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.

Appeal from a Ruling of the United States District Court
Northern District of Illinois, Eastern Division
No. 1:16-cv-11576
Hon. Edmond E. Chang

Motion of The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod for Leave to File Accompanying Brief of *Amici Curiae* in Support of Rehearing *En Banc*

Pursuant to Federal Rule of Appellate Procedure 29(b), the Lutheran Church–Missouri Synod ("LCMS") and the Wisconsin Evangelical Lutheran Synod ("WELS") respectfully request leave to file the accompanying Brief as *Amici Curiae* in Support of Appellants' Petition for Rehearing *En Banc*.

LCMS and WELS submit that their *amici curiae* brief will aid the Court by highlighting similarities between the panel majority's reasoning and the arguments that failed in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012)—and more recently in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The panel majority followed the very arguments the losing parties heavily relied in their briefs and during oral argument. *See, e.g.*, Br. for Resp'ts, *Our Lady of Guadalupe*; Br. for Fed. Resp't, *Hosanna-Tabor*. By showing that the Supreme Court has been briefed on and resoundingly rejected these arguments twice—dismissing them with little analysis or ignoring them entirely—*amici* believe that their brief "will assist the judges by presenting ideas, arguments, . . . [and] insights" that will not be found in the parties' briefs. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers).

Amici are well positioned to make these arguments. In *Hosanna-Tabor*, 565 U.S. 171 (2012)—the Supreme Court's first ministerial exception case—the petitioner was an LCMS congregation.

LCMS is an international Lutheran denomination with over 6,000 congregations and 2 million baptized members throughout the United States. In addition to numerous Synod-wide related entities, it has two seminaries, eight universities, the largest Protestant parochial school system in the country, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. LCMS is strongly committed to

preserving our nation's first freedoms. LCMS regularly participates before the U.S. Supreme Court and Courts of Appeals as *amicus curiae* in litigation that is likely to impact the church.

WELS is a Lutheran denomination consisting of more than 360,000 men, women, and children in nearly 1,300 congregations across the United States and Canada. In addition to supporting gospel outreach in 40 countries, WELS and its affiliated ministries operate one of the largest Lutheran school systems in the United States with nearly 400 early childhood ministries, nearly 300 elementary schools, 25 area Lutheran high schools, and two preparatory high schools, as well as two colleges and a seminary.

LCMS and WELS file here out of concern that the panel majority's decision will eviscerate the protection the ministerial exception offers against statutory employment discrimination claims. By allowing employees to reframe Title VII claims challenging tangible employment actions as alleging a hostile work environment, the panel majority's decision would embroil courts in evaluating supervisors' communications with and control of ministerial employees, matters often closely related to subsequent tangible employment action. Such gerrymandered claims pose the same threat to free exercise and the same risk of excessive entanglement as do challenges to hiring and firing decisions.

The panel majority's holding threatens not only the ecclesiastical integrity of their own churches and schools but also the religious freedom of thousands of religious institutions within this Circuit. Internal ecclesiastical affairs—such as the

content and delivery of communications with ministerial employees—are the very "supervision" that the ministerial exception is intended to protect. *See Our Lady of Guadalupe*, 140 S. Ct. at 2055 (explaining that judicial review of the way a religious organization carries out its constitutionally-protected "selection *and* supervision" of ministerial employees would "undermine the independence of religious institutions in a way that the First Amendment does not tolerate" (emphasis added)).

Counsel for *amici* have conferred with counsel for the parties regarding the relief requested in this motion. Counsel for Appellants consent to the filing of this brief. Counsel for Appellee do not consent to the filing of this brief.

Accordingly, pursuant to Rule 29, the Lutheran Church–Missouri Synod and the Wisconsin Evangelical Lutheran Synod respectfully request leave to file the accompanying Brief of *Amici Curiae* in support of Appellants' Petition for Rehearing *En Banc*. If such leave is granted, LCMS and WELS request that the accompanying Brief of *Amici Curiae* be considered filed as of the date of this motion's filing.

Respectfully submitted,

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Ste 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

October 13, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 697 words, excluding the parts of the motion exempted by Rule 32(f). This motion complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface 12-point Century font using Microsoft Word.

