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 (CIV. NO. 16-11576)

MOTION FOR LEAVE TO FILE BRIEF OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE RIGHT REVEREND DEREK JONES, THE ASSEMBLIES OF GOD (USA), THE CHURCH OF GOD IN CHRIST, INC., JEWISH COALITION FOR RELIGIOUS LIBERTY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLANTS AND REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 29(b)(3), The Ethics and Religious Liberty Commission of the Southern Baptist Convention, the Right Reverend Derek Jones, The Assemblies of God (USA), The Church of God in Christ, Inc., Jewish Coalition for Religious Liberty, The Church of Jesus Christ of Latter-day Saints, The International Society for Krishna Consciousness, Inc., and The General Conference of Seventh-day Adventists respectfully request leave to file the accompanying brief as *amici curiae* in support of Defendants-Appellants and rehearing en banc. Counsel for Defendants-Appellants has consented to the filing of the *amici curiae* brief. Counsel for Plaintiff-Appellee does not consent to the filing of the *amici curiae* brief.

Amici represent a wide array of faith groups with members in the Seventh Circuit and throughout the rest of the United States and the world.

The Ethics and Religious Liberty Commission of the Southern Baptist Convention is an entity of the Southern Baptist Convention, an incorporated organization whose purpose is to provide a general organization for Baptists in the United States and its territories.

The Right Reverend Derek Jones is the Bishop of the Armed Forces and Chaplaincy for the Anglican Church in North America. The Anglican Communion is the third largest Christian faith communion in the world.

The Assemblies of God (USA) is a Pentecostal Christian denomination with more than 13,000 churches and over 3 million adherents. It is part of the World Assemblies of God Fellowship, which has more than 69 million adherents worldwide and is the world's largest Pentecostal denomination and fourth largest Christian fellowship.

The Church of God in Christ, Inc. is a Pentecostal Christian organization with more than 12,000 congregations in the United States and other congregations in over 100 countries worldwide.

Jewish Coalition for Religious Liberty is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith.

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The International Society for Krishna Consciousness, Inc. is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith, with approximately 600 temples worldwide including 50 in the United States.

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 23 million members. In the United States, the Church has more than 1.2 million members.

Although *amici* differ in their beliefs, structures, and faith practices, they share a commitment to preserving religious groups' ability to decide, without governmental interference, matters of governance, faith, and doctrine. Many of *amici*'s members could be subject to hostile-work-environment and other intangible employment claims as a result of the panel decision. *Amici* thus have a particular interest in the outcome of this case. Further, *amici* have extensive experience with cases involving religious-autonomy issues generally and the ministerial exception specifically. Many *amici* filed briefs supporting

application of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), as well as in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Amici present the Court with different perspectives on this case than do the parties. As a diverse coalition of faith groups, *amici* can "add value" to the Court's evaluation of the case by highlighting the spiritual and practical costs of authorizing ministers—*i.e.*, the key people whose job entails embodying a faith—to bring hostile-work-environment claims against religious groups. *Prairie Rivers Network v. Dynegy Midwest Gen., LLC*, No. 18-3644, slip op. at 3 (Oct. 2, 2020) (Scudder, J., in chambers). *Amici* provide tangible examples of the ways in which ministers' hostile-work-environment claims would interfere with myriad religious groups' right to self-governance and their ability to live out particular doctrinal teachings. So too, *amici*'s discussion of the intrusive nature and costs of hostile-work-environment litigation involving ministers would assist the Court in understanding the practical consequences the panel decision will have on a wide range of religious groups throughout the Seventh Circuit.

Amici also present the Court with unique analysis of the panel decision's disposition. In particular, *amici* address multiple ways in which the panel's conception of the ministerial exception conflicts with the Supreme Court's reasoning in a long line of religious-autonomy cases. This analysis will contribute to the Court's consideration by placing the panel decision in the broader context of the Supreme Court's Religion Clause cases.

For these reasons, *amici* respectfully request that the Court grant their motion for leave to file a brief in support of Defendants-Appellants and rehearing en banc and direct the Clerk to deem the accompanying brief properly filed.

