No. 19-2142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SANDOR DEMKOVICH,

Plaintiff–Appellee,

v.

SAINT ANDREW THE APOSTLE PARISH, CALUMET CITY, *et al.*,

Defendants–Appellants.

On Appeal from the
United States District Court for the Northern District of Illinois
Case No. 16-cv-11576, Hon. Edmond E. Chang

MOTION OF 32 RELIGIOUS ENTITIES, CIVIL-RIGHTS ORGANIZATIONS, UNIONS, AND PROFESSIONAL ASSOCIATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF SUPPORTING PLAINTIFF-APPELLEE

RICHARD B. KATSKEE
BRADLEY GIRARD
Counsel of Record
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

Counsel for Amici Curiae

Under Federal Rule of Appellate Procedure 29 and this Court's order of December 15, Doc. 87, amici curiae—32 religious entities, civil-rights organizations, unions, and professional associations—respectfully ask this Court for leave to file the attached brief. In support of the motion, the undersigned counsel for amici state the following:

1. Amici include organizations committed to protecting the religious freedom of individuals, communities, and religious institutions by ensuring that the Religion Clauses of the First Amendment to the U.S. Constitution are correctly interpreted and faithfully applied, as well as organizations with experience and expertise protecting the rights of employees to be free from workplace discrimination and discriminatory harassment.

2. Amici will offer "a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Because the ministerial exception is an application of the religious-freedom protections of the Establishment and Free Exercise Clauses that also implicates the employment-antidiscrimination protections of Title VII, and because amici collectively have long and deep knowledge of the legal and practical issues at the intersection of these rights, amici are particularly well-suited to help inform the Court's analysis of the historical and constitutional justification and proper application of the ministerial exception.

Among those concerns, the Establishment Clause mandates both that courts must not interfere in religious entities' selection of their ministerial employees, and that courts must always consider how requested religious exemptions from general laws would affect third parties. The proposed brief addresses both considerations.

Amici also explain why the constitutional justifications for and aims of the ministerial exception do not apply to claims of workplace harassment, especially when the harassers are coworkers. And amici offer deeper understanding of the potential reach and consequences of expanding the ministerial exception as Defendants and their amici request—consequences that will be especially severe for certain classes of vulnerable workers.

Amici have filed amicus briefs in the Supreme Court proceedings in both *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). And counsel for the amici, Americans United, has served as counsel or an amicus curiae in many cases before this Court and the U.S. Supreme Court seeking to help the courts come to the correct balance of the constitutional interests implicated when religious organizations seek exemptions from general laws. *See, e.g.*, Brief of Amici Americans United, *et al.*, *Morrissey-Berru*, 2020 WL 703872 (2020); Brief of Intervenors–Appellees, *Univ. of Notre Dame v. Burwell*, No. 13-3853, 2014 WL 523338 (7th Cir. 2014).

3. None of the amici joining the proposed brief filed an amicus brief at any earlier stage in this case.

4. The undersigned counsel inquired of the Clerk's Office about whether the word limit for amicus briefs addressing the merits after the grant of rehearing en banc is 7,000 words as provided for amicus briefing on the merits of an appeal under Circuit Rule 29, or 2,600 words as provided for amicus briefs in support of motions for rehearing under Federal Rule of Appellate Procedure 29(b)(4).

On December 22, the Clerk's Office responded by e-mail that "[t]he word limit would be 7,000 in this particular case." Accordingly, counsel prepared the proposed 5,966-word brief.

5. Counsel for Plaintiff-Appellee has consented to the filing of the amicus brief. In a letter (Doc. 92) filed with the Court on December 22, Defendants-Appellants stated that they would not consent to any amicus briefs in support of Plaintiff-Appellee that are longer than 2,600 words. Accordingly, the undersigned counsel contacted Appellants' counsel to request consent to this brief in light of the word limit directed by the Clerk's Office. Defendants-Appellants responded that they do not consent.