Oct. 13, 2020

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed this motion with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

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-Appellant.

Appeal from a Ruling of the United States District Court
Northern District of Illinois, Eastern Division
No. 1:16-cv-11576
Hon. Edmond E. Chang

Brief of *Amici Curiae* The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod in Support of Defendants-Appellants' Petition for Rehearing *En Banc*

KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

Oct. 13, 2020

APPEARANCE AND FED. R. APP. P. 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for *Amici* The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod, hereby provides the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party that the attorney represents in the case:

The Lutheran Church–Missouri Synod

The Wisconsin Evangelical Lutheran Synod

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

First Liberty Institute

(3) If the party, amicus or intervenor is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Amici are 501(c)(3) corporations that do not issue stock and have no parent corporation.

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

Not Applicable.

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

Not Applicable.

Oct. 13, 2020

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorney for Amici Curiae

APPEARANCE AND FED. R. APP. P. 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for *Amici* The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod, hereby provides the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party that the attorney represents in the case:

The Lutheran Church–Missouri Synod

The Wisconsin Evangelical Lutheran Synod

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

First Liberty Institute

(3) If the party, amicus or intervenor is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Amici are 501(c)(3) corporations that do not issue stock and have no parent corporation.

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

Not Applicable.

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

Not Applicable.

Oct. 13, 2020

/s/ *Michael D. Berry*
MICHAEL D. BERRY
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
mberry@firstliberty.org

Attorney for Amici Curiae

APPEARANCE AND FED. R. APP. P. 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for *Amici* The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod, hereby provides the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party that the attorney represents in the case:

The Lutheran Church–Missouri Synod

The Wisconsin Evangelical Lutheran Synod

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

First Liberty Institute

(3) If the party, amicus or intervenor is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Amici are 501(c)(3) corporations that do not issue stock and have no parent corporation.

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

Not Applicable.

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

Not Applicable.

Oct. 13, 2020

/s/ *Stephanie N. Taub*
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
staub@firstliberty.org

Attorney for Amici Curiae

APPEARANCE AND FED. R. APP. P. 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for *Amici* The Lutheran Church–Missouri Synod and The Wisconsin Evangelical Lutheran Synod, hereby provides the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party that the attorney represents in the case:

The Lutheran Church–Missouri Synod

The Wisconsin Evangelical Lutheran Synod

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

First Liberty Institute

(3) If the party, amicus or intervenor is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Amici are 501(c)(3) corporations that do not issue stock and have no parent corporation.

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

Not Applicable.

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

Not Applicable.

Oct. 13, 2020

/s/ *Rebecca R. Dummermuth*
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
brdummermuth@gmail.com

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTEREST OF *AMICI CURIAE*[1]

The Lutheran Church–Missouri Synod ("LCMS") is an international Lutheran denomination with over 6,000 congregations and 2 million baptized members throughout the United States. In addition to numerous Synod-wide related entities, its ministry includes two seminaries, eight universities, the largest Protestant parochial school system in the country, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations.

The Wisconsin Evangelical Lutheran Synod ("WELS") is a Lutheran denomination consisting of more than 360,000 men, women, and children in nearly 1,300 congregations across the United States and Canada. In addition to supporting gospel outreach in 40 countries, WELS and its affiliated ministries operate one of the largest Lutheran school systems in the United States with nearly 400 early childhood ministries, nearly 300 elementary schools, 25 area Lutheran high schools, and two preparatory high schools, as well as two colleges and a seminary.

As *amici*, LCMS and WELS have an interest in preserving the constitutional protections afforded religious employers by *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), a case in which the petitioner was an LCMS congregation. For the ministry of religious organizations such as *amici* to flourish as well as to avoid judicial entanglement in ecclesiastical affairs, daily

[1] *Amici* have received the consent of Appellants to file its brief in this matter. Appellee declined to consent. No party or 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 *amici curiae*, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

interactions with ministerial employees must be provided the same First Amendment protections as tangible employment actions.

