IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-2142

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 Norther District of Illinois, No. 1:16-cv-11576,
The Honorable Edmund E. Chang, Judge

AMICUS BRIEF OF INDIANA AND 5 OTHER STATES IN SUPPORT OF PETITION FOR REHEARING EN BANC

CURTIS T. HILL, Jr.
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

KIAN J. HUDSON
Deputy Solicitor General

JULIA C. PAYNE
Deputy Attorney General

Counsel for Defendants/Appellants

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

INTEREST OF AMICI STATES

The States of Indiana, Louisiana, Mississippi, Nebraska, Oklahoma, and Texas respectfully submit this brief in support of Appellants' petition for rehearing en banc. Amici States have a significant interest in maintaining a clear, neutral, and broadly applicable standard for determining when the broad immunity protections of the First Amendment's ministerial exception apply to employment discrimination claims. States are asked to step into disputes between religious institutions and their employees in two ways: (1) through the investigation, and sometimes administrative adjudication, of employment discrimination complaints by state civil rights agencies, and (2) through adjudication and disposition of discrimination lawsuits in state court systems. Amici States seek to avoid entanglement in religious affairs, including the doctrinal inquiry required to decide whether a religious employer has created a hostile working environment. Because the panel majority's approach compels courts to wade into religious affairs, the amici States respectfully urge the Court to reject that rule and treat the ministerial exception as a neutral, objective, and easily applied litigation immunity, not merely a defense to liability.

SUMMARY OF THE ARGUMENT

Preventing judicial entanglements in religious disputes is a fundamental tenet of United States Law. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049 (2020). The First Amendment "protect[s] the[] autonomy [of religious institutions] with respect to internal management decisions that are essential to the institution's central mission." *Id.* at 2060. "By forbidding the 'establishment of religion'

and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012). Thus, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id*. By extension, civil courts lack authority to hear matters of religious governance: "[T]he First . . . Amendment[] permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government," and "the Constitution requires that civil courts accept their decisions as binding upon them." *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*, 426 U.S. 696, 724–25 (1976).

Courts have protected against improper entanglements through the application of the church autonomy doctrine and its ministerial exception litigation immunity. The ministerial exception precludes courts from questioning whether the motivation for an employment action was religious belief or secular animus, as "the mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., joined by Kagan, J., concurring). Requiring a church to justify its ministerial employment decisions would necessarily entail an unconstitutional entanglement by "calling witnesses to testify about the importance and priority of ... religious doctrine ... with a civil factfinder sitting in

ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.*

As a litigation immunity, the ministerial exception safeguards not merely employee selection and dismissal, but also the manner in which churches *supervise and control* their employees, which is "at the core of [the religious organization's] mission." *Our Lady*, 140 S. Ct. at 2055; *see also Hosanna-Tabor*, 565 U.S. at 194–95 (holding that churches have "the authority to select *and control* who will minister to the faithful" (emphasis added)). The First Amendment accordingly prohibits courts from reviewing *how* religious organizations "discharge those responsibilities." *Our Lady*, 140 S. Ct. at 2055. The panel majority's approach ignores *Our Lady*, which applies the ministerial exception to supervision and control as well as "tangible" employment actions, such as termination.

ARGUMENT

The Ministerial Exception Affords Immunity from Suit that Would Be Threatened Under the Panel's "Tangible Employment Action" Standard

The First Amendment's ministerial exception from employer liability must properly be understood as an immunity from litigation, not merely a defense to liability, such that beneficiaries may avoid altogether the exposure and indignity of judicial proceedings. The panel majority, however, rejected that proposition by claiming the court could manage the risk of entanglement not by recognizing the church's autonomy, but by "avoiding substantive decisions on issues of religious doctrine or belief and by balancing First Amendment rights with the employee's rights and the government's interest in regulating employment discrimination." *Demkovich v. St. Andrew*

the Apostle Par., No. 19-2142, 2020 U.S. App. LEXIS 27653, at *34 (7th Cir. Aug. 31, 2020). That view is built on the faulty idea that the ministerial exception tolerates an extensive judicial inquiry necessary to distinguish religious institutions' protected and unprotected employment actions. The full Court should correct that fundamentally erroneous understanding.