6. Because the proposed amicus brief complies with the Court's December 15 order, the Rules, and the Clerk's instructions and will offer unique perspectives and special insights to aid the en banc Court in deciding the important questions raised by the appeal, leave to file the attached brief should be granted and the Clerk should be directed to accept the proposed brief for filing.

Respectfully submitted,

/s/ *Bradley Girard*

RICHARD B. KATSKEE
BRADLEY GIRARD
Counsel of Record
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

Counsel for Amici Curiae

Date: January 5, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rule 32, I certify that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 696 words; and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Circuit Rule 32(b) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 12 points or larger.

/s/ *Bradley Girard*

CERTIFICATE OF SERVICE

I certify that on January 5, 2021, this motion was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Bradley Girard*

No. 19-2142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SANDOR DEMKOVICH,

Plaintiff–Appellee,

v.

SAINT ANDREW THE APOSTLE PARISH, CALUMET CITY, *et al.*,

Defendants–Appellants.

On Appeal from the
United States District Court for the Northern District of Illinois
Case No. 16-cv-11576, Hon. Edmond E. Chang

BRIEF OF 32 RELIGIOUS ENTITIES, CIVIL-RIGHTS ORGANIZATIONS, UNIONS, AND PROFESSIONAL ASSOCIATIONS AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

RICHARD B. KATSKEE
BRADLEY GIRARD
Counsel of Record
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

Counsel for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
American Federation of Teachers, AFL-CIO; Americans United for Separation of Church and State; ADL; A Better Balance; Disability Rights Advocates; Human Rights Campaign; (the rest listed on page 1-2 of the brief)

(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:
Americans United for Separation of Church and State

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Bradley Girard Date: 1/5/2021

Attorney's Printed Name: Bradley Girard

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

Address: 1310 L Street NW, Suite 200
Washington, DC 20005

Phone Number: (202) 466-3234 Fax Number: (202) 466-3353

E-Mail Address: girard@au.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
American Federation of Teachers, AFL-CIO; Americans United for Separation of Church and State; ADL; A Better Balance; Disability Rights Advocates; Human Rights Campaign; (the rest listed on page 1-2 of the brief)

(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:
Americans United for Separation of Church and State

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Richard B. Katskee Date: 1/5/2021

Attorney's Printed Name: Richard B. Katskee

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

Address: 1310 L Street NW, Suite 200
Washington, DC 20005

Phone Number: (202) 466-3234 Fax Number: (202) 466-3353

E-Mail Address: katskee@au.org

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Rules, and Regulations

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

INTERESTS OF THE AMICI CURIAE[1]

Amici are 32 religious entities, civil-rights organizations, unions, and professional associations committed both to ensuring the effective enforcement of our nation's antidiscrimination laws and protecting the rights of religious entities, and everyone, under the First Amendment. From long experience, amici believe that religious employers' rights to select their ministers without courts' involvement need not and should not extend to exempting religious employers from complying with all workplace laws that protect employees against harassment based on sex, race, disability, or any other protected class.

The amici are:

- Americans United for Separation of Church and State
- American Federation of Teachers, AFL-CIO
- ADL (Anti-Defamation League)
- A Better Balance
- Clearinghouse on Women's Issues
- Disability Rights Advocates
- Disciples Center for Public Witness
- Disciples Justice Action Network
- Equal Partners in Faith
- Feminist Majority Foundation
- Human Rights Campaign
- Interfaith Alliance Foundation
- Interfaith Worker Justice

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

- LatinoJustice PRLDEF
- Legal Aid at Work
- Legal Voice
- Jewish Social Policy Action Network
- Methodist Federation for Social Action
- Muslim Advocates
- Muslims for Progressive Values
- National Association of Social Workers
- National Women's Law Center
- New York Lawyers for the Public Interest
- People for the American Way Foundation
- Reconstructionist Rabbinical Association
- Reproaction
- Service Employees International Union (SEIU)
- Sikh Coalition
- Washington Employment Lawyers Association
- Women Lawyers on Guard Inc.
- Women's Law Center of Maryland, Inc.
- Women's Law Project