SUMMARY OF ARGUMENT

The panel majority repeatedly ignores Supreme Court precedent defining the ministerial exception, instead resurrecting arguments that have been thoroughly argued before and soundly rejected by the Supreme Court. This brief addresses two such errors.

First, the panel majority erroneously relies on a *Younger* abstention decision—*Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986)—diverging from the Supreme Court's two ministerial exception cases, *Hosanna-Tabor* and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). In considering those 2012 and 2020 suits, the Supreme Court was twice briefed on *Dayton* and twice ignored it, spurning the relevance of that 1986 decision to defining the ministerial exception. While *Dayton* expressly declined to address constitutional issues, *Hosanna-Tabor* and *Our Lady of Guadalupe* make clear that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2060; *see also Hosanna-Tabor*, 565 U.S. at 188 (affirming existence of a ministerial exception that "precludes application of [] legislation [such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers").

Second, the panel majority also disregards Supreme Court guidance by returning again and again to balancing competing interests. The oral argument in

Hosanna-Tabor demonstrates that the Court considered respondents' concerns about balancing competing interests, yet the resulting unanimous opinion candidly concluded the First Amendment itself establishes the balance. *Hosanna-Tabor*, 565 U.S. at 196. Because the First Amendment prevents governments from influencing the employment relationship between a minister and a church, the court may not use a "balancing test" to determine how much to intrude on such fundamentally religious matters.

By finding guidance in *Dayton* and attempting to balance competing interests, the panel majority demonstrates multiple misapprehensions of the judicial underpinnings of the ministerial exception. Given this flawed foundation, "consideration by the full court is [] necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A).

ARGUMENT

I. The panel majority relied on *Dayton*—a *Younger* abstention decision—as "helpful guidance," even though the Supreme Court twice found *Dayton* wholly irrelevant to defining the ministerial exception.

The panel majority erred in relying on *Dayton* to evaluate the risk of religious entanglement inherent in adjudicating Title VII claims between a minister and a church. *See Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142, 2020 U.S. App. LEXIS 27653, at *31–34 (7th Cir. Aug. 31, 2020) (finding *Dayton* "helpful guidance"). The Supreme Court was quite aware of *Dayton* when deciding its two ministerial exception cases, as the losing parties leaned heavily on it in their briefs. *See* Br. for Resp'ts, *Our Lady of Guadalupe*, 140 S. Ct. 2049; Br. for Fed. Resp't,

Hosanna-Tabor, 565 U.S. 171,; Brief for Resp't Cheryl Perich, *Hosanna-Tabor*, 565 U.S. 171. Most notably, in briefing *Our Lady of Guadalupe*, respondents referenced the Supreme Court's *Dayton* decision so many times (nearly twenty) that their Table of Authorities cited the decision as *"passim."* Br. for Resp't at vii, *Our Lady of Guadalupe*.

Although respondents in those cases (and the panel majority here) believed *Dayton* controlled, neither the seven Justices in the *Our Lady of Guadalupe* majority nor the two in the dissent even cited it. Similarly, in *Hosanna-Tabor*, a unanimous Court ruled without citing *Dayton.* And not a single Justice alluded to *Dayton* during oral arguments. *See* Tr. of Oral Arg., *Our Lady of Guadalupe*; Tr. of Oral Arg., *Hosanna-Tabor*.[2]

The Supreme Court understandably found *Dayton* irrelevant because it was a *Younger* abstention case. While the underlying state proceedings involved a teacher's allegation of employment discrimination by a religious school, *Dayton*, 477 U.S. at 621, the question in the federal case centered on whether the district court should abstain from entertaining the school's request for an injunction. *See id.* at 623 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). Holding that the district court

[2] Interestingly, just as respondents' brief in *Our Lady of Guadalupe* relied on *Dayton* to the point that it merited a "*passim*" reference, so also both respondents' briefs in *Hosanna-Tabor* made "*passim*" references to *Employment Division v. Smith*, 494 U.S. 872 (1990). Br. for Fed. Resp't at v, *Hosanna-Tabor*; Br. for Resp't Perich at vi, *Hosanna-Tabor*. However, despite thorough briefing, neither *Hosanna-Tabor* nor *Our Lady of Guadalupe* looked to the *Smith* standard in defining the ministerial exception. *See* Pet. for Rehearing *En Banc* 17, *Demkovich*. Nevertheless, just as the panel majority erroneously found losing arguments based on *Dayton* helpful, so too it found losing arguments based on *Smith* instructive. *See Demkovich*, 2020 U.S. App. LEXIS 27653, at *37–38 (finding "guidance" (citing *Smith*, 494 U.S. at 878–79)).

