts to inject a reason for the harassment at issue, recognizing that absent a religious justification, the Archdiocese's conduct is indefensible.

Put another way, the Archdiocese argues that when a church terminates a minister, the reason does not matter, and can even be discriminatory, because the action itself is protected by the ministerial exception. Yet when the Archdiocese harasses and creates a hostile work environment for a minister, its reasons for that misconduct matter. The Archdiocese's argument is not only at odds with Title VII and the A.D.A.'s purpose of protecting employees, but contradictory to the rationale behind the ministerial exception.

Demkovich's hostile work environment claims should not be dismissed simply because the Archdiocese asserts there *could* be some religious justification for its conduct, yet fails to articulate one. In seeking such a ruling, the Archdiocese seeks protections far beyond those the ministerial exception provides. Accordingly, this Court should construe

Demkovich's allegations in his favor and allow his claims based on gender, sexual orientation, marital status, and disability to proceed.

ii. **The Archdiocese distorts this Court's opinion in *Alicea-Hernandez* in arguing it precludes judicial inquiry into *all* aspects of an employment relationship between a religious organization and its ministers.**

The heart of the Archdiocese's claim that this case should be dismissed simply because it involves Title VII and the A.D.A. centers on the Archdiocese's misreading of this Court's opinion in *Alicea-Hernandez*. In *Alicea-Hernandez*, this Court ruled that the reasons for alleged discrimination had no bearing on whether the ministerial exception applies. *See Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003). However, the Archdiocese takes a handful of isolated sentences from that decision, ignores the context in which those statements were made, and manipulate them to craft an unacceptably broad scope of the ministerial exception, one this Court should reject for the reasons outlined above.

In *Alicea-Hernandez,* the plaintiff alleged she was deliberately given poor office conditions, excluded from meetings, and not given the resources needed to do her job. *Id.* at 700. Ultimately, she was constructively discharged and replaced by a less qualified male who received a higher salary and better title for the same position. *Id.* In ruling that the ministerial exception barred her claim, this Court did *not* hold that a religious organization has a constitutional right to "govern all aspects of its employment relationships with its ministers without government oversight" as the Archdiocese

argues. *See* Appellant Brief at 18-19. Rather, this Court held that when there is an employment decision regarding a minister, the Courts may not scrutinize the employment decision. *Alicea-Hernandez*, 320 F.3d at 703. Indeed, this Court made it clear that federal courts are not barred from adjudicating such claims strictly by the identity of the plaintiff as a minister. *Id.* at 702.

In arriving at its decision, this Court noted that the plaintiff argued the "discrimination in question," including her constructive discharge, was done for secular reasons. *Id.* at 703. However, it rejected that argument by saying the ministerial exception applies "without regard to the types of claims being brought." *Id.* While the Archdiocese latches onto those nine words, it overlooks that this Court supported that proposition with cases stating that a church did not need to proffer religious reasons for a ministerial employment decision. *Id.*, citing *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 799 (4th Cir. 2000) (involving the re-assignment of job duties, demotion, and termination of the plaintiff); *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972) (involving imposition of lower salary and benefits, as well as termination of the plaintiff). The authority used by this Court, as well as the context of the case, make it clear that *Alicea-Hernandez* established a rule that once the ministerial exception applies, the reasons for alleged conduct become irrelevant, not that all employment discrimination claims are barred regardless of the conduct alleged and its connection with religious beliefs.

The District Court correctly recognized that this Court's "without regard to the types of claims" language meant the motive behind an employment decision cannot be second-guessed under the ministerial exception. *See* Sept. 30, 2018 Order [D. Ct. Dkt. 36], 8-9. This is a far more plausible reading of *Alicea-Hernandez* than that espoused by the Archdiocese, which is that the ministerial exception bars *all* employment discrimination claims involving a minister, even when there are no tangible employment actions at issue.

While the Archdiocese claims this Court cited *McClure* in *Alicea-Hernandez* to argue there is no distinction between tangible and intangible employment actions, the actions outlined by the *McClure* court, including a "minister's salary, his place of assignment and duty," are tangible employment decisions far different from the numerous insults and other intangible actions that form Demkovich's hostile work environment claims. *See McClure*, 460 F.2d at 555. That is, a church's selection of employment conditions like job duties lies in sharp contrast to the day-to-day harassment Demkovich suffered. Further, as discussed above, *Alicea-Hernandez* itself involved a factual situation involving tangible, objective employment actions.