1. The ministerial exception exists because, under the long-established church autonomy doctrine, religious organizations have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Above all, "[r]eligious questions are to be answered by religious bodies." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013). Critically, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of [a religious body's] decisions could appeal to the secular courts and have them reversed." *Kedroff,* 344 U.S. at 114–15.

Accordingly, courts are secular agencies with no authority over matters of "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). Permitting investigation and litigation of church governance and doctrine plainly constitutes judicial "entanglement" with religion. It constitutes "intrusive government participation in, *supervision of*, or inquiry into religious affairs." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000) (emphasis added).

When civil courts decide matters of church government, faith, or doctrine they "inhibit[]the free development of religious doctrine and [implicate] secular interests in matters of purely ecclesiastical concern." *Milivojevich*, 426 U.S. at 710. Civil courts and state agencies must assiduously avoid the temptation to engage in cases that call upon them to review questions of church doctrine and governance so that they remain "completely secular in operation." *Jones v. Wolf*, 443 U.S. 595, 603 (1979). Steering clear of such cases "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id*. Even attempting to determine independently a division of the secular and inherently religious matters amidst litigation violates church autonomy doctrine. *See Whole Woman's Health v. Smith,* 896 F.3d 362, 373 (5th Cir. 2018) ("involvement in attempting to parse the internal communications [of the Church] and discern which are 'facts' and which are 'religious' seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause.").

Where a lawsuit against a church threatens church autonomy, therefore, the result must be judgment for the defendant, period. *See Hosanna-Tabor*, 565 U.S. at 194 (holding that "the First Amendment requires dismissal" of lawsuits falling within the ministerial exception). Merely ending the lawsuit after a period of extensive discovery and judicial inquiry is insufficient, for "the very process of inquiry leading to findings and conclusions" presents the possibility of "imping[ing] on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 502

(1979); *see also Whole Woman's Health v. Smith*, 896 F.3d at 373 (holding that discovery of internal church documents not only interferes with a church's "decision-making processes" but may "expose[] those processes to an opponent and will induce similar ongoing intrusions against religious bodies' self-government.").

Other courts have recognized that church autonomy doctrine properly functions as litigation immunity. *See McCarthy v. Fuller*, 714 F.3d at 975 (equating the church's immunity to "official immunity" or "immunity from the travails of a trial and not just from an adverse judgment"); *Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (church autonomy renders defendant "immune not only from liability, but also 'from the burdens of defending the action.'" (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006)); *United Methodist Church, Balt. Annual Conf. v. White*, 571 A.2d 790, 792 (D.C. 1990) (church autonomy "grant[s] churches an immunity from civil discovery and trial" (citing *N.L.R.B.*,440 U.S. at 503)).

If a Church must litigate a case to final judgment before the judiciary will respect its First Amendment immunity, it will, in effect, lose it. "[I]mmunity entitles its possessor to be 'free from the burdens of defending the action, not merely . . . from liability.'" *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009) (quoting *Rowan Cty.,* 201 S.W.3d at 474). Consequently, "such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Id.*; *see also Bryce v.*

Episcopal Church in the Diocese of Colo., 289 F.3d 648, 654 (10th Cir. 2002) (comparing ministerial exception to qualified immunity and holding that it is a threshold question); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) (ruling that additional discovery was impermissible since, once it became clear that resolving claims would cause entanglement, allowing discovery would only worsen entanglement).

2. Previously, this Court respected the resulting need for categorical protection when it held in *Alicea–Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003), that "[t]he 'ministerial exception' applies without regard to the type of claims being brought." While that case did not expressly address whether the church autonomy doctrine constitutes a litigation immunity, its bright-line standard effectively applies the doctrine like an immunity. The bright line rule applied in *Alicea-Hernandez* applied a standard that did not even permit investigation into a claim, regardless of the claim's nature. *Id.*; *see also Young v. N. Ill. Conf. of the United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (holding that "civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are in themselves an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment"). Here, however, the panel majority purported to distinguish *Alicea-Hernandez* because that case did not include a hostile environment claim, and, with such a claim before it here, deemed it appropriate to examine both the actions and motivations of religious employers. *See Demkovich,* 2020 U.S. App. LEXIS 27653, at *27–35.