should have abstained from considering the First Amendment questions, *id.* at 625, the Supreme Court itself declined to reach them, leaving the constitutional questions for the state proceedings, *id.* at 628 ("We . . . have no reason to doubt that Dayton will receive adequate opportunity [in the state proceedings] to raise its constitutional claims."). The Court gave "no weight" to the religious employer's beliefs, *Demkovich*, 2020 U.S. App. LEXIS 27653, at *32–33 (characterizing *Dayton*), simply because they were not pertinent to *Younger*'s assessment of comity and federalism.

Finally, the panel majority ignores the scope of *Hosanna-Tabor*'s holding by relying on *dicta* in *Dayton* as "signal[ing] that an investigation of such an allegation of discrimination does not threaten unconstitutional entanglement to the extent that the investigation must be shut down as it begins." *Demkovich*, 2020 U.S. App. LEXIS 27653, at *33; *cf.* Br. for Fed. Resp't 40, *Hosanna-Tabor*. Yet several years earlier, in addressing a labor dispute, the Court had held, "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)). *Hosanna-Tabor* cleared up any confusion *Dayton*'s *dicta* may have created.[3] There, the Supreme Court flatly rejected this precise argument, stating:

[3] *Dayton* has not confused other courts, as none have applied it to define the contours of the ministerial exception. In contrast, courts of appeal, including this one, have often referenced *NLRB v. Catholic Bishop* in defining the ministerial exception. *See, e.g.*, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038–39 (7th Cir. 2006) (quoting *NLRB v. Catholic Bishop* as "pertinent"), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S.

> [Respondents] suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. *That suggestion misses the point of the ministerial exception.* The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone.

Hosanna-Tabor, 565 U.S. at 194–95 (emphasis added; internal quotes and citation omitted).

The question of *Dayton*'s relevance to the scope of the ministerial exception has been asked and answered—twice. By finding "guidance" in a *Younger* abstention decision rather than following the Supreme Court's clear directives in its more recent ministerial exception cases, the panel majority seemingly also "misses the point of the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 194–95.

171; *cf. Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) ("[C]ivil court review of ecclesiastical decisions . . . are in themselves an 'extensive inquiry' into religious law and practice . . . . [Therefore] Young's argument, that Title VII may be applied to decisions by churches affecting the employment of their clergy, is fruitless.").

Similarly, several courts of appeals have echoed *NLRB v. Catholic Bishop*'s warning that discovery and litigation themselves create excessive entanglement. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1245 (10th Cir. 2010) (investigation into hostile work environment claim would have coercive effect, violating First Amendment); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466–47 (D.C. Cir. 1996) (EEOC investigation and litigation would constitute excessive entanglement); *Combs v. Central Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (investigating ministers' employment discrimination claims would "necessarily intrude into church governance in a manner that would be inherently coercive"); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement. . . .").

II. The *Demkovich* majority repeatedly applied a balancing test, even though the Supreme Court twice rejected balancing in the ministerial exception context, concluding that the First Amendment itself "has struck the balance" in favor of religious autonomy.

The panel majority flouts Supreme Court precedent by eight times referring to the importance of balancing the constitutional protection for religious freedom with other government interests. For example, the panel referenced courts' "long history of balancing and compromising to protect religious freedom while enforcing other important legal rights." *Demkovich*, 2020 U.S. App. LEXIS 27653, at *2.[4] However, the Supreme Court has neither "balanced" nor "compromised" in granting broad protection to the selection *and* supervision of ministerial employees. *See, e.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2055, 2060–61. Far from charting a course for lower courts to wrestle with competing interests, the *only* time *Hosanna-Tabor*'s 9-0 opinion used the word "balance" was to make this emphatic assertion: "*[T]he First Amendment has struck the balance for us.* The church must be free to choose those who will guide it on its way." *Hosanna-Tabor*, 565 U.S. at 196 (emphasis added). *Our Lady of Guadalupe* did not use the word "balance" but similarly affirmed, "[J]udicial intervention into disputes between [a religious employer] and [a ministerial employee] threatens the [religious organization's] independence in a way that the First Amendment does not allow." *Our Lady of Guadalupe*, 140 S. Ct. at 2069.