Put another way, the ministerial exception does not apply to every issue relating to the employment of a minister to a religious employer, only those that relate to church administration, governance, and conditions of employment. *Id.* Indeed, if this were not the case, the ministerial exception would have no limit, because even employment discrimination claims by non-ministerial employees would involve either conduct by a

religious organization's minister, or some form of "supervision" by that religious organization. For example, under the Archdiocese's proposed definition of the ministerial exception, a janitor who was sexually harassed by his boss would be barred from filing a Title VII suit if he happened to work for a church, and his minister was either accused of that harassment or responsible for investigating the same. Given the ever increasing scope of who is a "ministerial employee," the Archdiocese's approach will lead to the preclusion of all employment discrimination claims, not just the ones that warrant protection under the First Amendment.

As noted above, the ministerial exception is an affirmative defense, and accordingly serves as a limitation on litigation, not a complete prohibition of all employment discrimination litigation against religious organizations. The Archdiocese cannot concede that the ministerial exception allows litigation brought by some of its employees, and then argue that none of the actions taken against its employees are grounds for litigation because they might involve inquiry into the church's internal governance. This would nullify the purpose of the ministerial exception itself: protecting a church from judicial inquiry into its selection and control of ministers or its decisions on religious matters.

Just as the ministerial exception limits litigation by a specific group of people, as a matter of common sense it can only limit a specific set of claims against a church. The ministerial exception is a ban on litigation over ministerial acts – those that have a

religious purpose. Actions that are on their face are not ministerial in nature must not be protected from judicial oversight, particularly when a religious organization has not attempted to offer a religious justification for those actions.

The Supreme Court took great care to avoid the Archdiocese's overbroad approach to the ministerial exception in *Hosanna-Tabor*, and limited its holding to situations where a religious organization fired one of its ministers. *See Hosanna-Tabor*, 565 U.S. at 196. This Court should adopt the same restraint, and clarify that its holding in *Alicea-Hernandez* did not prohibit all employment discriminations claims made by a current or former minister, particularly when such a broad holding was not required.

Demkovich's claims point to the Archdiocese's pattern of harassing him or allowing its employees to do so, creating a hostile work environment. Whether this discrimination was based on Demkovich's gender, sexual orientation, marital status, or disability, it falls entirely outside the scope of the ministerial exception. Consequently, Demkovich's claims are not barred by *Alicea-Hernandez*, and this Court should not entertain the Archdiocese's invitation to hold that all employment discrimination claims by ministers are barred by the First Amendment, regardless of the nature of those claims.

III. Demkovich's hostile work environment claims will not cause excessive entanglement between government and religion.

As correctly noted by the District Court, Demkovich's lawsuit can only be barred if it will create excessive entanglement between government and religion. When reviewing an action against a religious organization, courts consider two distinct types

of entanglement: substantive entanglement, "where the government is placed in the position of deciding between competing religious views," and procedural entanglement, "where the state and church are pitted against one another in a protracted legal battle." *Petruska v. Gannon University*, 462 F.3d 294, 311 (3d Cir. 2006). Here, Demkovich's claims do not create either excessive substantive or procedural entanglement because the allegations against the Archdiocese have no connection to its religious beliefs. Accordingly, this Court should allow all of those claims to proceed.

First, this case does not raise any risk of substantive entanglement between government and religion. The conduct alleged in the Amended Complaint, involving the continued harassment of Demkovich and the hostile work environment the Archdiocese created, lies far outside the teachings of the Catholic Church and the Archdiocese has made no attempt to argue this is protected religious conduct. Because there is no connection between the alleged conduct at issue and the Archdiocese's religious beliefs, its First Amendment rights are not implicated, and those rights certainly do not allow it to belittle and harass its employees based on their gender, sexual orientation, or disability. Second, there is no meaningful risk of procedural entanglement with religion in this case because Demkovich's claims will not require an intrusive examination into the Archdiocese's religious doctrine, hiring practices, or its control over its ministers.