October 13, 2020

Respectfully submitted,

/s/ Sarah M. Harris

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CERTIFICATE OF COMPLIANCE

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/s/ Sarah M. Harris
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I hereby certify that on October 13, 2020, the foregoing motion was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Counsel of record hereby furnishes 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 or amicus the attorney represents:

The Ethics and Religious Liberty Commission of the Southern Baptist Convention
The Right Reverend Derek Jones
The Assemblies of God (USA)
The Church of God in Christ, Inc.
Jewish Coalition for Religious Liberty
The Church of Jesus Christ of Latter-day Saints
The International Society for Krishna Consciousness, Inc.
The General Conference of Seventh-day Adventists

2) If such party or amicus is a corporation,

i) Its parent corporation, if any;
ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party

The amici have no parent corporations and issue no shares of stock.

3) The names of all law firms whose partners or associates have appeared for the amici in the case or are expected to appear for the amici in this Court:

Williams & Connolly LLP

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INTEREST OF *AMICI CURIAE*[*]

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

Jewish Coalition for Religious Liberty is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith.

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The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 23 million members. In the United States, the Church has more than 1.2 million members.

Amici share a fundamental interest in preserving the right of religious organizations to decide, free from state interference, matters of religious government, faith, and doctrine. *Amici* represent several distinct faith traditions, and can uniquely attest to how adjudication of ministers' hostile-work-environment claims would intrude on a range of religious belief systems and ecclesiastical structures.

SUMMARY OF ARGUMENT

The Supreme Court has long held that the Free Exercise and Establishment Clauses together "protect[] the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). One facet of that constitutional protection—the ministerial exception—precludes courts from subjecting religious groups to "laws governing the employment relationship between a religious institution and certain key employees." *Id.* That doctrine applies to those key employees (so-called "ministers") because their job entails exemplifying their faith and performing core religious duties. Judicial scrutiny of the employment relationship between a religious group and its ministers inevitably invites unconstitutional interference with religious groups' self-governance, no matter what kind of employment claim is involved.

The majority opinion upends that understanding by confining the ministerial exception to those employment decisions that courts consider "*necessary*" for religious groups to control to practice their faiths "[i]n terms of the Free Exercise Clause." Op. 17. Because the majority views religious groups' control over hiring, firing, and other tangible employment actions as "ample" for that end, the majority deemed the exception categorically inapplicable to ministers' challenges to intangible employment actions, including hostile-work-environment claims. Op. 1-3.

That decision cries out for en banc review. As petitioners note, no other court has espoused such a narrow test for the applicability of the ministerial exception, and the panel

split with other circuits in allowing courts to entertain ministers' hostile-work-environment claims. En Banc Pet. 11-14. Worse, by contravening Supreme Court precedent that protects the entire ministerial employment relationship from secular intrusions, the majority mandates extraordinary secular interference with core ecclesiastical judgments.

ARGUMENT

I. Supreme Court Precedent Forecloses the Majority's Approach to the Ministerial Exception

1. The majority's test for applying the ministerial exception is incompatible with the Supreme Court's explanation and application of that doctrine. To start, the Supreme Court has expressly rejected the majority's cramped conception of the ministerial exception as protecting only those employment actions a religious group "need[s]" to control consistent with the Free Exercise Clause. *See* Op. 17-18, 20-21. That narrow view of the ministerial exception "misses the point," because "[t]he purpose of the exception is not to safeguard a church's decision … only when it is made for a religious reason." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012). Even if religious groups take employment actions vis-à-vis their ministers for non-religious reasons, the ministerial exception applies. *Id.*

That categorical rule against judicial interference with ministerial relationships makes sense. "The [ministerial] exception … ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-95 (citation omitted). This broad principle vindicates "[b]oth Religion Clauses." *Id.* at 181. The ministerial exception vindicates the Free Exercise Clause by helping faith groups ensure that the key people entrusted with carrying out religious missions fulfil that

sacred task. Protecting religious autonomy also avoids Establishment Clause violations, by preventing secular authorities from using federal employment law to intrude on the inner workings of ecclesiastical employment. *Id.* at 189. Such intrusions arise "not only" from courts' "conclusions" regarding the lawfulness of religious groups' employment practices, "but also" from "the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). The majority's formulation thus disregards most of the constitutional equation.

