

No. 19-2142

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 the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 1:16-cv-11576
The Honorable Judge Edmond E. Chang

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CATHOLIC
CONFERENCES OF ILLINOIS, INDIANA, AND WISCONSIN IN SUP-
PORT OF APPELLANTS' PETITION FOR REHEARING *EN BANC***

Pursuant to Federal Rule of Appellate Procedure 29(b) the Catholic Conference of Illinois, the Indiana Catholic Conference, and the Wisconsin Catholic Conference (collectively, the "Catholic Conferences") respectfully request leave to file the accompanying brief as *amici curiae* in support of Appellant's Petition for Rehearing *En Banc*.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae are the three Catholic Conferences representing the Roman Catholic dioceses throughout the Seventh Circuit in matters of public policy.

The Catholic Conference of Illinois serves as the public policy voice of the Illinois bishops and lay Catholics in Illinois' six Catholic dioceses, consisting of approximately 949 parishes, 18 missions, 2,215 priests, 260 brothers, 2,480

sisters, 1,372 permanent deacons, 46 Catholic hospitals, 21 health care centers, 11 colleges and universities, 65 high schools, 359 elementary schools, and 527 Catholic cemeteries. It interacts with all elements of government to promote and defend the interests of the Church.

The Indiana Catholic Conference is the statewide coordinating body for the five Catholic dioceses in Indiana. It serves as the official spokesperson for the bishops and Catholic faithful regarding state and national matters; represents the Church where common public policy interests exist with religious and civic, social, and governmental units; and by serves as liaison between the Catholic Church in Indiana and national Catholic groups in areas of common public policy interests.

The Wisconsin Catholic Conference, led by the Catholic bishops of Wisconsin, is the public policy voice of the Catholic Church throughout the state. It offers studied positions on legislation and other matters related to the interests and teachings of the Catholic Church. The organization represents the over 1,800 priests and deacons ministering in hundreds of Wisconsin parishes, nearly 280 Catholic elementary and secondary schools, and numerous Catholic pastoral, charitable, and educational ministries across Wisconsin.

**REASONS THE BRIEF OF *AMICI CURIAE*
IS DESIRABLE AND RELEVANT TO
THE DISPOSITION OF THE CASE**

In two important respects, the Catholic Conferences 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). The Catholic Conferences’ members’ broad and deep experience governing their respective dioceses and supervising countless bishops, priests, and other ministers, gives the

Catholic Conferences a unique vantage point from which to “highlight[] factual, historical, or legal nuance glossed over by the parties,” and “provid[e] practical perspectives on the consequences of potential outcomes.” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3544, Slip. Op. at 3–4, 2020 U.S. App. LEXIS 31380, at *4–5 (7th Cir., Sept. 24, 2020) (Scudder, J., in chambers).

Specifically, the Catholic Conferences’ proposed Brief *Amici Curiae* offers nuanced historical, factual, legal, and practical perspectives on:

- How the panel’s ruling affects the Catholic Conferences’ members internal governance in light of the Catholic Church’s history, tradition, and structure, as expressed in the *Code of Canon Law*;
- The extent to which the type of claims permitted by the panel’s ruling will chill the Catholic Conferences’ members’ ability to profess and teach the Catholic faith and its moral doctrines, as set forth in the Catechism of the Catholic Church and other doctrinal statements; and
- How the panel’s ruling departs not only from the Supreme Court’s rulings regarding the ministerial exceptions but also other well-established immunities regarding statements made in the course of ecclesial disciplinary proceedings.

Accordingly, pursuant to Rule 29, the Conferences respectfully request leave to file the accompanying amici curiae brief in support of Appellees’ Petition for Rehearing *En Banc*. If such leave is granted, the Conferences request that the accompanying brief amici curiae be considered filed as the date of this motion’s filing, October 13, 2020.

October 13, 2020

Respectfully submitted,

/s/ Stephen M. Judge

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Stephen M. Judge

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing Motion 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.

Dated: October 13, 2020

/s/ Stephen M. Judge

Stephen M. Judge

No. 19-2142

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**BRIEF OF *AMICI CURIAE* CATHOLIC CONFERENCES OF ILLINOIS,
INDIANA, AND WISCONSIN IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING *EN BANC***

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

Short Caption: Sandor Demkovich v. St.Andrew the Apostle Parish, Calumet City, 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.