Because this case will create neither substantive nor procedural entanglement between government and religion, it is not barred by the ministerial exception, and this Court should allow all of Demkovich's claims to proceed.

i. **Demkovich's claims do not raise any substantive entanglement concerns because hostile work environment claims are not barred as a matter of law and instead should be examined on a case-by-case basis.**

As discussed above, the ministerial exception does not bar employment discrimination claims based on a hostile work environment as a matter of law. Instead, they should be examined based on the circumstances of each case. Consequently, Demkovich's former employment as a minister, in and of itself, does not create any substantive entanglement concerns with respect to his claims.

Under Title VII, actions that create a hostile work environment are defined as "extreme." *E.E.O.C. v. Costco Wholesale Corp.*, 903 F.3d 618, 625 (7th Cir. 2018). A hostile work environment claim must be decided based on "all the circumstances," including "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." *Id.*; *see also Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 503 (7th Cir. 1997) (considering hostile work environment claims as a tort). While a tangible employment action is actionable on its own, a hostile work environment claim is based on non-tangible actions that are so severe or pervasive that they give rise to a Title VII cause of action. *Silk v. City of Chicago*, 194 F.3d 788, 804-05 (7th

Cir. 1999); *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011). Even harassing conduct directed at other employees can give rise to a hostile work environment claim when it leads to an "environment 'polluted' with discrimination." *E.E.O.C. v. Mississippi College*, 626 F.2d at 482 (quotation omitted).

Further, an employer's intent or motivation is not a factor in determining whether a hostile work environment existed for a plaintiff. *See Costco*, 903 F.3d at 627-28 (saying the employer was liable for the actions of one of its customers who harassed an employee because it was "reckless in permitting, or failing to prevent" that conduct by other people on its premises, even if they were not under the employer's control). Accordingly, the viability of a hostile work environment claim depends on the environment, as experienced by the employee, and the intent of the employer is not at issue.

Here, the Archdiocese cannot avoid liability for a hostile work environment claim by providing a general religious tenet against gay marriage. The factors outlined in *Costco* for a sufficient hostile work environment claim have absolutely no connection with any religious beliefs. The Archdiocese has not contended that offensive and demeaning insults are part of its religious practices, or that it condones the conduct Demkovich alleges. Dada's words and actions, as well as those made by the Archdiocese's other employees, do not require this Court to decide between competing religious views because the Archdiocese's religious views are not at issue.

Likewise, Dada's harassment of Demkovich because of his weight and diabetes has no connection with the Archdiocese's religious beliefs or its supervision of Demkovich in his capacity as a minister. Even to date, while the Archdiocese insinuates that Dada's derogatory comments about Demkovich's need for insulin equate to a concern for Demkovich's "fitness for ministry," it has never claimed Demkovich's diabetes or weight were relevant to any of his job duties. Instead, it makes the bizarre claim that Dada's statements had a religious purpose because Dada did not want to preach at Demkovich's funeral. *See* Appellant Brief at 29. It is wholly unclear how that or Dada's other statements relate to Demkovich's ability to act as a minister, and in any case, the Amended Complaint includes allegations of conduct that is not even remotely connected with Defendants' religious doctrines or control over its ministers.

From the beginning of Demkovich's employment at St. Andrew, Dada routinely harassed him because of his physical appearance, which had no arguable relation to any of his job duties. *See* Amended Complaint [D. Ct. Dkt. 16], ¶¶ 35-38, 84. For example, Dada constantly commented and insinuated that Demkovich was chronically overweight and at risk of death, often in front of others. *See* Amended Complaint [D. Ct. Dkt. 16], ¶¶ 35-38.

The Archdiocese, presumably recognizing this problem, attempts to hand-wave it away by claiming there was some nebulous employment purpose to Dada's harassment of Demkovich. It then argues over the semantics of how courts define hostile work

environment claims by quoting language that the severe and pervasive nature of those claims can affect the terms and conditions of a workplace. *See* Appellant Brief at 15, citing *Gomez v. Evangelical Luther. Church in Am.*, 2008 WL 3202925, *3 n.1 (M.D. N.C. 2008). *Gomez*, however, involved alleged conduct, such as the plaintiff's exclusion from staff meetings, that the court found could only be evaluated by referring to church doctrine. *See Gomez*, 2008 WL 3202925 at *2.