INTRODUCTION

The ministerial exception guarantees religious organizations the unfettered ability to choose their ministers—meaning those they deem most appropriate to develop and disseminate the organizations' religious teachings. But Defendants and their amici insist that this freedom is insufficient to permit them to "control" and "supervise" their ministerial employees, and therefore that the ministerial exception must be extended to foreclose an entirely different class of legal requirements that limit workplace harassment and similar abuses. The conditions that these laws address span offensive verbal harassment such as calling an employee a "fag" and a

"bitch," as occurred here, to virulent racial epithets, to sexual assault. Yet Defendants and their amici ask this Court to fashion a categorical rule giving them an absolute right to be excused from these fundamental workplace civil-rights laws. Far from requiring that extreme license, the Constitution forbids it. This Court should allow Mr. Demkovich's claims to proceed.

ARGUMENT

Defendants' bid to extend the ministerial exception finds no support in the First Amendment. The Establishment and Free Exercise Clauses undeniably and properly guarantee that religious organizations must be free to choose their ministers, because that is how they define and transmit their religious doctrine. But Defendants' proposed expansion of that exemption would take it well beyond what this fundamental freedom for religious institutions either requires or plausibly justifies. The absolute license that Defendants seek is, as the panel decision highlighted, unnecessary to protect the First Amendment rights of religious employers. More than that, it would *violate* one of the constitutional provisions that gives rise to the ministerial exception in the first place, by putting untold numbers of employees at risk of discriminatory harassment, with no possibility of legal recourse.

I. The rationale underlying the ministerial exception does not support a categorical bar against all hostile-work-environment claims.

The ministerial exception is an application of the constitutional prohibition against courts' making religious decisions, affording the guarantee that government has "no role in filling ecclesiastical offices." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012). "The 'ministerial' exception should be tailored to this purpose." *Id.* at 199 (Alito, J, concurring). Yet Defendants

and their amici invite this Court to unmoor the exception from its constitutional and historical justification to rule instead that workplace abuse—be it sexual harassment, racial harassment, or physical assault, by supervisors or by coworkers—necessarily constitutes "core ecclesiastical decisions" that employers must *categorically* be free to engage in. Their proposed rule would thus chart a path toward excusing certain employers not only from Title VII, but also from tort and criminal law. This Court should refuse that invitation.

1. The courts have long recognized that the First Amendment protects against governmental interference in religious organizations' *religious* decisions: Courts, like the political branches, should not and cannot decide "matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Thus, a court cannot, for example, determine who is the legitimate head of a congregation, *id.* at 115–16, what a religious doctrine actually means, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–709 (1976), or whether someone qualifies as a nun, *McCarthy v. Fuller*, 714 F.3d 971, 978 (7th Cir. 2013). But the First Amendment has never been thought to prohibit all applications of neutral laws to religious organizations.

Rather, the protection against courts' making religious decisions recognizes "autonomy with respect to internal management decisions that are essential to the [religious] institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). To allow the government to choose ministers would violate the First Amendment because "[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." *Hosanna-Tabor*, 565 U.S. at 184. Because "religious groups must be free to choose the personnel who are essential to the performance" of religious functions, *id.* at 199 (Alito, J., concurring), the ministerial exception is a narrow carve-out from secular laws that would otherwise limit employers' power over "the selection of the individuals who play certain key roles" in the development and transmission of the faith. *Morrissey-Berru*, 140 S. Ct. at 2060.

At bottom, then, the ministerial exception is instrumental. "The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). To control the conduct and content of these services, ceremonies, and rituals, religious organizations need to be able to choose their messengers. *Id.* Again, the ministerial exception is "tailored to this purpose." *Id.* For if government instead could control who leads services, it would have power to dictate the content of those services, thus potentially bending church practices and teachings to its own ends.