Such an examination, however, "misses the point of the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 194. "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 . . . is the church's alone." *Id*. at 194–95. This is true even where courts would normally determine the treatment improper; under the ministerial exception "an employer need not cite or possess a religious reason at all." *Our Lady*, 140 S. Ct. at 2072 (Sotomayor, J., joined by Ginsburg, J. dissenting).

Yet, having dismissed *Alicea-Hernandez*—the Seventh Circuit precedent that most directly applies here—the panel turned instead to the Ninth Circuit's decision in *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999), which said that only "tangible" employment actions, such as hiring and firing, qualified for the ministerial exception, not hostile work environment claims. Under that standard, the panel held that Reverend Dada's comments about Demkovich's sexuality and health problems were not "tangible" employment actions protected by the ministerial exception.

That approach invites judicial entanglement with religious practice and doctrine any time an employee can plead creatively enough to exclude "tangible employment actions." As this case illustrates, even a terminated minister need only allege humiliation and degradation during employment (regardless of termination) to make a facially valid claim. Indeed, the panel majority creates a paradoxical world where

the ministerial employee could not bring suit based on termination, but could do so for anything said in a termination or disciplinary meeting.

Permitting investigation of how and why churches supervise ministerial employees implicates questions of church doctrine, as it allows courts to evaluate both how churches encourage ministerial employees to conform to orthodoxy and the importance of doing so. To demonstrate a hostile working environment, a plaintiff must prove that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)). A court must therefore examine the nature of the working environment, which, for the ministerial employees of a religious institution, includes observance and adherence to religious doctrine. A church may view some sexual activities as sinful and may police adherence to that doctrine by asking ministerial employees whether they engage in such activities. Under the panel majority's view, however, such questions would constitute actionable workplace harassment and thereby undermine a church's beliefs and autonomy.

Ultimately, "courts are not equipped to say whether a religious employer's communications with its ministers inhibit or improve their job performance, and it is not for courts to regulate how a church communicates with its ministers to further its religious objectives." *Demkovich,* 2020 U.S. App. LEXIS 27653, at *43 (Flaum, J. dissenting) (citing *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989)).

As Judge Flaum observed in his panel dissent, intrusions into such internal processes necessarily violate "[t]he Church's First Amendment right to select and control its ministers includ[ing] the ability to supervise, manage, and communicate with them free from government interference." *Demkovich,* 2020 U.S. App. LEXIS 27653, at *41. Furthermore, "a categorical approach 'provides greater clarity in the exception's application and avoids the kind of arbitrary and confusing application the [panel majority's] approach has created.'" *Id.* at 40 (quoting *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010)).

A categorical approach also respects this Court's precedent in *Alicea-Hernandez*, where it broadly stated that "in the context of Title VII claims brought against a church by its ministers 'the balance weighs in favor of free exercise of religion.'" 320 F.3d at 703 (quoting *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th. Cir. 1985). The panel majority, in contrast, "will 'gravely infringe' on the rights of religious employers more generally 'to select, manage, and discipline their clergy free from government control and scrutiny.'" *Demkovich,* 2020 U.S. App. LEXIS 27653, at *44 (Flaum, J. dissenting) (quoting *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 803–04 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc)). The result will be a chilling effect on the selection and management of ministers. *Id.* Only the broad immunity of the ministerial exception ensures that a church maintains, through the selection and control of ministers, the "freedom to speak in its own voice, both to its own members and to the outside world." *Hosanna–Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring).

A religious organization's supervision of employees implicates the same matters of faith and doctrine that prohibit interference with hiring and firing ministerial employees. This Court should grant the Archdiocese the broad immunity protections necessary to avoid judicial entanglements in religion.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

CURTIS T. HILL, Jr.
Attorney General of Indiana

s/ Thomas M. Fisher
THOMAS M. FISHER
Solicitor General

KIAN J. HUDSON
Deputy Solicitor General

JULIA C. PAYNE
Deputy Attorney General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

ADDITIONAL COUNSEL

JEFF LANDRY
Attorney General
State of Louisiana

MIKE HUNTER
Attorney General
State of Oklahoma

LYNN FITCH
Attorney General
State of Mississippi

KEN PAXTON
Attorney General
State of Texas

DOUG PETERSON
Attorney General
State of Nebraska

CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 2,596 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Thomas M. Fisher

Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov