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Ministerial Exception: The Involuntary Servitude Loophole

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MINISTERIAL EXCEPTION: THE INVOLUNTARY SERVITUDE LOOPHOLE

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ABSTRACT

Human trafficking through religious organizations is a frequently overlooked issue in both human trafficking and First Amendment scholarship. In the face of expanding protections for religious organizations, the ministerial exception has grown into a powerful doctrine that shields religious entities from employment-related legal consequences in civil courts. Courts must recognize the ministerial exception's expanded reach and refuse to allow its operation as a jurisdictional bar for human trafficking cases arising under the Trafficking Victims Protection Act ("TVPA"). Lower courts in the United States have begun addressing the intersection of the ministerial exception and the TVPA and arrived at opposing conclusions. This Article provides legal and normative justifications for refusing to apply the ministerial exception to trafficking claims and contributes to First and Thirteenth Amendment scholarship by furnishing courts with several interpretive alternatives that can be used to resolve the tension that arises when these constitutional provisions come into conflict.

Table of Contents

INTRODUCTION

An estimated forty million people across the world are victims of human trafficking, with hundreds of thousands of those victims believed to be in the United States.[1] Human trafficking is defined as compelling someone to engage in commercial labor or sex against their will through force, fraud, or coercion.[2] While traffickers come in all forms, human trafficking through the use of religious organizations is an under-

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[1] *The Victims*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/victims (last visited Oct. 4, 2020).

[2] 22 U.S.C. § 7102 (2018).

recognized problem in the United States. For decades, numerous religious organizations have been suspected, accused, or found guilty of trafficking their members and employees by forcing them to work for the organization against their will.[3] The Trafficking Victims Protection Act ("TVPA") is one of the most important pieces of legislation in the United States' fight against human trafficking, which notably provides a civil remedy for victims of human trafficking.[4] Unfortunately, current interpretations and applications of the ministerial exception have put these civil remedies in jeopardy for people subjected to human trafficking by religious entities.

The ministerial exception is a common law outgrowth of the First Amendment's Free Exercise and Establishment clauses and provides religious organizations with a safe harbor against civil lawsuits regarding employee treatment.[5] The ministerial

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[3] S*ee, e.g.,* United States v. King, 840 F.2d 1276, 1277-80, 1283 (6th Cir. 1988) (affirming an involuntary servitude conviction against the leaders of the House of Judah religious group for forcing children to do agricultural work against their will); United States v. Broussard, 767 F. Supp. 1536, 1538, 1545 (D. Or.), *amended*, 767 F. Supp. 1545 (D. Or. 1991) (allowing 29 counts of involuntary servitude against the leader of the religious Ecclesia Athletic Association); Turner v. Unification Church, 602 F.2d 458, 458 (1st Cir. 1979) (dismissing an involuntary servitude claim against the Holy Spirit Association for the Unification of World Christianity, commonly referred to as the Unification Church); *Religious Leader Charged in Child Slave Labor Case Dies*, AP (Aug. 30, 2018), https://apnews.com/4a34560670b94bbaa8dcd6d287e40fa5/Religious-leader-charged-in-child-slave-labor-case-dies; *see generally* Hamadou Boiro & Jónína Einarsdóttir, *"A Vicious Circle": Repatriation of Bissau-Guinean Quranic Schoolboys From Senegal*, J. HUM. TRAFFICKING 6:3, 265–80 (Nov. 14, 2018) (discussing religiously-affiliated human trafficking in countries outside of the United States). On May 11, 2021 a class action complaint was filed by more than 200 Indian nationals recruited to the United States under R-1 visas who were allegedly forced to labor by building a Hindu temple in Robbinsville, New Jersey for over 87 hours per week at a rate of approximately $1.20 per hour. Compl. ¶ 1-3, Mukesh Kumar et al v Bochasanwasi Shri Akshar Purushottam Swaminarayan Sanstha, Inc et al. (D.N.J. 2021) (No. 3:21-cv-11048). One month earlier, a self-appointed bishop was sentenced to twelve years in federal prison for labor trafficking and wire fraud charges after being found guilty of coercing ministry members into forced labor. *Woman Sentenced to 12 Years in Prison for Coercing Members of Church Ministry Into Forced Labor*, U.S. DEP'T OF JUSTICE, (Apr. 6, 2021), https://www.justice.gov/usao-ndil/pr/woman-sentenced-12-years-federal-prison-coercing-members-church-ministry-forced-labor.

[4] For the purposes of this article, the terms "human trafficking," "involuntary servitude," and "slavery" are used largely interchangeably. While these terms may have slightly different definitions depending on their interpretive source, the terms here are used to mean involuntary, compelled labor, specifically the type that is prohibited by the Thirteenth Amendment; 18 U.S.C. § 1595.

[5] *See, e.g.*, Shukla v. Sharma, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *2, *3 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted*, No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).

exception operates by denying employees standing to sue, which deprives a court of subject matter jurisdiction over the case.[6] This effect is significant, insofar as pleading the ministerial exception provides a near-blanket level of protection for religious organizations.[7] Once pleaded, the ministerial exception is likely to be successful at defeating the suit.[8] During the 2020 term, the Supreme Court expanded the reach of the ministerial exception to cover suits not only brought by titled ministers within an organization, but also to those brought by any employee that a religious organization believes should be covered.[9] The Supreme Court did not provide a definition of "employee" and instead applied the ministerial exception to anyone serving an important ministerial function, as defined by the organization itself.[10] This broad standard would also likely cover suits brought by members of a congregation who are not formally employed by the religious organization. The full effects of the *Our Lady of Guadalupe School* decision will not be understood for a while, but with the Court tipping right with a firm 6-3 conservative supermajority, the ramifications of this decision are likely to be great.

While the ministerial exception has been historically applied to labor claims arising under the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII, courts have now begun to litigate the applicability of the ministerial exception to TVPA claims.[11] However, resolving whether the ministerial exception should cover TVPA cases requires more than a comparison to these federal statutes. Unlike other employment legislation, the TVPA is rooted in the Thirteenth Amendment and therefore necessitates unique treatment. The Thirteenth Amendment's protections for individuals held in involuntary servitude elevate the TVPA beyond other workplace

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[6] *Id.*

[7] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4 (2012) (explaining that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim").

[8] *See, e.g.*, *Shukla*, 2009 WL 10690810, at *4 (citing Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y., No. 01–CV–7871 (KMW), 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004)).

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

[10] *Id.*

[11] *See Shukla*, 2009 WL 10690810, at *3 (citing cases); Patsakis v. Greek Orthodox Archdiocese of Am., 339 F. Supp. 2d 689, 694 (W.D. Pa. 2004) (citing cases).

issues and mandate special consideration when confronted with the First Amendment's religious protections.[12]

Two courts in the United States have already analyzed this issue and reached opposing conclusions. A district court in New York resolved the question correctly,[13] and the Central District of California erred by failing to recognize the way that the Thirteenth Amendment distinguishes TVPA claims from traditional labor lawsuits.[14] Future litigation on this issue is likely to arise, with the Second Circuit positioned to hear arguments regarding the NXIVM human trafficking cases in future appeals.[15] If more courts embrace the Central District of California's flawed approach, religious traffickers will gain increased protections contrary to legal requirements, and the United States will regress in its fight against human trafficking. For the reasons discussed in this Article, courts should avoid setting dangerously flawed legal precedent and refuse to apply the ministerial exception to TVPA suits.