Here, conversely, the Archdiocese fails to state what church doctrine is at issue, and what purpose would exist for the alleged conduct at issue other than bullying and discriminatory animus towards Demkovich. Simply stated, the harassment and hostile work environment Demkovich experienced was not part of the Archdiocese's religious beliefs, nor its selection and control of Demkovich as a minister, and the District Court will not have to evaluate competing religious views in deciding his case.

Demkovich's claims are based on the epithets, derisive language, and harassment the Archdiocese's employees used during his employment. This is not a case where the Archdiocese expressed its opposition to Demkovich's sexual orientation, but rather committed and allowed tortious conduct of harassing, belittling and humiliating an employee. The Archdiocese has effectively conceded through its silence that it has no religious view that would justify its conduct.

Accordingly, Demkovich's claims will not result in any substantive entanglement between government and religion. Indeed, because Demkovich's status as a minister is

unrelated to the harassing and offensive conduct alleged, the "entanglement" the Archdiocese is concerned about is no greater than in a non-minister's sexual harassment suit against a church employer. *See Smith v. Raleigh District of N.C. Conf. of United Methodists*, 63 F. Supp. 2d 694, 710-11 (E.D.N.C. 1999) (saying a judicial inquiry was "unlikely to violate defendants' first amendment rights").

If, in contrast, the Archdiocese is correct that *any* employment discrimination claim by a former minister will create excessive substantive entanglement between government and religion, the Archdiocese is not only free to call Demkovich and other employees "bitches" or refer to their unions as "fag weddings," it can commit or allow any harassment or offensive conduct, no matter how outrageous, simply because it is a religious organization. *See* Amended Complaint [D. Ct. Dkt. 16], ¶¶ 16, 22. Further, under the Archdiocese's position, it would not even need to assert a religious justification for its conduct to be immunized from litigation. The Archdiocese's argument is unsupported by law, its alleged conduct is on its face unsupported by any religious belief, and this Court would not create any, much less excessive substantive entanglement with religion by allowing Demkovich's hostile work environment claims to proceed.

ii. **The ministerial exception does not shield religious organizations from all burdens of litigation, and the Archdiocese cannot manufacture excessive procedural entanglement with its blanket statement that discovery would "intrude" on its religious rights.**

The Archdiocese cannot avoid litigation and its attendant discovery burdens simply by claiming it is protected by the ministerial exception. Demkovich has pled

plausible hostile work environment claims, and given the Archdiocese's failure to offer any religious explanation for its alleged conduct, this Court would not create excessive procedural entanglement with religion by allowing the case to proceed to discovery.

A court does not create excessive procedural entanglement in a case against a religious organization when the inquiry involved is unrelated to religious matters. *See Minker*, 894 F.2d at 1359. In *Minker*, a pastor raised a breach of contract claim against his church, alleging the church terminated him from his pastoral duties because of his age. *Id.* at 1355. The defendant argued this claim would create government entanglement with religion by subjecting it to protracted legal procedures touching on ecclesiastic matters. *Id.* at 1359. While the D.C. Circuit Court dismissed the pastor's age-discrimination claim, it allowed his breach of contract claim to proceed. *Id.* at 1360.

In arriving at this decision, the *Minker* court acknowledged the contract claim at issue could threaten to impede on "the core of the rights threatened by the free exercise clause." *Id.* However, it rejected the defendant's argument that "even proving the existence of a contract in this case would require the sort of inquiry into subjective, spiritual, and ecclesiastical matters that the [F]irst [A]mendment prohibits." *Id.* at 1359. Specifically, the *Minker* court noted the First Amendment "does not immunize the church from all temporal claims made against it." *Id.* at 1360.

Instead, the plaintiff in *Minker* could "demonstrate that he can prove his case without resorting to impermissible avenues of discovery or remedies." *Id.* Further, the

plaintiff's claim could be resolved by a "fairly direct inquiry" into whether the elements of his breach-of-contract claim were met, meaning the lawsuit, in and of itself, did not create excessive entanglement with religion. *Id.*; *see also Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1089-91 (7th Cir. 2014) (saying a religious organization cannot shield itself from trial merely by asserting an interest in its religious freedom, and rejecting the defendant's argument that a trial would allow the jury to engage in an "impermissible inquiry" into the defendant's religious teachings).