[4] *See also id.* ("history of balance and compromise"); *id.* at *3 ("The right balance"); *id.* ("managed in a balanced way"); *id.* at *26 ("careful balancing"); *id.* at *30 ("manage a balance"); *id.* at *38 ("strike sensible balances" (citation omitted)); *id.* at *39 ("by balancing First Amendment rights with the employee's rights and the government's interest").

A review of *Hosanna-Tabor*'s oral argument supports the understanding that the Supreme Court has unequivocally rejected "balancing" in this context. There, respondents conceded that the ministerial exception protected the Catholic Church's decision to refuse to hire a woman as a priest; however, they argued that it did not prevent inquiry into the Lutheran school's application of its doctrine governing internal dispute resolution, suggesting that retaliation claims should be treated differently than discrimination claims. *See, e.g.*, Tr. of Oral Arg. 32:15–34:21, *Hosanna-Tabor* (Solicitor General explaining, "[T]he interests in this case are quite different. . . . [T]here is an important distinction to be made between the government's general interest in eradicating discrimination from the workplace and the government's interest in ensuring that individuals are not chilled from coming to civil authorities with reports about civil wrongs."). During oral argument the Justices pressed both the EEOC and the teacher's attorney as to why one religious doctrine was more important than another and why the government had a more compelling interest in one instance than another. *See id.* at 34:23–25 (Justice Kagan querying, "So, are you willing to accept the ministerial exception for substantive discrimination claims, just not for retaliation claims?"); *id.* at 40:10–13 (Justice Breyer pondering whether "it's more important to let people go to court to sue about sex discrimination than it is for a woman to get a job. I can't say that one way or the other."). After considering respondents' equivocal responses, the Supreme Court unanimously refused to favor some religious beliefs over others or some Title VII claims over others

and instead granted broad protections for religious autonomy through the ministerial exception.

Questions similar to those asked respondents' in *Hosanna-Tabor* arise here: Why is a church's autonomy to hire and fire ministerial employees more protected than its right to supervise those same employees? Why is the risk of excessive judicial entanglement less in investigating and adjudicating intangible employment actions of ministerial employees than tangible employment actions? Because, in the words of Justice Breyer, courts "can't say that one way or another," *id.*, the ministerial exception must apply in both contexts. Whether a Title VII claim is pled as discriminatory hiring, a retaliatory action, or a hostile work environment claim, the First Amendment simply "does not tolerate" judicial review of the way a religious organization "select[s] and supervis[es]" its ministerial employees. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.

CONCLUSION

During the oral argument for *Our Lady of Guadalupe*, counsel for the religious schools observed: "If Respondent's arguments give some members of the Court *deja vu* all over again, that is because Respondents have recycled many of the arguments the Court unanimously rejected eight years ago in *Hosanna-Tabor*." Tr. of Oral Arg. at 5:24–6:3, *Our Lady of Guadalupe Sch.* The same could be said here, as the panel majority advances arguments that failed not only in *Hosanna-Tabor* but again in *Our Lady of Guadalupe.* Because the panel repeatedly relied on misguided arguments opposed to recent Supreme Court precedent, the Court should grant Appellants' petition for rehearing *en banc.*

Respectfully submitted,

Oct. 13, 2020

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 29 because this brief contains 2,536 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface 12-point Century font using Microsoft Word.

Oct. 13, 2020

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on Oct. 13, 2020, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Oct. 13, 2020

/s/ *Kelly J. Shackelford*
KELLY J. SHACKELFORD
Counsel of Record
MICHAEL D. BERRY
STEPHANIE N. TAUB
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
(972) 941-4444
kshackelford@firstliberty.org

Attorneys for Amici Curiae