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(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): Amici Curiae Catholic Conference of Illinois, Indiana Catholic Conference, and Wisconsin Catholic Conference

(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: SouthBank Legal: LaDue Curran Kuehn

(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:

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

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

Attorney's Signature: /s/Stephen M. Judge Date: October 13, 2020

Attorney's Printed Name: Stephen M. Judge

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

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

Attorney's Signature: /s/Paul Edgar Harold Date: October 13, 2020

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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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INTEREST OF AMICI CURIAE

Amici curiae are the three Catholic Conferences representing the Roman Catholic dioceses throughout the Seventh Circuit in matters of public policy. They write to aid the Court in understanding the practical consequences of the panel's decision on Catholic dioceses and the bishops, priests, and other ministers in this Circuit, and to respectfully urge the Court to grant Appellant's petition for *en banc* rehearing.

The Catholic Conference of Illinois, the Indiana Catholic Conference, and the Wisconsin Catholic Conference serve as the public policy voices the Roman Catholic Church in their respective states. Together, they represent bishops and lay Catholics in Illinois' six Catholic dioceses, Indiana's five Catholic dioceses, and Wisconsin's five Catholic dioceses, consisting of over a thousand parishes, thousands of priests and deacons, hundreds of Catholic schools, and hundreds of other Catholic pastoral, charitable, and educational ministries throughout the Seventh Circuit. The Conferences regularly interact with all aspects of government and offer studied positions on legislation and other matters related to the interests and teachings of the Catholic Church. The Conferences regularly file amicus briefs and have approved the filing of this brief.¹

ARGUMENT

A. The panel's ruling interferes with the Catholic Church's autonomy to supervise and control ministers.

The Supreme Court's recent decisions recognize that the ministerial exception is essential to preserving churches' ability not only to select but to control and supervise their ministers. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565

¹ No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

U.S. 171 (2012), and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). See also *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1120 (7th Cir. 1977) (noting that “the position of the Court . . . is a positive ‘hands off’ stricture” when it comes to “matter[s] which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them” (quoting *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 714 (1976)). By opening the door to hostile work environment claims, the panel undermines churches’ autonomy to select the means to supervise and control their ministers.

1. *The employment relationship between Catholic ministers is deeply intertwined with religious formation and pastoral care.*

Within the Catholic Church, the panel’s decision has the potential to upend highly developed internal governance mechanisms rooted in centuries of tradition and practical experience. At the parish level, the pastor is the hierarchical superior.² The pastor “carries out the functions of teaching, sanctifying, and governing” for his parish, with the cooperation of other priests, deacons, and laity,³ and is thus ultimately responsible for the discipline, guidance, instruction, and expression of Catholic teaching to subordinate ministers within the parish. Permitting subordinate ministers to sue for a perceived hostile work environment directly impinges on a pastor’s freedom to choose the appropriate means of discipline and guidance and inevitably entangles courts in examining and evaluating the delicate balance that every pastor must maintain between pastoral care for his subordinates and advancing the Church’s mission in an effective manner.

² *Code of Canon Law (“CIC”)*, c. 515, at https://www.vatican.va/archive/ENG1104/_INDEX.HTM.

³ *Id.*, c. 519.

The potential intrusion into the relationship between bishops and their clergy is even greater. From the moment he begins formation, a Catholic priest establishes a filial bond with his bishop, to whom the priest solemnly promises respect and obedience at his ordination. For his part, the bishop must attend to his priests “with special solicitude,” and is “to protect their rights and take care that they correctly fulfill the obligations proper to their state” so that “the means and institutions which they need to foster spiritual and intellectual life are available to them.”⁴ It is in the context of this paternal-filial relationship that priests are formed, instructed, and guided to assist their bishop as co-workers in proclaiming the Gospel.⁵

2. *Hostile work environment claims will intrude on church governance.*

Given this familial relationship among the bishops, priests, deacons, and other ministers of a diocese, it is not difficult to see how disruptive and intrusive employment discrimination claims alleging hostile work environments may be to a bishop’s or pastor’s delicate task of disciplining, guiding, and instructing the members of his flock who assist him as subordinate ministers. For example, imagine if a parish could be sued because a 68-year-old Polish-American music director is offended because the new pastor restricts certain ethnic musical repertoire, removes job responsibilities, cuts the music budget, or otherwise offends sensibilities following the consolidation of an ethnically Polish parish with another urban parish. *Cf. Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568 (7th Cir. 2019). Or consider whether a white auxiliary bishop may sue a Latino archbishop because he believes that his suburban resources are being unfairly redirected to support ministries dedicated to Spanish-language outreach in urban parishes. *Cf. Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 700 (7th Cir. 2003). Such claims would interfere with difficult internal decisions

⁴ *CIC*, c. 384.

⁵ *Id.*, c. 757.

and undermine the Church's ability to supervise and control its ministers and allocate its resources.

Moreover, a key purpose of hostile work environment claims is to encourage employers to implement anti-harassment policies and training to protect themselves from vicarious liability. How should trainings under such policies address questions of sexual orientation, same-sex relationships, or gender identity, or instruct Catholic ministers whether or how to address difficult scriptural passages such as St. Paul's teaching regarding homosexual acts in Romans 1:26–27 or related teachings from Catholic catechisms?