2. The majority also misconceives of the ministerial exception as requiring a claim-by-claim inquiry into whether religious groups need leeway over particular types of employment actions to fulfill their ecclesiastical missions. *E.g.*, Op. 2, 3, 21-23. The Supreme Court instead treats the exception as prohibiting interference in the whole employment relationship between religious groups and their ministers. *Hosanna-Tabor* embraced the exception after explaining, "[s]ince the passage of Title VII … and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception' … that precludes application of such legislation to claims concerning the *employment relationship* between a religious institution and its ministers." 565 U.S. at 188 (emphasis added). And *Our Lady of Guadalupe* reiterated that the exception applies to "laws governing the *employment relationship* between a religious institution and certain key employees." 140 S. Ct. at 2055 (emphasis added). Because judicial second-guessing of religious groups' hiring and firing decisions necessarily intrudes upon matters of internal church governance, judicial second-guessing of other facets of the employment relationship—including informal communications—necessarily raises similar concerns.

3. The majority's reframing of the ministerial exception as a "line-drawing" exercise demands exactly the kind of judgment calls on ecclesiastical matters that the Supreme Court has deemed unconstitutional. Op. 2. The majority views legal "encounters between churches and civil law" as "always fraught," and prescribes judicial "balancing and compromising" of competing interests to find "[t]he right balance." Op. 2-3. But with respect to ministers' employment relations with their faith groups, the Supreme Court has held that "the First Amendment has struck the balance," and "the authority to select and control who will minister to the faithful … is the church's alone." *Hosanna-Tabor*, 565 U.S. at 195-96.

The majority (at Op. 23-25) reasons that ministers need to pursue hostile-work-environment claims to guard against abuse, citing extreme examples from secular employers. But *Hosanna-Tabor* rejected a similar "parade of horribles," 565 U.S. at 195, and the ministerial exception does not invite blanket unaccountability. The exception only protects employment relationships that implicate core matters of faith and involve accountability to ecclesiastical authorities. *Id.* at 188-89, 195.

The majority's admission that "[s]ensitive issues of potential entanglement … lie ahead," Op. 3, underscores how intrusive the application of its balancing test would be. The majority concludes that tangible employment actions leave religious groups with "enough" control over ministers to safeguard their faith, Op. 20, but deciding how much freedom a faith really needs is a matter of ecclesiastical judgment beyond the judicial ken. And the majority's suggestion that courts guard against entanglement on an as-applied basis, Op. 30, or by applying purportedly "neutral" principles of general applicability, *id.*, is little com-

fort. As *Hosanna-Tabor* held, the point of the ministerial exception is that laws that interfere with "internal church decision[s]" affecting "the faith and mission of the church itself"—even laws of general applicability—violate the Religion Clauses. 565 U.S. at 190.

II. Hostile-Work-Environment Claims Invite Especially Acute Intrusions Into Spiritual Matters

1. Hostile-work-environment claims place the entire employment relationship under a judicial microscope. Those claims ask whether conduct was "sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Unlike discrete hiring or firing decisions, that inquiry frequently involves litigation over years' worth of interactions. Dissenting Op. 46-47. And because there is no clear liability standard and courts must view all assertions in employees' favor, hostile-work-environment actions are generally difficult to dismiss at the pleading stage. 1 Employment Disc. Law & Litig. § 5:10. Even if religious groups ultimately prevail, they face expensive, invasive discovery and litigation concerning ministerial employment—which invites secular micromanagement of ecclesiastical decision-making.

Hostile-work-environment claims often turn on "comparative evidence" of how other similarly situated employees fared. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). But addressing whether particular ministers are "similarly situated" would require courts to decide where members of a religious group should fit within its hierarchy and which people perform analogous spiritual functions. Say, for instance, that a nun alleged a hostile-work-environment claim based on sex. Deciding how to compare her treatment with priests' treatment would force courts to evaluate religious doctrine to adjudicate a Title VII claim.

Further, resolving whether harassment was "based on" a protected characteristic inevitably entails "forbid[den]" judicial inquiry into religious leaders' motives. *Werft v. Desert Sw. Ann. Conf. of United Methodist Church*, 377 F.3d 1099, 1103 (9th Cir. 2004). Courts would have "to decide" myriad matters of "faith and doctrine," *Our Lady of Guadalupe*, 140 S. Ct. at 2055, including whether each challenged incident reflected religious teachings or bare secular animus. How can courts determine, for instance, whether a church's "complaints about [a minister's] ability to provide meaningful sermons" are frank, faith-based assessments or "fabricat[ed]" pretexts for hostile-work-environment discrimination? *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1000 (D. Kan. 2004). Compare sermon transcripts to Biblical teachings? Permit depositions of other ministers or congregants?

