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, and THE ARCHDIOCESE OF CHICAGO,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Case No. 1:16-cv-11576 – Judge Edmond E. Chang

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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MOTION

Pursuant to Federal Rule of Appellate Procedure 29, the movants listed below (together, "*Amici*") respectfully seek leave to file the accompanying amicus brief in support of Defendants-Appellants St. Andrew the Apostle Parish and the Archdiocese of Chicago, and in support of rehearing *en banc*. *Amici* include four church bodies in the Orthodox Christian tradition (together, "the Orthodox Churches"). They are the Serbian Orthodox Diocese of New Gracanica-Midwestern America, the Orthodox Church in America Diocese of the Midwest, the Greek Orthodox Metropolis of Chicago, and the Synod of Bishops of the Russian Orthodox Church Outside of Russia ("ROCOR"). Amici also include Agudath Israel of America, an Orthodox Jewish religious body; and the Christian Legal Society, a nonprofit entity that assists religious organizations on religious freedom matters.

Defendants-Appellants haves consented to the filing of this brief. Plaintiff-Appellee Sandor Demkovich does not consent to the filing of this brief.

In support of this motion, *Amici* state the following:

1. An amicus should be granted permission to file where the amicus "has a unique perspective . . . that can assist the court of appeals beyond what the parties are able to do" or a "direct interest" that could be "materially affect[ed]" by the Court's disposition. *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

2. This Court should grant the motion because each of the *Amici* offers a unique perspective that will assist the Court on the issue before it: whether the First Amendment's ministerial exception prohibits courts from hearing a minister's claims of a hostile work environment based on comments that his supervisor made with the intent of supervising and controlling the minister. The brief emphasizes the connection between the ministerial exception and broader principles of religious organizational autonomy set forth in decisions such as *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

3. The *amici* Orthodox Churches have unique experience with civil-court interference in their internal affairs, and a significant interest in avoiding such interference. One *amicus* is a diocese of the Serbian Orthodox Church, whose internal governance was at issue in the seminal church-autonomy case of *Milivojevich*, *supra*. Other *amici* are Russian

Orthodox, the tradition at issue in another seminal church-autonomy case, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *Amici* have a strong interest in ensuring that principles giving churches broad autonomy over their internal affairs inform the scope of the ministerial exception.

4. From cases like *Milivojevich*, the *amici* Orthodox Churches have experience of civil courts improperly second-guessing or misunderstanding the churches' structures of decision-making and authority. See, e.g., *Milivojevich*, 426 U.S. at 708-25 (holding that state courts had unconstitutionally determined that church's removal of bishop and reorganization of dioceses were "arbitrary" and violated church's own rules); *Primate and Bishops Synod of Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection*, 418 Mass. 1001, 636 N.E.2d 211 (1994), *cert. denied*, 513 U.S. 1121 (1995) (holding that ROCOR, a hierarchically organized church, was nevertheless congregationally organized with respect to church property).

5. The Orthodox Churches also have a significant interest in ensuring that churches are not held liable for comments that a supervisor—in this particular case, a Roman Catholic parish priest—

makes toward another minister in the course of supervising or guiding that other minister. Such liability would interfere with important aspects of church leadership. As just one example, the Statute of the Orthodox Church in America provides that the parish priest "serves as the spiritual father and teacher of that portion of the flock of Christ entrusted to him, the first among the Parish Clergy." Article XII, Section 3(a), https://www.oca.org/statute/article-xii. This guidance function will easily be impaired if comments of guidance and control can serve as the basis for a lawsuit alleging a hostile work environment.

6. The risks of second-guessing and misunderstanding internal affairs are particularly strong with respect to Orthodox Christian traditions, many of which are relatively small and draw on ethnic traditions and are therefore unfamiliar to the broader population.

7. Consistent with the perspective and experience of the Orthodox Churches, the amicus brief presents distinct arguments for this Court's consideration. The brief emphasizes that the ministerial exception does not stand alone but rests in broader principles of a religious organization's autonomy over its internal affairs and internal governance. The brief explains such principles and why they call for

barring hostile work environment claims by ministers. For example, the brief explains how, for a hostile work environment claim, several specific elements of the plaintiff's prima-facie case and the employer's affirmative defense require a court to "engag[e] in a searching and therefore impermissible inquiry into church polity." *Milivojevich*, 426 U.S. at 723. This analysis is not present in the petition for rehearing *en banc*. See *Johnson v. U.S. Office of Pers. Mgmt.*, No. 14-C-0009, 2014 WL 1681691, at *1 (E.D. Wis. Apr. 28, 2014) (granting a motion to file an amicus brief because it "provide[d] arguments, theories, and citation to legal precedent that will be useful to the Court and are not addressed by the parties").