In this piece, I make two arguments. The first is a doctrinal argument that the Central District of California's decision to apply the ministerial exception to TVPA cases is not legally sound given both the existing jurisprudence and the requirements of the First and Thirteenth Amendments. The

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[12] *See, e.g.*, *Shukla*, 2009 WL 10690810, at *6.
[13] *See id.*
[14] *See* Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *6 (C.D. Cal. Aug. 5, 2010), *aff'd* on other grounds, 687 F.3d 1173 (9th Cir. 2012).
[15] The criminal prosecution of Keith Raniere, guru and leader of the NXIVM group, is likely to be appealed to the Second Circuit, and the Second Circuit may be called on to make a collateral determination on the ministerial exception. Raniere and his co-conspirators were indicted by the Grand Jury of the Eastern District of New York for numerous counts, including Forced Labor, Sex Trafficking, Sex Trafficking Conspiracy, and Conspiracy to Commit Forced Labor under §§ 1589 and 1591 of the TVPA. Indictment, No. 18-CR-204, 2019 WL 1458957 (E.D.N.Y. Mar. 13, 2019); United States v. Raniere, 384 F. Supp. 3d 282, 296 (E.D.N.Y. 2019). Despite NXIVM not explicitly touting itself as a religious organization, it has been described as such by many, and Raniere came close to claiming religious protections by referencing in his filings the *Headley* case from the Central District of California which applied the ministerial exception to TVPA. *Headley,* 687 F.3d at 1180. By citing to *Headley* in his attempt to dismiss the indictment, Raniere sought to indirectly take advantage of the Ninth Circuit's decision expanding the ministerial exception to human trafficking cases. These arguments were rejected by the Eastern District of New York but may be relitigated in future appeals. *Raniere*, 384 F. Supp. 3d at 314 (E.D.N.Y. 2019). If the Second Circuit discusses the ministerial exception's application to TVPA cases, a circuit split on this issue would be on its way to being established.

second argument approaches the question from a normative perspective. I will explain why refusing to examine human trafficking claims that arise between religious organizations and their employees is pragmatically dangerous. It can create a safe harbor for human traffickers who disguise themselves as religious entities, and for genuine religious organizations that deliberately embrace practices which amount to human trafficking. While current jurisprudence supports a strong prioritization of the Thirteenth Amendment, this piece also discusses several doctrinally consistent interpretive alternatives that courts could embrace to simultaneously safeguard First Amendment protections while avoiding the pitfalls of applying the ministerial exception to TVPA cases.

I. THE ROOTS OF THE MINISTERIAL EXCEPTION

The ministerial exception stems from the basic tenets of separation of church and state—that religious organizations should be able to select their own proselytizers, without government interference.[16] Its fundamental purpose is to keep courts "out of employment disputes involving those holding certain important positions with churches and other religious institutions."[17] This Article revolves around three foundational questions: how far the ministerial exception should reach, what types of investigation it should avoid, and which employees it should cover.[18]

Over the years, increased judicial hesitancy to investigate or regulate religious organizations has allowed the ministerial exception to grow beyond its original straight-forward application to now cover nearly all labor disputes and

[16] The ministerial exception exists to prevent state labor regulation from infringing on a religious organization's ability to select its ministers based on doctrine, even when the selection criteria may otherwise be discriminatory or in violation of state and federal laws. *See, e.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952).

[17] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

[18] *See, e.g.,* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 697–98 (1976) (determining that an Illinois Supreme Court decision finding the procedures of the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church for the removal of a bishop from his position to be "arbitrary and invalid" was an impermissible violation of the First and Fourteenth Amendments because it constituted "improper judicial interference with the decisions of the highest authorities of a hierarchical church").

employment discrimination actions.[19] Attempts to employ the ministerial exception in human trafficking cases are a relatively recent development in federal litigation and have only been tested twice—leading to the differing approaches by the district courts discussed in this article. In *Shukla v. Sharma*,[20] a magistrate judge on the Second Circuit refused to place human trafficking claims under the ministerial exception's coverage, while the Central District of California, in *Headley v. Church of Scientology International*,[21] found that the ministerial exception did indeed reach TVPA claims.

A. Shukla v. Sharma

Shukla addressed the application of the ministerial exception to TVPA cases as a matter of first impression and reached the legally sound conclusion that the ministerial exception does not apply to TVPA suits.[22] Devendra Shukla was a Hindu priest, brought to the United States on an R–1 religious worker visa to work at the Ashram congregation in New York.[23] Shukla sued the director of the Ashram under the TVPA, alleging that his passport was confiscated upon arrival in the country and that he was treated like a slave of the Ashram.[24]

Shukla was decided by Magistrate Judge Cheryl Pollak, whose opinion was later adopted by a district court judge in the Eastern District of New York.[25] Pollak's opinion properly removes the TVPA from a labor and employment framework, discussing human trafficking not as a mere extension of improper

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[19] *See* Shukla v. Sharma, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *4 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted,* No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009) (citing Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y., No. 01–CV–7871 (KMW), 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004)).

[20] No. 07 CV 2972 (CBA), 2009 WL 10690810, at *1 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted,* No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).

[21] No. CV 09-3987 DSF MAN, 2010 WL 3184389, at *6 (C.D. Cal. Aug. 5, 2010), *aff'd* on other grounds, 687 F.3d 1173 (9th Cir. 2012).

[22] *Shukla*, 2009 WL 10690810, at *6.

[23] *Id.* at *5.

[24] *Id.* at *2 (alleging that he was "subjected to exploitative work conditions, tortured, abused, and forced to live under enslaved conditions") (internal quotation marks omitted).

[25] Shukla v. Sharma, No. 07-CV-2972 (CBA), 2009 WL 3151109, at *1 (E.D.N.Y. Sept. 29, 2009).

labor practices, but as a unique type of abuse.[26] The opinion reads "[t]he type of abuse addressed by the TVPA is so extreme, offensive, and contrary to fundamental human rights as to distinguish it from the type of conduct that ordinarily gives rise to violations of labor and employment laws."[27] The *Shukla* opinion focuses on this critical distinction between traditional wage and hour claims and human trafficking claims, explaining that "[a]lthough labor and employment laws seek to eradicate certain societal evils, such as poverty and discrimination, the TVPA seeks to address the evil of human trafficking and *forced* labor, both of which strike directly at the core individual liberty."[28]

B. Headley v. Church of Scientology International

In contrast, the district court in *Headley* affirmatively applied the ministerial exception to a TVPA claim and allowed the Church of Scientology to eliminate the court's subject matter jurisdiction through the ministerial exception.[29] Referencing the *Shukla* decision, Judge Fischer refused to follow the New York court, holding that the ministerial exception does not apply to the TVPA.[30] The *Headley* opinion dismissed the *Shukla* decision stating that "[t]he only support for this argument comes from an out-of-circuit magistrate judge's report and recommendation that does not even cite to Ninth Circuit decisions on the ministerial exception, let alone apply the exception in accordance with Ninth Circuit case law."[31]

Plaintiffs Marc and Claire Headley joined the Church of Scientology's secretive "Sea Org" as teenagers.[32] They labored for over 100 hours per week but received only $50 in weekly stipends in addition to their Church-provided living expenses.[33] They were also assigned additional manual labor as a form of discipline.[34] Further, they alleged that they were unable to

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[26] *Shukla*, 2009 WL 10690810, at *7.
[27] *Id.*
[28] *Id.*
[29] Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *6 (C.D. Cal. Aug. 5, 2010).
[30] *Id.*
[31] *Id.*
[32] Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1174 (9th Cir. 2012).
[33] *Id.* at 1176.
[34] *Id.*

leave.[35] Claire and Marc Headley filed suit against the Church of Scientology under the TVPA.[36]

Unlike Magistrate Judge Pollak on the Second Circuit, Judge Fischer approached the TVPA and trafficking as an extension of labor relations.[37] The *Headley* court readily accepted the Church of Scientology's argument that the challenged conduct was "doctrinally motivated," and therefore refused to investigate the merits of the Headleys' claims.[38] The court explained that "inquiry into these allegations would entangle the Court in the religious doctrine of Scientology and the doctrinally-motivated practices of the Sea Org."[39] Judge Fisher applied the labor-based precedent of the ministerial exception to the trafficking claim, explaining that it would be impossible to disentangle the Headleys' allegations from the Church of Scientology's religious doctrine.[40] Throughout the Ninth Circuit opinion as well, much deference was given to the Church of Scientology's claims of doctrine.[41] Although the Ninth Circuit did not reach the ministerial exemption question, both the trial court and the Ninth Circuit exhibited a reluctance to distinguish human trafficking from existing ministerial exception jurisprudence.[42]