Here, as stated earlier, the Archdiocese acknowledges it is not wholly immune from litigation filed by current or former ministers. For example, the Archdiocese concedes it would not be immune to religion-neutral common-law claims, such as those involving a breach of contract or tortious conduct outside Title VII or the A.D.A. *See* Appellant Brief at 24. The Supreme Court implied the same in *Hosanna-Tabor* by holding only that the ministerial exception applied to claims involving an employee's termination, while refraining from precluding other employment-related claims. *See Hosanna-Tabor*, 565 U.S. at 196. Even after *Hosanna-Tabor*, other courts have noted that excessive entanglement will not always occur in a suit brought by a minister against a religious organization. *See*, *e.g.*, *Gregorio v. Hoover*, 238 F. Supp. 3d 37, 46 (D.D.C. 2017) (holding that the plaintiff's breach-of-contract and defamation claims were not barred on religious entanglement grounds).

Indeed, while the Archdiocese attempts to draw a bright line between common-law and employment discrimination claims, the ministerial exception does not involve any such distinction. *See, e.g.*, *Petruska*, 462 F.3d at 310-11. In *Petruska*, the court said the plaintiff's breach-of-contract claim must be evaluated based on whether it could be decided "without waiving into doctrinal waters." *Id.* at 312. Put another way, entanglement is not decided by whether the claim at issue arises under Title VII or the A.D.A., but whether resolution of that claim implicates the concerns protected by the ministerial exception: a church's selection and control of its ministers.

Here, the Archdiocese does not offer any explanation regarding how a discovery process that investigates whether its employees used derogatory and insulting words, and engaged in other abusive or harassing behavior, would constitute an "impermissible inquiry." *See* Appellant Brief at 14. Nor would that discovery process create any such entanglement in this case because the alleged conduct does not touch on any religious beliefs or the Archdiocese's ability to supervise its ministers, and Demkovich's inquiry in this case would not intrude on either of those concerns. To prevail on his hostile work environment claims, Demkovich must prove that he was subjected to an abusive work environment based on his gender, sexual orientation, marital status, and/or disability. *See Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 982 (7th Cir. 2014). He must also prove that this conduct was severe and pervasive. *Id.* None of those factors implicate any

entanglement with religion whatsoever, because it is strictly the conduct itself that must be evaluated, not the Archdiocese's religious views.

Further, in arguing that allowing Demkovich's claim to proceed would lead the District Court "into a religious thicket," the Archdiocese relies on cases that involve tangible employment actions that clearly fall under the ministerial exception. For example, *Milivojevich* involved the suspension and removal of a minister. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 697-98 (1976). As discussed above, *McClure* involves a minister claiming she received a smaller salary and fewer benefits because of her gender. *See McClure*, 460 F.2d at 555. Finally *N.L.R.B.* involved a fact pattern far different than this case that concerned the general labor practices of a church. *See Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112, 1113-14 (7th Cir. 1977). Demkovich's claims are on their face distinguishable from the above cases because he is not complaining about termination, salary, benefits, or unfair labor practices, but rather the extensive harassment he experienced at the hands of Dada and the Archdiocese's other employees.

Rather than show procedural entanglement, the Archdiocese provides only a "generalized and diffuse concern" that Demkovich's hostile work environment claims will allow judicial scrutiny over the Archdiocese's internal governance. For example, the Archdiocese claims discovery will intrude on its investigation into any complaints of harassment or any disciplinary actions it took, despite never asserting that any such

actions actually took place. *See* Appellant Brief at 16. However, the Archdiocese's internal governance is not protected *per se* by the ministerial exception. *See Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1007 (D. Kan. 2004) (saying hostile work environment issues, "on their face, do not involve defendant's right to select clergy or decide matters of church government, faith and doctrine"); *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991) (holding that a sexual harassment claim is unrelated to ecclesiastical decisions concerning minister selection and qualifications). Instead, the Archdiocese's control over its minister employees, including its selection and discipline of the same, is only protected insofar as it as it relates to the Archdiocese's spiritual functions. *See Rayburn*, 772 F.2d at 1171.

Given that this case is at the pleading stage, Demkovich's claims should proceed because he can show "that *some* form of inquiry is permissible and *some* form of remedy is available…" *Minker*, 894 F.2d at 1360 (emphasis in original). Demkovich's allegations, which must be assumed as true in evaluating the Archdiocese's Motion to Dismiss, include that (1) Demkovich was referred to as a "fag," (2) Demkovich was referred to as a "bitch," (3) the Archdiocese engaged in actions that were abusive, demeaning, and toxic towards Demkovich, and (4) the Archdiocese created a work environment that belittled and humiliated Demkovich. *See* Amended Complaint, ¶¶ 14-16.