8. *Amicus* Agudath Israel of America likewise brings a unique perspective. Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through

the submission or participation in *amicus curiae* briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. As an organization that advocates for synagogues, schools, and other Orthodox Jewish religious organizations throughout the United States, Agudath Israel has a unique interest and perspective regarding the importance of a robust ministerial exception. That perspective will be important to the Court to ensure that its resolution of this case is appropriately sensitive to faith traditions other than the Catholic parties to the appeal. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., joined by Kagan, J., concurring) (emphasizing the need for courts to issue rulings concerning "the important issue of religious autonomy" in a manner that accounts for diverse faiths).

9. *Amicus* Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1963. CLS operates the Center for Law and Religious Freedom ("the Center"), the nation's oldest organization committed exclusively to the protection of religious freedom. For four decades, CLS has sought to protect all

citizens' free exercise and free speech rights in the federal and state courts and legislatures. CLS was instrumental in passage of landmark federal legislation to protect persons of all faiths, including: 1) the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* which protects the religious freedom of persons of all faiths; and 2) the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.,* which protects religious freedom for congregations and institutionalized persons of all faiths. Through the Center, CLS has served as *amicus* or counsel to *amici* in numerous cases, including both Supreme Court decisions affirming and delineating the ministerial exception, *Hosanna-Tabor*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). CLS has filed *amicus* briefs in key cases defending the autonomy of religious organizations in making employment decisions. See, e.g., Brief for *Amici Curiae* Christian Legal Society, et al., *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No. 19-267), 2020 WL 703882; Brief for *Amici Curiae* Professor Eugene Volokh, Christian Legal Society, et al., *Hosanna-Tabor Evangelical Lutheran Church & School*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2470847;

Brief for *Amici Curiae* Christian Legal Society, et al., *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*, 483 U.S. 327 (1987) (No. 86-179 & 86-401), 1987 WL 864773.

10. Co-counsel with CLS on this amicus brief, the Religious Liberty Appellate Clinic at the University of St. Thomas School of Law (Minnesota), has also served as counsel for various *amici* in numerous cases, including *Our Lady of Guadalupe*. The Clinic's director and co-counsel here, Professor Thomas C. Berg, is a leading First Amendment scholar, the author of *The State and Religion in a Nutshell* (West, 3d ed. 2016), and a co-author of the leading casebook in the field, *Religion and the Constitution* (Wolters Kluwer, 4th ed. 2016) (with Michael W. McConnell and Christopher Lund).

11. Recently, a published opinion of this Court cited, as a source of relevant information, the amicus brief filed by these same co-counsel—the St. Thomas Clinic and CLS—on behalf of CLS and other *amici*. *Gaylor v. Mnuchin*, 919 F.3d 420, 424 n.3 (7th Cir. 2019). This Court cited that brief as a source for the number of religious congregations that would be affected were the income-tax allowance for ministerial housing to be held unconstitutional. *Id.* Similarly in this case, the amicus brief

presents a unique perspective on why a range of religious bodies, of varying faiths, will be affected if civil courts become embroiled in claims of a hostile work environment based on a supervising minister's comments when exercising supervision and control over another minister.

12. Especially given the brevity of the petition for rehearing *en banc*, the amicus brief will add "unique perspective" from these *amici* and "will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003); see also *Johnson v. U.S. Office of Pers. Mgmt.*, *supra*, at *1.

13. Thus, *Amici* have a "unique perspective" on the important constitutional issues before this Court and should be allowed leave to file their brief.

For the foregoing reasons, *Amici* respectfully request that this Court grant leave to file the attached brief amici curiae.

Respectfully submitted.