Courts moreover consider whether conduct constitutes harassment through the eyes of a "reasonable person" in the employee's position, in light of "social context." *Oncale*, 523 U.S. at 81. But courts cannot possibly view actions through the lens of a "reasonable" minister without substituting secular judgments for ecclesiastical considerations. Is it "reasonable" for rabbis to feel harassed on the basis of disability by consistent critiques that they were failing to visit congregants in the community, as required by "the rabbinic nature" of employment? *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1025 (N.D. Iowa 2007). How can courts assess whether conduct detracted from a minister's job performance without passing judgment on the minister's effectiveness in "minister[ing] to the faithful"? *Hosanna-Tabor*, 565 U.S. at 189.

2. The majority's assumption (at Op. 21) that religious groups never legitimately need to engage in conduct giving rise to hostile-work-environment claims is faulty. Courts have recognized hostile-work-environment claims arising from "implicit criticism," "social shunning," "offensive … statements" of opinion, "derogatory remarks," and "exclusion from management meetings and communications."[1] But various faiths use criticism as a tool to prompt self-reflection and spiritual improvement, as part of a religious obligation to step in and help other members of the faith avoid violating tenets of the faith. *E.g.*, Rabbi Jack Abramowitz, *Shame on You!: The Obligation to Rebuke*, https://outorah.org/p/5884/. Other faiths employ social shunning as a means of disciplining members of the faith who stray from their precepts. *E.g.*, J. Hostetler, *The Amish and the Law: A Religious Minority and its Legal Encounters*, 41 Wash. & Lee L. Rev. 33, 36-37 (1984) (discussing social shunning by the Amish society). If the Religion Clauses bar anything, they bar courts from putting faith groups to the choice of abandoning their religious practices or facing federal employment lawsuits.

Take other examples: Are comments about weight hostile and humiliating, or proper expressions of many faiths' doctrinal teachings against gluttony?[2] May religious groups require repentance from ministers who become pregnant out of wedlock? *Cf. Vigars v. Valley*

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[1] *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 834 (7th Cir. 2015); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 657 (10th Cir. 2002); *Valdivia v. Township High School Dist. 214*, 2017 WL 2114965 (N.D Ill. May 15, 2017); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 700 (7th Cir. 2003).

[2] *Cf., e.g.*, *Thirukkural* 95:947 ("The thoughtless glutton who gorges himself beyond his digestive fire's limits will be consumed by limitless ills."); The Church of Jesus Christ of Latter-day Saints, *The Lord's Law of Health*, Ch. 29 ("We should also avoid overeating."); Proverbs 23:20-21 ("Be not among … gluttonous eaters of meat").

Christian Ctr., 805 F. Supp. 802, 804 (N.D. Cal. 1992). May spiritual leaders instruct ministers that men are the head of the household, and require ministers to profess this view? *Cf. EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986). What about repeatedly explaining why women are barred from the clergy? *Cf. Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 n.9 (4th Cir. 1985); Rabbinical Council of Am., *2015 Resolution: RCA Policy Concerning Women Rabbis*, https://tinyurl.com/yxd3ycwb. To secular eyes, these examples could easily constitute harassment; to religious groups, these interactions are expressions of faith.

The majority (at Op. 27) acknowledges that "defendants' predictions of intolerable abuses and intrusions may come true," yet "[a]t this time" endorses the experiment of allowing hostile-work-environment claims to proceed. But religious groups cannot afford to bear the "significant burden" of predicting, "on pain of substantial liability … which of its activities a secular court will consider religious." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987); *see EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996). Religious groups certainly cannot afford to subordinate usual criteria for hiring ministers—like whether the person will persuasively embody the faith—to judgments about candidates' perceived litigiousness. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010). The majority's suggestion that religious groups can "simply fire" a problematic minister, Op. 21 n.8, underscores the problem. Many religious groups consider guiding and training wayward ministers as a spiritual command. Abandoning a minister at the first sign of disagreement would

compound the spiritual price that the majority's rule will exact upon myriad faith groups throughout the Seventh Circuit.

CONCLUSION

This Court should grant the petition for rehearing en banc.

October 13, 2020

Respectfully submitted,

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