Under these facts, Demkovich's inquiry is "fairly direct," and would establish whether the Archdiocese in fact engaged in unprotected tortious conduct. This conduct

would be evaluated on entirely neutral methods of proof because, as discussed above, the Archdiocese has offered no religious justification for that conduct. As in *Minker*, it is more than plausible that Demkovich could inquire about the factors composing his hostile work environment claims without touching on any ecclesiastic issues protected by the First Amendment.

Finally, the District Court has already indicated it will ensure discovery in this case does not intrude upon the Archdiocese's First Amendment rights, and will act accordingly if those constitutional concerns are implicated. *See* September 30, 2018 Order [D. Ct. Dkt. 36], 26, n.14. Specifically, the District Court stated that if the Archdiocese believed Demkovich's discovery requests were "intruding into protected territory, then [the Archdiocese] may raise the issue with this Court." *Id.*; *see also Bollard*, 196 F.3d at 950 (saying that the limited nature of the plaintiff's claim "combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters"). The District Court's only error was in failing to apply this to Demkovich's claims based on his gender, sexual orientation, and marital status, which, like his disability-based claims, bear no connection to the Archdiocese's religious beliefs.

While the Archdiocese would have this Court believe this is an unprecedented decision by the District Court, and that it will lead to the violation of the Archdiocese's First Amendment rights, other courts have noted their ability to end a lawsuit if it becomes clear a plaintiff cannot prevail without inquiring into matters protected by the

First Amendment. *See*, *e.g.*, *Minker*, 894 F.2d at 1360 (saying that if the plaintiff is forced to inquire into ecclesiastical policy in attempting to prove his case, a court can grant summary judgment because pursuing the matter further would create an excessive entanglement with religion). Indeed, the *Minker* court noted that the same dire concerns raised by the Archdiocese here may never occur, that the case may be proven by "neutral methods of proof," and that it would be "premature" to end a lawsuit merely because of "speculative" concern that discovery would intrude on a defendant's First Amendment rights. *Id.*

Accordingly, the Archdiocese cannot shield itself from discovery and continued litigation in this case merely because of its unsupported assertion that its religious beliefs will be second-guessed. This Court would not create excessive procedural entanglement in allowing employment discrimination claims for patently nonreligious conduct such as abusive language to proceed into discovery. Even if such an issue arises during discovery, courts, as the District Court has already indicated, can address it just like any other discovery dispute. *See Elvig*, 375 F.3d at 969 (noting that courts are more than capable of "providing nuanced relief that respects both" a minister's rights under Title VII and a church's First Amendment rights).

As a result of that safeguard, the ministerial exception does not create excessive procedural entanglement with religion any time a minister makes an employment discrimination claim. This Court should reject the Archdiocese's request for such a ruling,

which would create a new type of protection from litigation far broader than that justified by the First Amendment.

iii. **This Court should adopt the approach taken by the Ninth Circuit in *Elvig*, which correctly noted that hostile work environment and harassment claims are rooted in secular questions that do not implicate the ministerial exception.**

Finally, as the Archdiocese acknowledges, there is currently a circuit split between the Ninth and Tenth Circuits regarding whether religious organizations enjoy unlimited protection from hostile work environment claims made by their ministers[2]. While the Archdiocese relies on *Skrzypczak*, *infra*, a Tenth Circuit decision, in arguing for an overly broad reading of the ministerial exception, this Court should adopt the approach taken by the Ninth Circuit in *Bollard* and *Elvig*. Both decisions involve intangible employment actions and correctly conclude that the ministerial exception does not bar *all* claims made by ministers; rather, claims based on secular questions do not implicate the concerns protected by the ministerial exception, and can proceed.