The district court opinion improperly allows room for human trafficking to be legitimately contained within religious doctrine deserving of judicial protection. Judge Fisher wrote "[d]etermining whether Scientology's practices of routing out,

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[35] *Id.* at 1177.
[36] *Id.* at 1178.
[37] Headley v. Church of Scientology Int'l, No. CV 09-3987 DSF MAN, 2010 WL 3184389, at *4-6 (C.D. Cal. Aug. 5, 2010).
[38] *Id.* at *6.
[39] *Id.*
[40] For example, Claire Headley alleged that one of the methods of control exerted over her by the Church of Scientology was its forcing her to obtain two abortions. *Id.* at *5. Judge Fischer explained that "inquiry concerning the pressure Plaintiff allegedly faced after becoming pregnant would require review of Scientology's doctrine prohibiting Sea Org members from raising children." *Id.* at *6.
[41] The Ninth Circuit began its analysis by setting forth Scientology's expectations for its members, effectively laying out First Amendment exemptions for the organization. *Headley*, 687 F.3d at 1174 ("The Sea Org demands much of its members, renders strict discipline, imposes stringent ethical and lifestyle constraints, and goes to great efforts to retain clergy and to preserve the integrity of the ministry. These features of the Sea Org flow from the teachings and goals of the Scientology religion.").
[42] *See id.* at 1181. *See also Headley*, 2010 WL 3184389, at *6.

censorship, or heavy manual labor as a form of discipline, for example, constitute involuntary servitude within the meaning of the TVPA is precisely the type of entanglement that the Religion Clauses prohibit."[43] This extreme deference to religious doctrine dangerously allows the legitimization of religious practices that would otherwise be prohibited by the Thirteenth Amendment.[44]

The Ninth Circuit's refusal to reach the ministerial exemption question prevents the Headleys and others similarly situated from using the legal system to remediate alleged human trafficking. In fact, this district court approach would, if it were binding precedent, legitimize human trafficking by religious organizations and give them carte blanche to ignore the Thirteenth Amendment. The Headley district court decision to apply the ministerial exception to TVPA cases allows First Amendment protections to entirely overwhelm and cast aside any Thirteenth Amendment concerns, effectively permitting religious organizations to engage in serious human rights abuses without any judicial scrutiny.

II. DOCTRINALLY, IMPOSITION OF FIRST AMENDMENT INVIOLABILITY IS AHISTORICAL AND INAPPROPRIATE IN AN ANTI-SLAVERY SETTING

Resolving conflicts between the First and Thirteenth Amendment requires careful attention, but upon analysis of the legal issues at hand, it becomes clear that the First Amendment's religious protections do not crush the Thirteenth Amendment's guarantees. The ministerial exception is a powerful statutory bar, so allowing the ministerial exception to operate in TVPA cases would functionally place even the strongest violations of the Thirteenth Amendment subservient to any minor First Amendment violation. From a legal doctrine perspective, the Thirteenth Amendment's prohibition on involuntary servitude and slavery should be firmly prioritized over the protections provided to religious organizations under the Free Exercise and Establishment clauses. This section will discuss the legal justifications for placing TVPA cases outside the ministerial exception's reach.

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[43] *Headley*, 2010 WL 3184389, at *6.

[44] *See, e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2998 (2006) (arguing that the TVPA was enacted to "revitalize" the protections of the Thirteenth Amendment against involuntary servitude).

A. The Thirteenth Amendment Supersedes the First Amendment in a Constitutional Framework

When constitutional protections come into conflict, courts must decide how to prioritize and sacrifice opposing rights. Unlike the traditional labor dispute claims arising under the Fair Labor Standards Act or the Americans with Disabilities Act, human trafficking claims under the TVPA stem directly from the Thirteenth Amendment's prohibition of slavery and involuntary servitude.[45] Following the Civil War, slavery and involuntary servitude were deemed so abhorrent as to be specifically outlawed by constitutional amendment.[46] The severity of this constitutional prohibition is great enough to warrant distinct treatment, and the law must treat human traffickers more severely than it treats ordinary exploitative employers. American jurisprudence supports this proposition: unlike other constitutional amendments subject to balancing tests, courts have historically understood the Thirteenth Amendment as imposing an absolute and non-negotiable prohibition.[47]

Placing the Thirteenth Amendment above the First Amendment is not a revolutionary idea. Despite the First Amendment's constitutional guarantee, courts and legislatures have determined that the Free Speech clause is limited when adversely positioned against the Thirteenth Amendment.[48] In *United States v. Bradley*,[49] the First Circuit discussed a divide between speech that consisted of "improper threats or coercion" which would be outlawed and regulated by the TVPA, and "permissible warnings of adverse but legitimate consequences"

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[45] Jennifer Mason McAward, *The Thirteenth Amendment, Human Trafficking, and Hate Crimes*, 39 SEATTLE U. L. REV. 829, 829 (2016) ("[T]he Thirteenth Amendment basis of the TVPA has never been questioned in court.").

[46] U.S. CONST. amend. XIII, § 1.

[47] *See, e.g.*, United States v. Shackney, 333 F.2d 475, 485 (2d Cir. 1964) ("[T]he prime purpose of those who outlawed 'involuntary servitude' in the predecessors of the 13th Amendment, in the Amendment itself, and in statutes enacted to enforce it, was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced."); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–42 (1968); United States v. Reynolds, 235 U.S. 133, 149 (1914); Richard Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51, 53 (1979).

[48] *See, e.g.,* United States v. Bradley, 390 F.3d 145, 151 (1st Cir. 2004), *cert. granted, judgment vacated on other grounds,* 545 U.S. 1101 (2005).

[49] 390 F.3d 145 (1st Cir. 2004).

that fall outside the scope of anti-trafficking regulation.[50] By prohibiting "improper threats" intended to coerce trafficking victims to enter into or remain in positions of involuntary servitude, courts have already interpreted the TVPA as imposing limitations on the First Amendment—here, the Free Speech clause.[51] In the context of coercive speech, the Thirteenth Amendment is *not* balanced against the First Amendment, but instead entirely trumps it. If the Thirteenth Amendment can restrict Free Speech, the same interpretive standard ought to be applied when the Thirteenth Amendment enters into conflict with the First Amendment's religious provisions.

B. The Thirteenth Amendment Deliberately did not Carve out Religious Protections

The Thirteenth Amendment does not prohibit all forms of forced labor, but instead permits certain forms of involuntary servitude to continue, namely as punishment for crimes.[52] Notably, no religious accommodation was provided in the amendment.[53] Courts frequently look at historical understandings and patterns of interpretation when analyzing the Thirteenth Amendment, and such inquiries do not support applying the ministerial exception to TVPA cases.[54] When drafted, the Thirteenth Amendment specifically carved out prison labor as an acceptable form of involuntary servitude.[55] The drafters were particularly aware of the forms of servitude they wished to permit, and the fact that the Thirteenth Amendment's deliberate carve-outs did not include any religious protections means that it was never intended to fall subservient to First Amendment claims.[56] From a purposivist perspective,

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[50] *Id.* at 151.
[51] *Id.*
[52] U.S. CONST. amend. XIII, § 1.
[53] *Id.*
[54] *See, e.g.*, Butler v. Perry, 240 U.S. 328, 332 (1916) (explaining that the Thirteenth Amendment was intended to cover "those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results"); United States v. Bibbs, 564 F.2d 1165, 1167–68 (5th Cir. 1977) (explaining that opportunity for escape did not defeat a slavery claim because slaves in the antebellum period were often unsupervised). *See also* United States v. Kozminski, 487 U.S. 931, 945 (1988); L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523 (1935); United States v. Mussry, 726 F.2d 1448, 1451 (9th Cir. 1984).
[55] U.S. CONST. amend. XIII, § 1.
[56] *See Butler*, 240 U.S. at 333 ("[The Thirteenth Amendment] introduced no novel doctrine with respect of services always treated as exceptional.").

religious protections should not overwhelm Thirteenth Amendment concerns.