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Counsel for Amici Curiae

October 13, 2020

CERTIFICATE OF SERVICE

I certify that on October 13, 2020, the foregoing Motion for Leave to File a Brief *Amici Curiae* and attached brief were served on counsel for all parties by means of the Court's ECF system.

s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Counsel of Record for
Amici Curiae

Dated: October 13, 2020

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BRIEF *AMICI CURIAE* OF AGUDATH ISRAEL OF AMERICA, THE SERBIAN ORTHODOX DIOCESE OF NEW GRACANICA—MIDWESTERN AMERICA, THE ORTHODOX CHURCH IN AMERICA DIOCESE OF THE MIDWEST, THE GREEK ORTHODOX METROPOLIS OF CHICAGO, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

Short Caption: Demkovich v. St. Andrew the Apostle Parish, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements 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 the 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.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
AgudathIsraelofAmerica;SerbianOrthodoxDioceseNewGracanica-MidwesternAmerica;OrthodoxChurchinAmericaDioceseofMidwest;GreekOrthodoxMetropolisChicago;SynodofBishopsRussianOrthodoxChurchOutsideRussia;ChristianLel

(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:
Center for Law & Religious Freedom of the Christian Legal Society (Kimberlee Wood Colby and Reed N. Smith)
Religious Liberty Appellate Clinic, University of St. Thomas School of Law (Professor Thomas C. Berg)

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

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

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/Kimberlee Wood Colby Date: October 13, 2020

Attorney's Printed Name: Kimberlee Wood Colby

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

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Attorney's Printed Name: Thomas C. Berg

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N/A

Attorney's Signature: /s/ Reed N. Smith Date: October 13, 2020

Attorney's Printed Name: Reed N. Smith

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

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TABLE OF AUTHORITIES

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Amici joining this brief include a religious body of Orthodox Judaism, Agudath Israel of America, and four bodies of Orthodox Christianity: the Serbian Orthodox Diocese of New Gracanica-Midwestern America, the Orthodox Church in America Diocese of the Midwest, the Greek Orthodox Metropolis of Chicago, and the Synod of Bishops of the Russian Orthodox Church Outside of Russia ("ROCOR"). *Amici* also include the Christian Legal Society, a nonprofit entity that assists religious organizations on religious freedom matters. All *amici* are concerned that the First Amendment's ministerial exception be interpreted broadly to secure churches' autonomy over their internal governance. Detailed descriptions of *amici* appear in the Appendix.

[1] Pursuant to FRAP 29(a)(4)(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person (other than the *amici curiae,* their members, or their counsel) contributed money that was intended to fund preparing or submitting the brief. Pursuant to FRAP 29(a)(2), Petitioners' counsel consented to the filing of this brief, but Respondent's counsel denied consent. A motion for leave to file accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel opinion in this case seriously erred when it allowed the plaintiff to evade the First Amendment's ministerial exception by pleading that another minister's comments created a "hostile work environment." *Amici* agree that this case requires en banc review for the reasons set forth in the rehearing petition. *Amici* file this brief to emphasize the general principles of church autonomy that undergird the ministerial exception, and to show how claims of hostile work environment undercut two such principles: (A) judicial non-intervention in deciding questions of religious law and polity, and (B) churches' right to supervise and control, as well as select, their ministers.

General principles of church autonomy have been particularly important for Orthodox churches; many such principles were articulated in cases involving Orthodox bodies, most notably in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). And prohibitions on judicial second-guessing of organizations' internal affairs are particularly important for groups that are relatively unfamiliar because of their limited size or their distinct ethnic culture—as is the case with several of the Jewish and Orthodox *amici* here.

ARGUMENT

I. The Ministerial Exception Rests on, and Should Be Informed by, General Autonomy Principles Protecting Religious Organizations' Internal Governance and Prohibiting Government Intervention in Religious Questions.

Under the ministerial exception, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Government interference in decisions concerning those who "will minister to the faithful" violates both the Free Exercise and Establishment Clauses. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

In interpreting the ministerial exception's scope, it is important to recognize that the exception does not stand in isolation. "The constitutional foundation for [the ministerial exception is] the general principle of church autonomy …: independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2060. The Court in *Hosanna-Tabor* and *Our Lady* relied on "three prior decisions"; all of them "drew on this broad

principle, and none was exclusively concerned with the selection or supervision of clergy." *Our Lady*, 140 S. Ct. at 2061.

Two of the cases on which *Hosanna-Tabor* relied (see 565 U.S. at 186–87) involved *amici* here or other Orthodox Christian churches. In *Milivojevich*, 426 U.S. 696, the Court held that a state court had impermissibly overturned the Serbian Orthodox Church's removal of a bishop and its reorganization of its American/Canadian dioceses. The Court held that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," and that civil courts may not resolve "quintessentially religious controversies whose resolution the First Amendment commits exclusively to [those] tribunals." *Id.* at 724, 720. Both *Hosanna-Tabor* and *Milivojevich* relied on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), which barred a state from interfering with the Russian Orthodox Church's authority over both property and church administration and affirmed the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 106.

This Court, likewise, has emphasized that the ministerial exception is part of a church's broader autonomy over its "internal affairs." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006).

The panel majority here cited *Milivojevich* only once, in a paragraph of string cites. Op. 31. Unsurprisingly then, the panel applied the ministerial exception in a way incompatible with the broader religious autonomy principles undergirding it. Two such principles are especially relevant here: that (a) autonomy precludes courts from inquiring into or resolving disputed questions of religious law or polity; and (b) the ministerial exception protects churches' right not just to select, but to supervise and control, ministers.

A. Church Autonomy Precludes Courts from Inquiring Into or Resolving Disputed Questions of Religious Law or Polity.

A key principle of church autonomy is that civil litigation cannot be "made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). That bar also applies to courts' inquiries and determinations concerning religious polity.

Milivojevich overturned the state court's ruling for probing too deeply "into the allocation of power within a [hierarchical] church." 426 U.S. at 709 (brackets in original; quotation omitted). The Court held that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity," civil courts may not overturn the decision of the highest authority "within a church of hierarchical polity." *Id.*

The same principle forbids courts from determining what is "reasonable care" when a church or its employees act concerning religiously sensitive matters. On this ground, for example, courts have refused to impose duties of care for pastoral counselors—even in the fraught situation where a counselee may be suicidal. *Nally v. Grace Cmty. Church*, 763 P.2d, 948, 960 (Calif. 1988) ("'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations'") (quotation omitted); *Baumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319, 1323 (Ill. App. Ct. 1986) ("[T]he first amendment bars the judiciary from considering whether certain religious conduct conforms to the standard of a particular religious group.").

Amici are particularly concerned to preserve the bar against judicial second-guessing of religious polity. "If civil courts undertake to resolve such controversies …, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church*, 393 U.S. at 449. *Amici* have experienced, in cases like *Milivojevich*, the hazards of civil courts failing to appreciate the allocation of authority within a religious organization. As Part II discusses, these hazards are particularly present when a minister alleges that comments made to him by a supervising minister created a hostile work environment.

B. The Ministerial Exception Protects the Supervision and Control of Ministers, Not Merely Their Selection.

The Supreme Court in *Our Lady* and *Hosanna-Tabor* applied the ministerial exception to lawsuits challenging the removal of ministers. But the broader principles of church autonomy above show why the ministerial exception protects an organization's right not just to "select" (hire and fire) ministers, but also to supervise and control them. *Our Lady*, 140 S. Ct. at 2060–61 ("[A] church's independence on matters 'of faith and doctrine' requires the authority to select, *supervise*, and *if*

necessary, remove a minister without interference by secular authorities.") (emphasis added); *Hosanna-Tabor*, 565 U.S. at 194–95 ("The exception … ensures that the authority to select and *control* who will minister to the faithful … is the church's alone.") (emphasis added); *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972). Likewise, this Court has held that minimum-wage claims fall within the ministerial exception, even though those involve the right to control ministers, not the right "to decide who will perform" that role. *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

II. Under the Above Principles, Claims for Hostile Work Environment Are Barred by the Ministerial Exception.

Under the above principles, the ministerial exception should bar claims by ministers not only when they allege a tangible employment action, but also when they allege a hostile work environment. The latter inevitably embroil courts in impermissibly second-guessing religious organizations and determining religious questions at every stage of adjudication.

A. Evaluating a Minister's Hostile-Work-Environment Claim Will Require Courts to Inquire Into and Resolve Questions of Church Polity and Doctrine.

Courts cannot adjudicate hostile work environment claims by ministers "without engaging in a searching and therefore impermissible inquiry into church polity." *Milivojevich*, 426 U.S. at 723. Those inquiries begin with plaintiff's prima-facie case, where courts must determine whether the alleged discriminatory conduct is "severe or pervasive enough to create … an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23). Circumstances also include whether the conduct "unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Whether the alleged conduct is "severe" or "unreasonably interferes with … work performance" depends upon "the social context in which [the conduct] occurs and is experienced by [the plaintiff]." *Oncale*, 523 U.S. at 81.

The first impermissible inquiry in a minister's lawsuit is that judging from the perspective of a "reasonable plaintiff," *Oncale*, 523

U.S. at 81, means judging from the perspective of a "reasonable minister." Determining what is a reasonable minister's perspective is impermissible, see *supra* p. 6; like the duty of reasonable care rejected in cases such as *Nally*, the standard "would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity." 763 P.2d at 960.