The ministerial exception does not bar employment discrimination claims when the alleged conduct is unrelated to ecclesiastical matters or a church's selection and control of its ministers. *See Bollard*, 196 F.3d at 947. In *Bollard*, a minister was subjected to

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[2] While the Archdiocese claims other Circuits follow the Tenth Circuit's approach, all federal appellate cases it cites from the First, Third, Sixth, and Eighth Circuits involve tangible employment actions or internal disciplinary proceedings, rather than hostile work environment claims, as noted throughout this brief. *See* Appellant Brief at 6.

severe sexual harassment for years by his superiors, who "routinely sent him pornographic material, made unwelcome sexual advances, and engaged him in inappropriate and unwelcome sexual discussions." *Id.* at 944. The harassment became so severe that it forced the plaintiff to leave the Jesuit Order. *Id.* In evaluating the plaintiff's employment claim, the *Bollard* court did not need to examine any religious justification for the actions at issue. *Id.* at 947. Indeed, the defendant, a Jesuit order, disavowed the actions of its employees. *Id.* As a result, the Ninth Circuit concluded the "application of Title VII in this context will have no significant impact on [the defendant's] religious beliefs or doctrines." *Id.*

Indeed, the *Bollard* court went so far as to say that "the danger that the application of Title VII in this case will interfere with its religious faith or doctrine is particularly low." *Id.* at 948. While the *Bollard* court recognized that any lawsuit against a religious organization would interfere with its autonomy to some degree, a "generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws." *Id.* If this were not the case, churches would be immune from all secular legal obligations. *Id.*

The Ninth Circuit later confirmed that the *Bollard* doctrine applies to hostile work environment claims, which revolve around repeated, pervasive, and sustained tortious conduct that does not touch on the concerns protected by the ministerial exception. *See Elvig*, 375 F.3d at 965. This is because hostile work environment claims do not "implicate

protected employment decisions." *Id.* at 953. In *Elvig*, the plaintiff, an associate pastor, was subjected to sexual harassment by the church's pastor. *See Elvig*, 375 F.3d at 953. After the plaintiff reported this harassment, the pastor continued to verbally abuse her and create an intimidating working environment. *Id.* at 953-54.

In ruling that the ministerial exception did not bar the plaintiff's hostile work environment claim, the *Elvig* court said the only decisions by the church that were implicated in this type of claim were (1) whether its officials sexually harassed the plaintiff and (2) whether the church took sufficient action to stop the sexual harassment. *Id.* at 963. The *Elvig* court also noted that the defendants denied the conduct alleged by the plaintiff, and did not offer any religious justification for the same. *Id.* at 959. Consequently, the plaintiff's claims required only a "restricted, secular inquiry," and would not require "evaluation of religious doctrine or the 'reasonableness' of the religious practices followed by the church." *Id.* at 963, quoting *Bollard*, 196 F.3d at 950.

Here, Demkovich's claims, like those in *Elvig* and *Bollard*, involve specific actions, rather than the motivation behind them. *See Elvig*, 375 F.3d at 963. As such, they require only a "restricted, secular inquiry." *Id.* Specifically, the inquiry into Demkovich's claims would only focus on the actual conduct alleged in the Amended Complaint. Because the Archdiocese has not articulated any religious basis for that conduct, there is no reason for the judicial inquiry or discovery in this case to involve the Archdiocese's religious teachings.

In contrast, the Tenth Circuit, relying on a flawed interpretation of *Alicea-Hernandez*, ruled that the ministerial exception is broad enough to bar even claims that do not involve religious doctrine. *See Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1245-46 (10th Cir. 2010). In *Skrzypczak*, the Tenth Circuit affirmed the dismissal of the plaintiff's employment-law claims based on the ministerial exception, including her hostile work environment claims. *Id.* While the court did not discuss the factual allegations at issue, it said allowing the plaintiff's hostile work environment claim to proceed would create excessive entanglement with religion. *Id.* at 1245. The court then concluded that "*any* Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference." *Id.* at 1246 (emphasis added).

Notably, in reaching its decision, the *Skrzypczak* court claimed it was following this Court's decision in *Alicea-Hernandez*. *Id.* at 1245. However, as discussed above, *Alicea-Hernandez* did not establish a blanket rule barring *any* employment discrimination claims by ministers against their employers. Accordingly, the Tenth Circuit based its conclusion on an erroneous view of *Alicea-Hernandez*, and *Skrzypczak* should be given little weight by this Court, which is certainly equipped to interpret its own opinion.