In each case, the panel's ruling would force bishop or pastor to take into account the risk of an employment discrimination claim when deciding how to supervise, control, or train subordinate ministers. And if such a lawsuit is filed, district courts will inevitably become entangled in policing the line between legitimate discipline, guidance, or instruction and what crosses over to harassment or a hostile work environment. "The types of investigations a court would be required to conduct in deciding" such claims "could only produce by their coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). The panel's note that issues of entanglement can be resolved on a case-by-case basis is little comfort, *see Slip. Op.* at 34, for as the Supreme Court has observed "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

The panel reasoned that churches retain ample powers to supervise and control ministers because churches may select and terminate ministers without scrutiny. *See Slip Op.* at 17–18, 20–21. But the panel overlooks the pastoral nature of relationships among bishops, priests, and other ministers. A bishop or parish pastor is not just a

supervisor but a teacher and shepherd, deeply interested in the physical or spiritual condition of the subordinate ministers he already has. Moreover, in the case of ordained clergy and pastors, in particular, a bishop cannot simply “fire” the minister: Canon Law provides rigorous procedures that a bishop must follow to remove a pastor from a parish church and a complex penal code governing canonical penalties such as the removal a priest or a deacon from ministry.⁶ Far preferable is that the minister regain his health, grow in virtue, adhere to Catholic moral code, and continue his ministry; in a church attempting to live up to Jesus Christ’s example of reconciliation and forgiveness, termination is a matter of last resort.

3. *The panel’s ruling will entangle the courts in internal church affairs.*

Finally, although the panel does not rule out the possibility that the risk of entanglement may be too great with certain ministers or certain claims, the ruling leaves far too much for courts to figure out by trial and error. *See Slip Op.* at 9, 29–30, 34–35. The panel points to egregious cases of racially and sexually hostile work environments, *see Slip Op.* at 24–25, but the reality is that the vast majority of hostile work environment claims look nothing like these cases. For example, in 2019 alone, the EEOC found no reasonable cause in at least 17,000 of the 23,000 charges of sex discrimination leveled at employers. U.S. EEOC, Sex-Based Charges (Charges filed with EEOC) FY 1997 - FY 2019, *available at* <https://www.eeoc.gov/statistics/sex-based-charges-charges-filed-eeoc-fy-1997-fy-2019> (last visited Oct. 12, 2020). As these statistics make clear, it is manifestly easy to allege a hostile work environment claim and, as the dissent notes, evade the ministerial exception by “artful pleading.” *Slip Op.* at 39.

In attempting to sift through the many unmeritorious claims to find the few grievous claims the panel posits, district courts would necessarily have to evaluate how

⁶ *Id.*, cc. 1740–52; cc. 1400–1731.

the employment discrimination laws do or do not apply to various ministers or to various conditions of employment, inevitably forcing those courts to supervise churches' determinations of what is "necessary" to control ministers—thus inviting the very sort of "gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy" that the ministerial exception seeks to avoid. *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1245 (10th Cir. 2010) (quoting *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 976 (9th Cir. 2004) (Trott, J., dissenting)). It is this "very process of inquiry," and "not only the conclusions that may be reached" that "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); see also *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that EEOC investigation would "both burden . . . [the] right of free exercise and excessively entangle the Government in religion.").

B. The panel's ruling would chill religious teaching and expression both within ministerial relationships and in public.

Even beyond entangling the courts in church governance, training, and discipline, the risk of employment discrimination claims on issues that touch on Catholic moral teaching would transgress core First Amendment protections on the Church's free exercise of religion and chill its ability to boldly proclaim its moral teachings and pursue its religious mission in the world. Bishops and priests should not have to weigh the risk of legal claims when deciding how to express Catholic teaching, either in public sermons or writing, or in private teaching, counseling, and discipline.

These concerns are not simply hypothetical. Like this case, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017), and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), highlight the prevalence of discrimination claims related to issues of

same-sex relationships and gender identity. Bishops and pastors already face a delicate task of balancing the task of proclaiming Catholic moral doctrine regarding human sexuality and marriage with the obligation to “accept[] with respect, compassion, and sensitivity” those persons who have “deep-seated homosexual tendencies.”⁷ There is perhaps no better example than the chilling effect of the panel’s ruling than the case that it permits to proceed here: if a Catholic priest can be sued by a music minister (or a bishop by his chancellor) for stating, in a manner he rightly or wrongly deems pastorally appropriate, that same-sex marriage violates Catholic teaching, than the Church’s free expression of any controversial teachings may be subject to challenge by any offended employee.