Moreover, because courts must view the circumstances of a hostile work environment in the social context where the conduct occurs, *Oncale*, 523 U.S. at 81, a minister's claim must be viewed in the context of the relevant church and its tenets. The objective "severity" of harassment necessarily depends upon church context. Some negative comments about an organizational leader's same-sex conduct might be expected when he leads a Catholic church as opposed to a Walmart store. But judging whether and how that difference affects the comments' "severity" requires inquiries into church doctrine and context that a civil court cannot make.

Impermissible inquiries also arise in determining whether the alleged conduct "unreasonably interferes with [the minister's] work performance." Determining what interference is "unreasonable"

requires courts, again, to discern a "reasonableness" standard with respect to ministers. And determining the effects on "work performance" requires courts to assess what the minister's proper performance should be. This too is impermissibly entangling, as this Court held in *Tomic*, a discrimination suit by a music director. If the suit went forward, the Court said, "the diocese would argue that [plaintiff] was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services"—the plaintiff would question this as a pretext, "and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services." *Tomic*, 442 F.3d at 1040. So too with a court evaluating a minister's performance to determine whether it was unreasonably affected.

Impermissible inquiries also arise under a church's affirmative defense to a hostile work environment claim. An employer can defeat liability by showing that (1) it "exercised reasonable care to prevent and correct promptly any … harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Under the defense, the court must determine what is a "reasonable" church response to alleged discriminatory comments made by one minister to another. That may require judging both the capacity of higher church authorities to intervene and the adequacy of the church's "preventive or corrective opportunities." *Id.* Again, these factors require "searching and therefore impermissible inquiry into church polity." *Milivojevich*, 426 U.S. at 723.

It is no answer to say, as the panel did, that district courts should wait for these inevitable religious questions to arise before dismissing the suit. This approach would still create "procedural entanglement"; the burdens of litigation could induce churches to employ ministers who pose less risk "rather than those that best 'further its religious objectives.'" *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (quotation omitted); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (Religion Clause rights may be "impinge[d]" on "not only [by] the conclusions" government decisionmakers reach, "but also [by] the very process of inquiry leading to findings and conclusions").

B. The Hostile-Work-Environment Claim Here is Barred by the Ministerial Exception Because the Alleged Statements Were Attempts to Supervise a Minister.

The ministerial exception protects a church's right not just to select its ministers, but to supervise and control them. *Supra* Part I-B. Comments relating to a minister's fitness for ministry fall within the right of supervision and control. Here, Reverend Dada's comments to plaintiff, even as alleged in the complaint, were attempts to guide and supervise him. As the panel recognized, "[t]he parties treat Reverend Dada's alleged harassment of Demkovich as motivated by his and the Church's religious beliefs, if not actually required by those beliefs." Op. 9. And when the supervising minister commenting on another minister sincerely intends the comments as supervision or guidance concerning the church's beliefs, the court cannot reject that characterization based on its independent judgment. "[I]t is precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*." *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019).

Liability for such guidance would interfere with important aspects of church governance. For example, the Statute of the Orthodox Church

in America provides that the parish priest "serves as the spiritual father and teacher of that portion of the flock of Christ entrusted to him, the first among the Parish Clergy." Article XII, Section 3(a), https://www.oca.org/statute/article-xii.

The panel concluded that churches have sufficient power to supervise and control ministers by taking tangible employment actions against them. Op. *16 n.4, 20–21. But this approach still restricts how the church "'manage[s] and discipline[s]'" its ministers, *Skrzypczak*, 611 F.3d at 1245 (quotation omitted), and how it addresses a conflict between ministers growing out of the lead minister's supervision. And the approach "creates a perverse incentive," as Judge Flaum's dissent observed. Op. 38–39. Under the panel's rule, a church can take discriminatory action against a minister, but comments intended to guide the minister risk creating liability. The rule pushes churches to take the harsher step of tangible action without giving the minister comments of guidance first.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the length limitation found at XXIV (E), *Practitioner's Handbook for Appeals* 181, ed. 2020, and Fed. R. App. P. 29(b)(4) because it contains 2597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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Dated: October 13, 2020

CERTIFICATE OF SERVICE

I certify that on October 13, 2020, the foregoing brief and attached appendix were attached to a Motion for Leave to File Brief *Amici Curiae* and were served on counsel for all parties by means of the Court's ECF system.

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Dated: October 13, 2020

APPENDIX
DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

The Serbian Orthodox Diocese of New Gracanica-Midwestern America is an integral part of the Serbian Orthodox Church, which is one of the fourteen autocephalous/self-governing, hierarchical/episcopal churches which comprise the Orthodox Christian Church, commonly referred to as the Eastern Orthodox Church. The Ruling Bishop of the Serbian Orthodox Diocese of New Gracanica-Midwestern America is the Right Reverend Bishop Longin Krco. His See is at New Gracanica Monastery in Third Lake, Illinois and he has

territorial jurisdiction over all Serbian Orthodox monasteries, parishes, church-school congregations, etc. in the States of Illinois, Indiana, Wisconsin, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Oklahoma, Arkansas, Louisiana, Texas, Alabama, Mississippi, Kentucky and Tennessee. This diocese comprises over 45 parishes, five monasteries and sketes, a School of Theology in Libertyville, Illinois, and other institutions which administer the Holy Mysteries/Sacraments, educate, and minister to the more than 250,000 persons of Serbian descent who live in these States and to the Orthodox Christians who have chosen to accept the omophorion/jurisdiction of the Serbian Orthodox Patriarchate.

The Orthodox Church in America Diocese of the Midwest is a diocese of the Orthodox Church in America--a hierarchical and "autocephalous" (self-governing) church arising from the Orthodox tradition. It encompasses eleven states in the Midwestern United States, including Illinois, Indiana, and Wisconsin.

The Greek Orthodox Metropolis of Chicago is one of eight Metropolises and the Archdiocesan District that comprise the Greek Orthodox Archdiocese of America, a hierarchical church within the

jurisdiction of the Ecumenical Patriarchate of Constantinople. The Greek Orthodox Church is a Christian Church, established from the time of the Apostles of Christ.

His Eminence Metropolitan Nathanael is the governing hierarch of the Metropolis of Chicago, a diocesan region encompassing Illinois, Northwest Indiana, Iowa, Minnesota, Northwestern Missouri, and Wisconsin. The Metropolis of Chicago is home to 58 parishes, two monasteries, and other institutions, offering the rites of the Holy Orthodox Church, education, and numerous religious and philanthropic ministries to Orthodox Christians and communities in those states.

The Synod of Bishops of the Russian Orthodox Church Outside of Russia is the executive body of the Russian Orthodox Church Outside of Russia, which was established by bishops, clergymen and laity who fled the Bolshevik Revolution and Civil War in 1920. It assembled its administration in Yugoslavia in the form of the Synod of Bishops of ROCOR, its executive body, which after World War II moved to New York City. The Synod of Bishops incorporated in the State of New York in 1952, and is a non-profit 501(c)(3) religious organization with its headquarters in New York City. The Synod of Bishops oversees

over 500 parishes, monasteries, missions and communities worldwide, including over 225 in the United States.

The Synod of Bishops of the Russian Orthodox Church Outside of Russia has for decades defended itself, its dioceses, parishes, monasteries and communities in the United States against individuals and groups seeking to induce civil courts to interfere in Canonical Church life. With full respect for Constitutional law, ROCOR consequently insists on the concepts of the right to free assembly and the separation of Church and State as we strive to live by the two-millennium-old tenets of traditional Christianity. We likewise strongly support other religious organizations in preserving and defending their own legal rights.

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1963. CLS operates the Center for Law and Religious Freedom ("the Center"), the nation's oldest organization committed exclusively to the protection of religious freedom. For four decades, CLS has sought to protect all citizens' free exercise and free speech rights in the federal and state courts and legislatures. CLS was instrumental in passage of landmark

federal legislation to protect persons of all faiths, including: 1) the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* which protects the religious freedom of persons of all faiths; and 2) the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.,* which protects religious freedom for congregations and institutionalized persons of all faiths. Through the Center, CLS has served as *amicus* or counsel to *amici* in numerous cases, including both Supreme Court decisions affirming and delineating the ministerial exception, *Hosanna-Tabor*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). CLS has filed *amicus* briefs in key cases defending the autonomy of religious organizations in making employment decisions. See, e.g., Brief for *Amici Curiae* Christian Legal Society, et al., *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No. 19-267), 2020 WL 703882; Brief for *Amici Curiae* Professor Eugene Volokh, Christian Legal Society, et al., *Hosanna-Tabor Evangelical Lutheran Church & School*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2470847; Brief for *Amici Curiae* Christian Legal Society, et al., *The Corporation of*

the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 483 U.S. 327 (1987) (No. 86-179 & 86-401), 1987 WL 864773.