Additionally, while the Tenth Circuit argued the Ninth Circuit's approach is "arbitrary and confusing," as does the Archdiocese in its brief, the Ninth Circuit in *Elvig* drew a clear line between tortious conduct that does not fall within the ecclesiastical

concerns protected by the ministerial exception, and other employment discrimination claims that *would* implicate a church's ability to select and control its ministers. *See Elvig*, 375 F.3d at 964 (noting that the court could not bar Title VII claims simply because a church's affirmative defense "*might* somehow involve some doctrinal component").

Indeed, while the defendants in *Elvig* and *Bollard* could have invoked the First Amendment as a defense by giving the alleged conduct a religious justification, they, like the Archdiocese here, failed to do so. *Id.* at 963; *Bollard*, 196 F.3d at 956. Absent that defense, there is no threat to the Archdiocese's First Amendment rights, and the Archdiocese's professed concern for its autonomy is the same "generalized and diffuse concern" that is insufficient to trigger the ministerial exception.

The Ninth Circuit's approach continues to preserve the ministerial exception when there is a clear religious justification presented, but in the absence of that justification, prevents churches from hiding behind that protection by raising only a vague concern about their autonomy. In other words, the ministerial exception does not allow a church to avoid judicial inquiry based its religious freedom without even needing to assert a justification based on religious grounds.

Further, while the Archdiocese questions the validity of *Bollard* and *Elvig* after *Hosanna-Tabor*, other courts have confirmed the Ninth Circuit's approach is compatible with *Hosanna-Tabor*. *See Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1116 (N.D. Cal. 2015). In *Bohnert*, the court held that claims involving a "purely

secular inquiry" as to the sexual harassment of a Catholic school teacher were not barred by the First Amendment. *Id.* at 1115. While the archdiocese in *Bohnert* argued that Catholic "principles" influenced its actions involving investigating the harassment at issue, and that a review of those actions would entail a court second-guessing the reasonableness of those principles, the court disagreed. *Id.* at 1116. Indeed, the *Bohnert* court noted that the archdiocese's argument would amount to immunizing a church from judicial review of almost any cause of action, which was "clearly not the law." *Id.*

As the Supreme Court appeared to recognize in *Hosanna-Tabor* when it limited its holding, the Ninth Circuit's approach to the ministerial exception is far more logical than a blanket exception. While such an exception would provide the "clarity" the Archdiocese seeks, it would also give religious organizations free reign to engage in sexual harassment and a variety of other offensive conduct, even when that conduct has no relation to religious beliefs or a church's selection or control of its ministers. Although the ministerial exception affords religious organizations extensive freedom in hiring, firing, and controlling their ministers, those ministers do not lose all rights they are given as employees under Title VII and the A.D.A. *See Bollard*, 196 F.3d at 947-48. This Court should reject the Archdiocese's argument that the ministerial exception gives religious organizations blanket immunity from employment discrimination claims.

As the Archdiocese alludes to, once the ministerial exception is triggered, it has a powerful impact in preventing all judicial inquiry into a claim. Because that protection is

so powerful, the Supreme Court in *Hosanna-Tabor* was hesitant to give the ministerial exception a broad scope. This Court should also hesitate before giving the ministerial exception the nearly unlimited scope the Archdiocese demands.

Accordingly, this Court should adopt the Ninth Circuit's approach in *Elvig* and *Bollard* to the ministerial exception, which strikes a far more reasonable balance between protecting a religious organization's First Amendment rights and protecting employees from the hostile working environments prohibited by Title VII and the A.D.A.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's September 30, 2018 Order insofar as it denied the Archdiocese's motion to dismiss Demkovich's claims based on his disability, and reverse the District Court's Order insofar as it dismissed Demkovich's claims based on his gender, sexual orientation and marital status.

Dated: August 28, 2019

Respectfully submitted,

SANDOR DEMKOVICH,
Plaintiff-Appellee

By: /s/ Kristina Buchthal Alkass
One of His Attorneys

Kristina Buchthal Alkass
Patti S. Levinson
Thomas J. Fox
Attorneys for Sandor Demkovich
Lavelle Law, Ltd.
1933 N. Meacham Road, Suite 600
Schaumburg, Illinois 60173
(847) 705-7555

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Dated: August 28, 2019

/s/ Kristina Buchthal Alkass
Kristina Buchthal Alkass
One of the Attorneys for Appellee

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I hereby certify that on August 28, 2019, the Brief of Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Kristina Buchthal Alkass