Moreover, questions of sexual morality are far from the only issues subject to the panel’s ruling. The need to balance Catholic teachings condemning racism with the pastoral needs of various racial and ethnic religious communities,⁸ affirming the rights of migrants and the universal brotherhood of humanity against legitimate efforts to protect and advance the common good of one’s own political community,⁹ and championing the rights of the disabled against the often rigorous mental and physical demands of Catholic ministry¹⁰—not to mention the teachings affirming the dignity of women with limitations on certain ministerial roles based on sex¹¹—call for sensi-

⁷ *Catechism of Catholic Church* (“CCC”) ¶¶ 2357, 2358, 2360–62 (2d ed. 2000).

⁸ CCC ¶ 1935; Vatican II, *Gaudium et Spes, Pastoral Constitution on the Church in the Modern World* (“GS”) ¶ 29 (1965), at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

⁹ CCC ¶ 2241; GS ¶ 66.

¹⁰ See United States Conference of Catholic Bishops, *Pastoral Statement of U.S. Catholic Bishops on Persons with Disabilities* (1978).

¹¹ See John Paul II, *Mulieris Dignitatem* (1988), at http://www.vatican.va/content/john-paul-ii/en/apost_letters/1988/documents/hf_jp-ii_apl_19880815_mulieris-dignitatem.html; John Paul II *Ordinatio Sacerdotalis* (1994) at http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html.

tive pastoral judgment. Yet all also involve foreseeable clashes with statutory prohibitions on discrimination on the basis of race, sex, national origin, age, or disability. The shadow of hostile work environment lawsuits would inevitably become a consideration for where to draw that line, and when to speak out or remain silent.

C. Courts in other contexts have recognized the chilling effect of judicial intrusion into the clergy discipline process.

Adopting a bright-line rule prohibiting hostile work environment suits under employment laws would bring this Court's jurisprudence in line with court decision in other contexts recognizing that adjudicating matters of clergy discipline will inevitably chill the free exercise of religion. For example, courts have recognized an absolute privilege where plaintiffs have attempted to bring a defamation claim against ministers based on statements made during an ecclesial disciplinary procedure. *See, e.g., Stepek v. Doe*, 910 N.E.2d 655 (Ill. App. Ct. 2009); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002); *see also Yaggie v. Indiana–Kentucky Synod Evangelical Lutheran Church in Am.*, 860 F.Supp. 1194, 1199 (W.D.Ky.1994), *aff'd*, 64 F.3d 664 (6th Cir.1995) (noting “substantial federal authority” for declining jurisdiction over defamation claims against religious organizations).

Courts have found judicial intervention into such disputes to be “impermissible” because it “excessively inhibit[s] religious liberty.” *Yaggie*, 860 F. Supp. 1198. If defamation suits based on statements between church ministers were allowed, courts would need to decide matters going to the heart of church governance, such as “interpret[ing] canon law, apply[ing] church policies, assess[ing] [a minister's] fitness and reputation as a priest, and review[ing] decisions of the bishop.” *Hiles*, 773 N.E.2d at 937. Facing that type of judicial scrutiny, churches would face the hard choice between bending church law and policy to please the courts or risking the resulting civil liability—either way, the free exercise of religion would be curtailed. For this reason, courts have recognized the absolute immunity of churches to such suits, as well as in

suits raising similarly intrusive claims, such as slander, negligence, and conspiracy. *See, e.g., Hiles*, 773 N.E.2d. at 938; *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (rejecting sexual harassment claim under Title VII for statements made during internal ecclesiastical discipline). Similarly, the panel’s decision permitting hostile work environment employment discrimination claims would render the protections afforded by the ministerial exception and other similar privileges “meaningless.” *See Hiles*, 773 N.E.2d. at 937.

CONCLUSION

For these reasons, the Catholic Conferences respectfully urge the Court to grant appellants’ petition for rehearing *en banc*.

October 13, 2020

Respectfully submitted,

/s/ Stephen M. Judge

Paul Edgar Harold
Stephen M. Judge

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g) of the Federal Rules of Appellate Procedure, I certify that this Brief complies with the type-volume limitation of Rule 29(b)(4). This Brief contains 2,587 words, excluding the contents of those sections listed in Federal Rule of Appellate Procedure 32(f) as exempt from the word count. In submitting this certificate, I relied upon the word count of the word processing system (Microsoft Word for Mac v. 16.40) used to prepare the Brief. I performed the word count with the feature “include footnotes and endnotes” turned on.

I also certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5)–(6), as modified by Circuit Rule 32. This Brief has been prepared in 12-point Century Schoolbook, a proportionally-spaced font with serifs.

Dated: October 13, 2020

/s/ Stephen M. Judge
Stephen M. Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing Brief 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.

Dated: October 13, 2020

/s/ Stephen M. Judge

Stephen M. Judge