Prior to the Civil War and the ratification of the Thirteenth Amendment, many religious organizations were closely associated with and even owned slaves.[57] Several southern churches owned and rented out slaves as a means of covering church expenses.[58] Jennifer Oast explains that slave ownership by Presbyterian churches in the American South often "paid the minister's salary and provided for other needs of the church. In many cases the slaves were the only endowment the congregation required."[59] These churches saw slavery as a worthwhile financial investment, not only for direct profits associated with owning and leasing enslaved people, but also for the "increase" that perpetuated slavery for generations.[60]

Religious institutions that did not hold slaves themselves, such as the Jesuit Georgetown University, still maintained strong ties to slavery.[61] Georgetown University was largely financed by income derived from slave plantations owned by the Jesuits who helped found and maintain the school.[62] Slavery was so fundamental to American religious life that it was one of the root causes of the North/South schisms in the Baptist and Presbyterian churches in the late nineteenth century.[63] Church ownership of slaves was a heavily debated and recognized reality of American religious life, yet no special protections were

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[57] *See, e.g.*, Jennifer Oast, *"The Worst Kind of Slavery": Slave-Owning Presbyterian Churches in Prince Edward County, Virginia*, 76 J.S. HIST. 867, (2010), https://www.jstor.org/stable/27919282.
[58] *Id.* at 868.
[59] *Id.*
[60] *Id.* at 869–70. Slavery was considered profitable both for the labor provided by enslaved people and for their potential to have children who would be born into slavery and could be either sold, leased, or forced to labor for the economic benefit of their proprietary church. *Id.*
[61] *See, e.g.*, *What We Know: Georgetown University and Slavery*, GEO. SLAVERY ARCHIVE (2015), http://slaveryarchive.georgetown.edu/items/show/4 (last visited Oct. 18, 2020).
[62] *Id.*
[63] *See* Oast, *supra* note 57, at 899; James Moorehead, *Presbyterians and Slavery*, PRINCETON AND SLAVERY, https://slavery.princeton.edu/stories/presbyterians-and-slavery (last accessed Oct. 10, 2020); Tom Gjelten, *Southern Baptist Seminary Confronts History of Slavery and 'Deep Racism'*, NPR KQED (Dec. 13, 2018), https://www.npr.org/2018/12/13/676333342/southern-baptist-seminary-confronts-history-of-slaveholding-and-deep-racism; Adeel Hassan, *Oldest Institution of Southern Baptist Convention Reveals Past Ties to Slavery*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/us/southern-baptist-slavery.html.

afforded to religious institutions in the Thirteenth Amendment. Slaves owned by these organizations were emancipated alongside all other American slaves.

The Thirteenth Amendment's failure to carve-out exceptions for religious organizations in the face of widespread slave ownership by churches at the time of its ratification is informative: The Thirteenth Amendment was always intended to supersede the First Amendment's religious freedom protections.

C. The Free Exercise and Establishment Clauses do not Provide Immunity for Religious Organizations

Despite the revered importance of the First Amendment's Free Exercise and Establishment Clauses, courts have imposed limitations on the reach of the First Amendment's religious protections in numerous settings. There is no legal justification for making religious protections uniquely inviolable in the human trafficking realm. In *Employment Division, Department of Human Resources v. Smith*,[64] the Supreme Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[65] In *Prince v. Massachusetts*,[66] the Supreme Court stated that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty."[67] Similarly, parents are required to vaccinate their school children, even if such vaccination goes against their religious beliefs.[68] Individuals may not "engage in religious practices inconsistent with the peace, safety and health of the inhabitants of the State."[69]

Courts have also rejected the notion that the owner of a restaurant may refuse to serve people of color because of a religious belief against racial intermixing.[70] In *Newman v. Piggie*

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[64] 494 U.S. 872, 879 (1990).
[65] *Id.* at 879 (internal quotation marks omitted).
[66] 321 U.S. 158 (1944).
[67] *Id.* at 166.
[68] *See* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 29 (1905); *see also* Cude v. State, 337 S.W.2d 816, 819 (1964).
[69] *Cude*, 337 S.W.2d at 819.
[70] Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd,* 377 F.2d 433 (4th Cir. 1967), *aff'd,* 390 U.S. 400 (1968). *But see* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719,

Park Enterprises, Inc.,[71] the court readily denied a restaurant owner's First Amendment free exercise claims, stating "[t]his court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."[72]

Courts have already limited the extent of freedoms that religious organizations have when contravening certain larger societal norms. For example, the Supreme Court upheld a prohibition on polygamy, despite it being part of the explicit religious doctrine of the Church of Jesus Christ of Latter-Day Saints.[73] In *Reynolds v. United States*,[74] the Court firmly stated that "professed doctrines of religious belief" would not supersede the "law of the land."[75] Discussing the prohibition on polygamy, the Court stated, "[i]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[76]

1724 (2018) (permitting a cake shop owner to refuse to customers based on the owner's religious beliefs).

[71] *Newman*, 256 F. Supp. at 941.

[72] *Id.* at 945.

[73] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[74] 98 U.S. 145 (1878).

[75] *Id.* at 167.

[76] *Id.* at 165. Despite not having a dedicated constitutional amendment, marriage was deemed a "fundamental" right that resides within "constitutional imperatives" by the Supreme Court in *Obergefell v. Hodges.* Obergefell v. Hodges, 576 U.S. 644, 670–71 (2015). Yet even with the heightened status of marriage as a constitutional right, the Supreme Court still found itself balancing the First Amendment rights of the shop owner—both religious and speech—against "an otherwise valid exercise of state power" in *Masterpiece Cakeshop*. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018). Despite an outcome expanding religious protections, the Court still engaged in more detailed analysis than it would in a ministerial exception case. The cake shop owner was not permitted to simply claim a religious exemption and avoid any fact-based inquiry. The Court noted that whether a cake shop owner had the right to refuse service to a same-sex couple seeking a wedding cake because of the owner's religious beliefs was a "delicate question," but ultimately determined that an explicit constitutional provision took precedence over a state statute, the Colorado Anti-Discrimination Act. *Id.* Quite the opposite—*Masterpiece Cakeshop* reached the Supreme Court after a hearing by the Colorado Civil Rights Commission. Had the cake shop been operated as part of a religious group, like so many businesses, that fired someone for their sexuality, then no fact-based inquiry or balancing of factors would have occurred. Instead, pleading the ministerial exception at the summary judgment level would have sufficed to give the cake shop owners a free pass.

The *Reynolds C*ourt also drew a notable distinction between belief and action to explain away First Amendment issues, writing, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[77] The Court went on to provide examples of scenarios that, similar to polygamy, would not be deemed acceptable regardless of religious belief.[78] These included human sacrifice and the burning of a wife when her husband dies.[79] It seems reasonable to place human trafficking within the same category of morally unacceptable behaviors that ought to be regulated and prohibited, regardless of religious belief.

Further, the ministerial exception was never intended to be inviolable, and it should not become one of the few federal doctrines without any exception. The Second Circuit has separately noted that boundaries to the ministerial exception do indeed exist, although the court did not delineate these specific limits.[80] Given the admitted existence of areas untouched by the ministerial exception, it seems more than reasonable to believe that human trafficking and slavery would be among of them. Courts have been willing to impose numerous restrictions on the unfettered free exercise of religion for the promotion of overall societal objectives,[81] and a similar exception should be made to allow for the enforcement of human trafficking prohibitions. There is no legal doctrine that requires, or supports, deeming the ministerial exception untouchable and superior to all other constitutional rights and doctrines arising out of the First Amendment.

D. Regardless of the Ministerial Exception's Outgrowth to Cover All Employment Decisions, Human Trafficking Falls Outside the Scope of Labor Disputes

The application and discussion of ministerial exception case law suggests that the ministerial exception was intended primarily for use in the labor setting and, as originally contemplated, the ministerial exception would not have directed

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[77] *Reynolds*, 98 U.S. at 166.
[78] *Id.*
[79] *Id.*
[80] *See* Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (noting that boundaries to the ministerial exception exist but refusing to extend them to the present case).
[81] *See supra* notes 64–76 and accompanying text.

itself at Thirteenth Amendment issues.[82] The ministerial exception, even in its expanded form, can remain entirely intact without being applied to TVPA claims since human trafficking and slavery are not mere extensions of labor disputes, but comprise something else altogether.

Human trafficking is not properly bounded as a labor issue and merits a distinct treatment. In *Shukla*, Magistrate Judge Pollak rightfully resisted the popular desire to confine human trafficking within the labor law framework.[83] Unlike traditional labor disputes stemming from wage claims and workplace conditions, slavery and trafficking rest on the *coercion* of labor, regardless of payment to the victim.[84] While forced labor clearly falls on the labor spectrum, its position on that spectrum is so extreme that it necessitates additional remedies and distinct consideration, especially given its unique Thirteenth Amendment status. Confining human trafficking to generic employment law would redefine trafficking as a practice that could be validly contained in contracts and business arrangements. Nothing could stray further away from public policy. Unlike employment disputes rooted in contract law, human trafficking is fundamentally about the infringement of personal liberty.[85] Human trafficking manages to be

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[82] *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012) (explaining that the ministerial exception "precludes application of [employment discrimination] claims concerning the employment relationship between a religious institution and its ministers"). Interestingly, one dissenting opinion in a lower court case applying the ministerial exception addressed the concern that the absence of federal jurisdiction within religious organizations could lead to abuses in power. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 105 n.6 (2004) (Brown J., dissenting) ("[I]t is not clear how an employer is in a position to impose anything on its employees to which they object. (U.S. Const., 13th Amend. [prohibiting slavery or involuntary servitude].) Only the state, which holds the monopoly on coercive force, can compel adults to remain where they do not choose to be and do what they do not wish to do.").

[83] Shukla v. Sharma, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *7 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted,* No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).

[84] *See* 22 U.S.C. § 7101(a), (b)(24) (stating that trafficking is "by means of force, fraud, or coercion"); Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1181 (9th Cir. 2012) (finding that the Headleys did not establish a genuine issue of material fact that their labor was obtained "'by means of' improper conduct" for their TVPA claim).

[85] *See* People v. Guyton, 20 Cal. App. 5th 499, 506, 229 Cal. Rptr. 3d 117, 122 (2018), *rev. denied* (May 9, 2018) ("Human trafficking entails a deprivation of liberty.").

simultaneously both a labor issue, and something entirely distinct.

Since human trafficking should not be treated as an employment practice, the ministerial exception's application in the sphere of employment decisions should have no bearing on whether the ministerial exception should cover TVPA claims. When refusing to apply the ministerial exception to Shukla's lawsuit, Magistrate Judge Pollack properly reasoned that "[g]iven the relative magnitude of the deprivation of individual liberty in cases covered by the TVPA, and the international scope and significance of human trafficking, the TVPA transcends the boundaries of the ministerial exception."[86]

III. NORMATIVELY, THE MINISTERIAL EXCEPTION OUGHT NOT BE APPLIED TO THIRTEENTH AMENDMENT CLAIMS

Extending the ministerial exception's reach to cover human trafficking cases would be an inappropriate and unwise expansion of the First Amendment that violates societal norms and enables the perpetuation of slavery within the United States. Shukla did not win his TVPA claim despite the court's refusal to apply the ministerial exception as a jurisdictional bar;[87] and given the fact pattern and previous cases, it is unlikely that the Headleys would have won their trafficking claim against the Church of Scientology either. But regardless of the particulars of these two cases, expanding the ministerial exception to TVPA suits creates a significant danger that must not be ignored. A court applying the ministerial exception to dismiss a TVPA case effectively makes the determination that no matter how heinous the alleged human trafficking violation, it is more important to protect the First Amendment interests of religious organizations.

A. Religious Organizations are Not Necessarily Aligned with the Moral "Good"

Religious organizations are not immune from trafficking concerns and human rights abuses solely by virtue of their religious missions. Mainstream religions have been accused of

[86] Shukla, 2009 WL 10690810, at *7.
[87] Shukla v. Sharma, No. 07-CV-2972 (CBA), 2009 WL 3151109, at *1 (E.D.N.Y. Sept. 29, 2009).

numerous human rights violations, notably the Catholic Church's most recent child sex abuse cover-up.[88] The Catholic Church spent over $4 billion in pay outs between 1980 and 2019 to settle sex abuse cases involving their clergy.[89] It was estimated that in 2020, over 5,000 new cases would come to light in California, New York, and New Jersey alone due to openings in statute of limitation windows for child sex abuse cases across the country.[90]

Religious doctrine alone does not protect against abuses, and religious institutions remain subject to criminal laws.[91] The civil cause of action within the TVPA was not included in the original bill and was instead added later as part of the TVPA's reauthorization in 2003 to bolster the fight against human trafficking.[92] The criminal and civil provisions operate in tandem as a "comprehensive and coordinated campaign to eliminate modern forms of slavery."[93]

The types of abuses alleged in *Shukla* and *Headley* are reminiscent of the behavior patterns exhibited by non-religious traffickers. The Headleys feared escaping the Sea Org not only because they were monitored and escorted by other members of the organizations, but also because the 'base' they lived on contained over $100 million of audio/visual security equipment, and the couple had received threats of being harmed upon leaving.[94] Marc Headley also specifically alleged three instances of physical force being used against him.[95] The alleged abuses of the Church of Scientology are not limited to the Headleys; outside of the *Headley* lawsuit, other Sea Org members have alleged that they have been held against their will and forced to

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[88] Bernard Condon & Jim Mustian, *Surge of New Abuse Claims Threatens Catholic Church Like Never Before*, PBS NEWS HOUR (Dec. 3, 2019, 12:27 AM), https://www.pbs.org/newshour/nation/surge-of-new-abuse-claims-threatens-catholic-church-like-never-before.
[89] *Id.*
[90] *Id.*
[91] Emp. Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'").
[92] *Human Trafficking Key Legislation*, U.S. DEP'T OF JUST. (Jan. 6, 2017), https://www.justice.gov/humantrafficking/key-legislation.
[93] *Id.*
[94] *See* Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1176–77 (9th Cir. 2012).
[95] *Id.* at 1180.

work 100 hours per week doing tasks such as compiling Scientology literature for almost no pay.[96] Similar to many other trafficking victims, Shukla had his passport confiscated, became an undocumented immigrant, and was subjected to a combination of physical and verbal abuse as he was forced to labor.[97]

Religion ought not excuse trafficking. Regardless of whether traffickers are genuinely motivated by their religions, or whether they are merely employing religion as a cover-up for their trafficking practices, traffickers should not be permitted to shield themselves behind religious doctrine while enslaving vulnerable populations. Religious organizations also include "new religions," popularly referred to as "cults,"[98] several of which have already faced criminal trafficking prosecutions over the years. For example, leaders of the religious group House of Judah were convicted for putting children in their congregation into positions of involuntary servitude.[99] Eldridge Broussard was convicted of twenty-nine counts of involuntary servitude through his work leading the Eccelesia Athletic Association, which enslaved children and forced them to undergo rigorous athletic training to compete in sporting tournaments for profit.[100] Unfortunately, prosecutors are unable to criminally convict all religious trafficking cases, and, as a result, the trafficking legal landscape relies heavily on the TVPA's civil remedies. Allowing religious organizations to take advantage of the ministerial exception in TVPA settings will enable the perpetuation of Thirteenth Amendment violations.

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[96] *Scientology's 'Slave Labor' Scandal*, THE WEEK (Mar. 29, 2010), https://theweek.com/articles/495686/scientologys-slave-labor-scandal.
[97] Shukla v. Sharma, No. 07-CV-2972 (CBA), 2009 WL 3151109, at *1 (E.D.N.Y. Sept. 29, 2009).
[98] Tina Rodia, *Is it a cult, or a new religious movement?*, PENN TODAY (Aug. 29, 2019), https://penntoday.upenn.edu/news/it-cult-or-new-religious-movement.
[99] United States v. King, 840 F.2d 1276, 1277 (6th Cir. 1988).
[100] United States v. Broussard, 767 F. Supp. 1536, 1538 (D. Or. 1991), *amended*, 767 F. Supp. 1545 (D. Or. 1991).

B. Extending the Ministerial Exception to Include TVPA Cases Creates a Safe Harbor for Human Trafficking via Religious Organizations

Traffickers seeking civil protection for their crimes can easily exploit the ministerial exception by claiming to run a religious organization. New religions are relatively easy to set up and receive the same First Amendment protections as more established religious groups.[101] If the ministerial exception is found to apply to TVPA cases, individuals hoping to profit from forced labor will be able to disguise themselves as religious entities and avail themselves of the vast benefits of the ministerial exception at little cost.[102] The district court's approach in *Headley*, if adopted by the Ninth Circuit, would effectively preclude all civil liability for human traffickers who hide behind the veil of a religious order.[103]

As applied in *Headley*, the ministerial exception provides a safe harbor for religious organizations that make their members and employees engage in forced labor. A trafficker need not even establish their own religious group to take advantage of this liability shield, since even religiously affiliated schools, hospitals, and corporations have been found to qualify as religious institutions for purposes of applying the ministerial exception.[104] Courts have left open the possibility that the ministerial exception might also apply to for-profit religious entities, rather than exclusively to not-for-profit ones.[105] Combining for-profit ventures with the economic incentives behind human trafficking is reckless and can lead to devastating real-world consequences,

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[101] United States v. Ballard, 322 U.S. 78, 87 (1944) ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment.").

[102] *Id.*

[103] Where it has been applied, the ministerial exception has led to widespread dismissal of disputes involving religious organizations. *C.f.* Shukla v. Sharma, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *4 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted,* No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009) (citing Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y., No. 01–CV–7871 (KMW), 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004)).

[104] *See Shukla*, 2009 WL 10690810, at *4.

[105] *Id.* at *5; *c.f.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (granting other religious protections to for-profit corporations).

especially as the Supreme Court continues to expand religious protections.

Business ventures with religious ties have already been known to engage in practices that likely constitute human trafficking. For example, the MudMan burger chain in Montana had been staffing its restaurants with "interns" who worked sixty hours per week, while receiving as little as $2 an hour compensation.[106] These "interns" had all been recruited from Potter's Field, an evangelical Christian group run by MudMan's owners.[107] Similarly, the Holy Tabernacle Born Again Faith Inc. religious organization forced children at the McCollum Ranch to work over forty hours a week in fish markets, where they would engage in dangerous manual labor, with little to no pay.[108] If religious organizations are granted protection against human trafficking claims, more of these types of arrangements are likely to emerge.

The ministerial exception's extreme deference to religious organizations makes it too easy for ill-intentioned individuals to abuse. Combatting human trafficking is an incredibly challenging endeavor, and opening the door for shrewd traffickers to disguise themselves as religious organizations can cause extensive damage to the fight against human trafficking. Trafficking rings can be highly sophisticated, and it is naïve to underestimate the ability of traffickers to adapt to a changing legal landscape.[109] The highly-structured NXIVM trafficking ring, for example, received cult accusations as early as 2003, but it took nearly fifteen years for authorities to successfully build a legal case against the organization.[110] Too often, authorities are unwilling or unable to prosecute human trafficking cases, and the TVPA's civil remedies are central to the anti-human trafficking landscape. The decision to prioritize First Amendment considerations over Thirteenth Amendment realities by

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[106] Pilar Melendez, *Montana Pastor Accused of Abusing His Flock Reopens His Burger Chain to Outrage*, THE DAILY BEAST (May 19, 2020), https://www.thedailybeast.com/potters-field-minister-michael-rozell-reopens-mudman-burger-chain-despite-abuse-allegations.

[107] *Id.*

[108] Martha Quillin, *How Could This Alleged Child Slavery Happen? Religious Freedom Helped it Stay Hidden*, NEWS & OBSERVER (Feb. 08, 2018), https://www.newsobserver.com/news/local/article199116809.html.

[109] Alexandra Stein, *Keith Raniere Nxivm Trial: Why It's So Hard to Stop a Cult*, BBC NEWS (June 20, 2019), https://www.bbc.com/news/world-48635278.

[110] Sharon Thorne, *Cult of* Personality, FORBES (Oct. 12, 2003), https://www.forbes.com/forbes/2003/1013/088.html?sh=5bfc25361853.

following the *Headley* district court approach will have devastating impacts for both victims and survivors of human trafficking.

IV. INTERPRETIVE ALTERNATIVES TO AVOID THE TRAPPINGS OF THE MINISTERIAL EXCEPTION

As suggested above, optimally the Supreme Court should adopt the approach emerging in the Second Circuit through the Eastern District of New York and limit the ministerial exception so that TVPA cases fall outside of its reach. This blanket restriction on the ministerial exception's scope would properly align with the relevant jurisprudence and avoid dangerous practical ramifications. However, if the Court is unwilling to eliminate the ministerial exception in human trafficking cases altogether, it can still embrace numerous interpretive alternatives that will attain similar outcomes while providing greater deference to First Amendment concerns. This section will discuss four of these alternatives—three of which can be readily embraced and one of which has already been discussed in the literature, but warrants caution.

A. First Alternative – Constrain the Ministerial Exception to Employment Decisions Based on Doctrinal Issues

The scope of the First Amendment's religious protections is generally limited to issues that directly infringe on religion, as opposed to providing freedom from regulation altogether.[111] Compared to other First Amendment doctrines, the ministerial exception has uniquely outgrown the confines of the First Amendment. Even in the landmark *Burwell v. Hobby Lobby*[112] case that is recognized as having widely expanded religious protections, the Supreme Court only exempted Hobby Lobby from following the Food and Drug Administration's *contraceptive* mandate in its health insurance plan and did not exclude Hobby Lobby Stores from FDA regulation as a whole.[113] Yet this typical

[111] Emp. Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990).
[112] 573 U.S. 682 (2014).
[113] *Id.* at 692. Even though *Burwell v. Hobby Lobby Stores, Inc.* dealt with religious freedom under the Religious Freedom Restoration Act, as opposed to directly under the First Amendment, this comparison is helpful to understand the treatment of religious liberties.

approach to safeguarding First Amendment protections has not been paralleled with ministerial exception pleadings. Instead of restricting the ministerial exception to cases involving specific, actual doctrinal entanglement, courts adopted a broader interpretation that places all employment-related decisions under the scope of the First Amendment.[114] To restrain the reach of the ministerial exception, courts could use the same approach employed in other First Amendment areas by first determining whether the facts underlying a dispute are based in doctrine, and only then applying the ministerial exception as a jurisdictional bar.

Currently, the ministerial exception is not restricted to cases related to religious doctrine. For example, in *Our Lady of Guadalupe School v. Morrissey-Berru*,[115] the Supreme Court applied the ministerial exception to the firing of a teacher at a religious school who had requested medical leave for breast cancer treatment.[116] The school explained that they fired the teacher for "poor performance--namely, a failure to observe the planned curriculum and keep an orderly classroom."[117] The dismissal was not attributed to any doctrinally-related issues, yet the ministerial exception still barred the suit from moving forward.[118] This type of decision-making would be the equivalent of courts allowing Hobby Lobby Stores to claim that its religious views impact healthcare decisions, and therefore no regulation whatsoever of employee health care plans would be permitted. Following the logic of the ministerial exception, any court's analysis to determine whether a particular aspect of a health plan had any connection to the organization's religious doctrine would therefore be forbidden and deemed "excessive entanglement."

The ministerial exception has grown to essentially protect all hiring and firing decisions. It provides religious organizations with full discretion over the treatment of its employees under the rationale that religions should be able to choose their

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[114] *See, e.g.*, E.E.O.C. v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 515 (E.D.N.C. 1999), *aff'd,* 213 F.3d 795 (4th Cir. 2000); Duquesne Univ. of the Holy Spirit v. Nat'l Labor Relations Bd., 947 F.3d 824, 834 (D.C. Cir. 2020); Cmty. Econ. Dev., Inc. v. Cote, No. TTD CV 07-5001261-S, 2008 WL 5481209, at *6 (Conn. Super. Ct. Dec. 1, 2008).
[115] 140 S. Ct. 2049 (2020).
[116] *Id.* at 2059.
[117] *Id.*
[118] *Id.*

proselytizers.[119] Several lower courts have applied the ministerial exception as a jurisdictional bar to employment suits involving religious organizations, regardless of whether any connection between religious doctrine and the contested employment decision existed.[120] While some employment decisions are directly related to religious doctrine—such as the Catholic Church requiring priests to be male—others, such as decisions based on an individual's race, age, or disability status, as well as those based on poor workplace performance, may have nothing to do with a religion's doctrine. Even so, the ministerial exception affords all cases the same broad protection. This expansion of the ministerial exception goes beyond what is necessary and effectively exempts religious organizations from all employment laws.[121]

Courts can limit this free pass by requiring religious organizations that plead the ministerial exception to have a doctrinal reason behind contested employment decisions. A religious organization that provides a good-faith doctrinal rationale for its decision would be afforded the full ministerial exception, while those that cannot would be subject to the same rules and regulations as other employers. Deference could still be afforded to a religious organization's own interpretations of doctrine, but the ministerial exception would no longer affect matters where it ought not be applied. For example, traditional wage and hour disputes would not fall under the ministerial exception insofar as religious doctrine does not establish a minimum wage or regulate overtime. Importantly, the First

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[119] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) (barring employment discrimination suits by a minister challenging her court's decision to fire her); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 121 (3d Cir. 2018) (applying the ministerial exception to employment contract disputes); Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (applying the ministerial exception to bar a Title VII claim due to "impermissible entanglement"); Werft v. Desert Sw. Annual Conference of United Methodist Church, 377 F.3d 1099, 1102–03 (9th Cir. 2004) (applying the ministerial exception to a disability discrimination suit brought by a minister who was "forced to resign" because of the Church's refusal to make reasonable accommodations).

[120] *See, e.g.*, Combs v. Central Tex. Annual Conference, 173 F.3d 343, 345–50 (C.A.5 1999); E.E.O.C. v. Roman Catholic Diocese, 213 F.3d 795, 800–01 (C.A. 4th 2000); Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (C.A.3 2006); *Rweyemamu*, 520 F.3d at 204–09.

[121] *See Lee*, 903 F.3d at 122 ("[W]e are not aware of any court that has ruled on the merits (i.e., not applied the ministerial exception) of a breach of contract claim alleging wrongful termination of a religious leader by a religious institution.").

Amendment does not prohibit all religious entanglement, but only *excessive* entanglement.[122] The initial determination of whether a decision is based on doctrine would not constitute the level of entanglement frowned-upon in our legal system, since an organization unable to provide a doctrinal reason for its decision would not suffer any doctrinal incursions by further judicial analysis.[123]

This approach would allow TVPA cases to move forward because human trafficking is not a permitted religious practice, regardless of doctrine. Religious organizations would not be able to benefit from the ministerial exception in trafficking lawsuits because "the standards that govern what constitutes trafficking and forced labor do not depend on the interpretation of religious doctrine."[124] This method would also avoid excessive religious entanglement because human trafficking is analyzed entirely through a secular framework.

At its core, the ministerial exception is about providing religious organizations with the freedom to make their own doctrinal decisions without judicial interference. Requiring an organization to state a piece of doctrine justifying a disputed employment decision would protect First Amendment interests while avoiding the pitfalls of an overly broad ministerial exception.

B. Second Alternative – Raise the Standard for Determining which Employees are Covered by the Ministerial Exception

In *Our Lady of Guadalupe*, the Supreme Court reinterpreted its previous standards for determining which employees were covered for the purposes of the ministerial exception. Prior to this decision, courts had adopted the four-factor test established in *Hosanna-Tabor* to determine when the

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[122] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 670 (1970).

[123] *See First Amendment - Ministerial Exception - Ninth Circuit Avoids Constitutional Question, Holding That Ministers did not State a Claim That Church of Scientology Violated Trafficking Victims Protection Act* - Headley v. Church of Scientology Int'l, 687 F. 3d, 126 HARV. L. REV. 2121, 2123 (2013) (explaining that the *Headley* court could have "emphasized that the Establishment Clause prohibits only *excessive* entanglement" to resolve the case in a narrower manner).

[124] Shukla v. Sharma, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *7 (E.D.N.Y. Aug. 21, 2009), *report and recommendation adopted,* No. 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).

exception applied.[125] In *Our Lady of Guadalupe*, however, the Supreme Court rejected a strict factor-based approach and instead determined that "[w]hat matters, at bottom, is what an employee does."[126] This functional approach had the potential to limit the ministerial exception by applying it only to individuals highly ranked within religious organizations. Unfortunately, however, *Our Lady of Guadalupe* permits religious organizations to decide for themselves which employees conduct essential functions, and, therefore, should be covered by the ministerial exception.[127] Given the powerful operation of the ministerial exception at the summary judgment level, the effect of this decision is to "allow[] employers to decide for themselves whether discrimination is actionable."[128] With such unchecked discretion, no organization would choose to subject itself to judicial scrutiny, and the ministerial exception effectively serves as a complete civil liability shield. This broad interpretation allows even employees who are not members of the same religion as the organization to fall under the ministerial exception's reach.[129]

Instead of bestowing religious organizations with such broad discretion, courts could engage in a more substantive analysis to determine whether an individual performs functions that are indeed crucial to the ministerial functioning of a religious organization. As Justice Sotomayor explains in her dissent, "[a]lthough certain religious functions may be important to a church, a person's performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws."[130] It is the courts' job to make these determinations.

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[125] *Hosanna-Tabor* looked at the following four factors to determine whether an employee was covered by the ministerial exception: 1) whether the minister was bestowed with formal religious title, 2) whether the title reflected training and ministerial substance, 3) whether the employee embraced the title and held themselves out as a minister, and 4) whether the employee's job included important religious functions. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 191–92 (2012).

[126] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2059 (2020).

[127] *Id.* at 2070 (Thomas, J., concurring) ("What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis.").

[128] *Id.* at 2076 (Sotomayor, J., dissenting).

[129] *Id.*

[130] *Id.*

By engaging in this low level of substantive analysis and sacrificing a fraction of the vast protections currently afforded to religious entities, courts—not self-interested religious organizations—would determine whether an employee ought to be covered by the ministerial exception. Courts would consider someone's role within the organization to decide whether they fall within the ministerial exception's original intent. After conducting this preliminary finding, if an employee is deemed to be a proselytizing 'minister,' courts could continue to apply the ministerial exception as a bar to an employee's claims. However, if the employee is not deemed to be truly performing a crucial religious function, courts would engage in the same analysis afforded in other employment settings and provide each side with the requisite due process as the case moves forward.

Refusal to apply the ministerial exception to certain employees would not automatically necessitate a negative finding against the religious organization. Indeed, at this point, religious organizations would be in the same position as other employers facing comparable suits, and courts would proceed by engaging in the merits of the case. If needed to account for an organization's religious doctrine and purpose, religious entities could be allowed to introduce doctrinal arguments for their employment decisions that would be unavailable to secular employers. Such a judicial investigation does not improperly infringe on First Amendment protections, for if this were the case, religious organizations would be entirely immune from laws. [131] In affording special protections for religious organizations, we must remember that a religious mission does not negate an organization's status as an employer and must not exempt it from all labor-related regulations.

C. Third Alternative – Give Force to the "Outward Physical Acts" Distinction

The Supreme Court first considered the ministerial exception in *Hosanna-Tabor*, where it established a key distinction that could be better developed to properly restrict the

[131] *C.f.* Bob Jones Uni. v. United States, 461 U.S. 574, 593 (1983) (holding that the First Amendment did not prohibit the Internal Revenue Service's revocation of a religious university's tax exempt status in response to the university engaging in racial discrimination, which was found to be contrary to a "fundamental national public policy").

ministerial exception's scope.[132] Ministerial exception jurisprudence has not yet delved into *Hosanna-Tabor*'s exclusion of outward physical acts from the ministerial exception's reach. "The Court in *Hosanna-Tabor* expressly distinguished 'government regulation of only outward physical acts'—which it found to be permissible—from impermissible 'government interference with an internal church decision that affects the faith and mission of the church itself.'"[133] Developing this distinction between the permissible regulation of outward physical acts and the impermissible regulation of internal church decisions could help restrain the scope of the ministerial exception.

The *Hosanna-Tabor* court created the outward physical act caveat to distinguish between the present case involving teachers at a religious school and *Employment Division, Department of Human Resources of Oregon v. Smith.*[134] In *Smith*, the court upheld Oregon's prohibition on peyote use, regardless of its effect on religious practice.[135] The *Hosanna-Tabor* Court set up a distinction based not on the regulatory laws being enforced, but on the *effect* of their enforcement. The Court explains that while the Americans with Disabilities Act's prohibition on retaliation and Oregon's prohibition on peyote use are both "valid and neutral law[s] of general applicability," the effect of the laws differ since "a church's selection of its ministers is unlike an individual's ingestion of peyote."[136] The Court continues drawing out the contrasting nature of these cases, stating that "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[137]

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[132] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 195 (2012).
[133] United States v. Thompson, 896 F.3d 155, 166 (2d Cir. 2018), *cert. denied,* 139 S. Ct. 2715 (2019) (citing *Hosanna-Tabor*, 565 U.S. at 190).
[134] 494 U.S. 872 (1990).
[135] Since *Hosanna-Tabor*, *Smith* has been superseded by the Religious Freedom Restoration Act of 1993 [hereinafter RFRA]. 42 U.S.C. § 2000bb et seq. (2018). RFRA was enacted "to provide greater protection for religious exercise than is available under the First Amendment." Holt v. Hobbs, 574 U.S. 352, 357 (2015). Nonetheless, the history of *Smith* does not negate *Hosanna-Tabor*'s built-in distinction of outward physical acts and interference with internal church decisions.
[136] *Hosanna-Tabor*, 565 U.S. 171 at 190.
[137] *Id.*

This distinction between outward acts and internal decisions could be explored further and applied to involuntary servitude cases. The line is tricky, but it can be drawn. *Hosanna-Tabor* dealt with an individual being removed from the religious hierarchy and excused from their ministerial duties, which would qualify as an internal decision.[138] This type of decision is fundamentally what the ministerial exception was designed to protect from government interference. In contrast, involuntary servitude cases are not based on shifting roles within a religious organization, but are instead premised on non-consensual forced labor, which has a definitively outward effect. Forcing an unwilling individual to labor is an act that has an external effect extending well beyond the religious organization's internal management.

D. Fourth Alternative – Apply the "Harm Principle" when Analyzing the Ministerial Exception

The ministerial exception could be constrained by imposing an internal balancing test that operates within the limits of the First Amendment. Molly Gerratt advocates for employing the "harm principle" in the ministerial exception analysis.[139] The "harm principle" in this context would balance the religious conduct that would otherwise be protected under the First Amendment against the harm that it imposes on individuals.[140]

Applied to the ministerial exception, the harm principle would have courts determine "whether a state's interest in employment regulation laws is 'compelling' and whether that state interest outweighs a religious institution's free exercise rights."[141] Under this framework, anti-trafficking protections contained within the Thirteenth Amendment would not be

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[138] *Id.* at 171.

[139] Molly A. Gerratt, *Closing a Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 142 (2011).

[140] *Id.* at 177. The harm principle traces back to the early foundations of American laws and early political philosophers such as John Locke and John Stuart Mill and can be identified throughout American jurisprudence. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good,* 2004 BYU L. REV. 1099, 1116 (2004) (referring to the "harm principle" as the "no-harm principle"); *see, e.g.,* Reynolds v. United States, 98 U.S. 145, 166 (1878); Prince v. Massachusetts, 321 U.S. 158 (1944); Emp. Div. v. Smith, 494 U.S. 872, 890 (1990); Com. v. Bonadio, 415 A.2d 47, 50 (Pa. 1980).

[141] Gerratt, *supra* note 139, at 182.

maintained per se but would likely be permitted to move forward after courts made their own analyses of whether the alleged harms are sufficiently serious to warrant some infringement upon the First Amendment. In all likelihood, human trafficking would constitute a severe enough harm to circumvent religious protections provided by the ministerial exception.

The "harm principle" would still afford significant room for court interpretation and would require courts to engage in individualized analyses based on the facts of the cases before them. With this broad discretion for court enforcement and application, the harm principle could severely constrain the ministerial exception in a multitude of scenarios—not just those involving human trafficking.

There are, however, substantial risks to this approach. The harm principle could easily be interpreted to prioritize the harms that religious organizations may face without their expansive First Amendment protections and serve to continue the expansion of religious protections at the expense of individual rights. The major drawback of the harm principle resides in its broad definition of "harm," which can be easily co-opted and would lead to unintended consequences. Concepts such as "psychic harm" and "communal harm" may ultimately restrict liberties and affect other politically salient issues such as LGBT rights and abortion access.[142] While the harm principle could restrict religious protections granted via the ministerial exception and safeguard Thirteenth Amendment rights, it could also have the opposite effect. Given the broadness of already-existing religious protections, and the large space afforded for religious considerations, this Article does not advocate for the use of the harm principle to mitigate the reach of the ministerial exception.

CONCLUSION

The ministerial exception exists to protect religious organizations from the type of government interference that would prevent the fulfillment of religious missions. It does not exist to exempt religious organizations from all laws and

[142] *See, e.g.,* Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 1 (2006).

regulations, and it certainly does not exist to give religious organizations a free pass to traffic their employees. The Trafficking Victims Protection Act is a vital piece of legislation that provides survivors of human trafficking with civil remedies against the infringement of their constitutional Thirteenth Amendment rights. The First Amendment's Free Exercise and Establishment clauses must not be interpreted to vanquish Thirteenth Amendment protections. Such an approach would be counter to public policy and to the original intent and mission of the Thirteenth Amendment, which deliberately did not carve out an exemption for religious organizations.

Permitting the use of the ministerial exception as a defense to TVPA cases is improper from both legal and normative perspectives. Human trafficking in religious organizations is an unfortunately common occurrence, and religious traffickers must not be excused solely by virtue of their religious status. Courts handling TVPA cases should not permit the use of the ministerial exception as a jurisdictional bar given the unique legal status that human trafficking has in American law. The Thirteenth Amendment must not be reduced to simply another manifestation of labor laws that fall subservient to broad religious freedoms in the United States and must instead be upheld as constitutionally vital and crucial to the fight against human trafficking.