As the panel opinion correctly highlighted (at 18–19), the choice of who is to minister to the faithful is both necessary and central to an organization's ability to define itself and its faith. Thus, while decisions about hiring or firing a minister might in some instances actually be made for nonreligious reasons that would otherwise potentially violate employment-antidiscrimination laws, to dig for the true motivation for those employment decisions is deemed to pose too great a risk of courts'

wading into questions of church doctrine. *See Hosanna-Tabor*, 565 U.S. at 194–95. In other words, the likelihood that questioning the selection of a minister will raise ecclesiastical questions is so great that an exemption from liability is warranted.

The same cannot be said, however, of an absolute exemption from the law that would license all workplace harassment, even when it is so severe or pervasive that it materially alters working conditions and has absolutely nothing to do with an entity's choice of its ministers. Failing to address a hostile work environment is neither necessary nor central to the preservation and transmission of the faith: While a religious organization cannot preach its message without choosing its messengers, it can guide and supervise those messengers without harassing them based on protected characteristics—or allowing coworkers to do so. Whether or not there might be any cases at the margin, allowing a hostile work environment is certainly not so necessary or so central to religious faith or practice as to warrant a categorical exemption from liability for abuse faced by those deemed ministers. Just as with the selection of ordinary, nonministerial employees, "the particularly strong religious interests surrounding a church's choice of its representative are missing" when it comes to claims of hostile work environments, so "applying Title VII is constitutionally permissible," *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999).

2. Although protections against discrimination in tangible employment actions and hostile work environments are both addressed under the same overarching federal statute—Title VII—neither Defendants nor their amici acknowledge the critical differences in the types of conduct that are prohibited by these separate

categories of statutory rights. Nor can they: As the panel correctly highlighted, Op. 18, hostile-work-environment claims—unlike hiring-and-firing claims—are "essentially tortious in nature." The classes of claims are thus different in kind, not degree. So there is no logical reason to lump them all together for purposes of a ministerial exception.

3. Ignoring the logical justification for the exemption, Defendants and their amici lean heavily on one word in *Hosanna-Tabor*: "control." 565 U.S. at 195. But they do not explain why tangible employment actions are insufficient to "control" employees in the constitutionally pertinent sense, much less why supervisors should need to be categorically free to harass their subordinates without any potential employer liability, just because those subordinates happen to perform some ministerial duties. And even more straightforwardly, Defendants and their amici offer nothing to explain why this need for "control" over ministerial employees should necessarily and absolutely entail permitting abuse of those employees by their *coworkers*. After all, "[i]t is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace," *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998), as are other forms of workplace harassment. And sadly, religious institutions are not immune from those ills.

Nor are Defendants better served by the Supreme Court's statement that "judicial intervention into disputes between the school" and a teacher who is a minister "threatens the school's independence in a way that the First Amendment does not allow," *Morrissey-Berru*, 140 S. Ct. at 2069. For the Court was specifically addressing

the potential for intrusion upon the choice of the "school with a religious mission [to] entrust[] a teacher with the responsibility of educating and forming students in the faith," *id*. If the statement in *Morrissey-Berru* meant that religious employers have absolute license in all things touching on employees who happen to have religious duties, as Defendants insist, the ministerial exception would swallow tort and criminal law.

In fact, under the reasoning of Defendants and their amici, there would be a far stronger reason to apply the ministerial exception to tort and criminal law than to Title VII. Defendants and their amici contend that allowing Title VII hostile-work-environment claims by ministerial employees would impermissibly entail unconstitutional judicial inquiries into the mindset of religious actors. But consider cases involving assault, as highlighted by one of Defendants' amici. For physical assaults committed on the basis of membership in a protected class, what matters under Title VII is the mindset of the *victim*, not that of the perpetrator. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (to be actionable, conduct must "create an objectively hostile or abusive work environment"—without regard to what the perpetrator intended—yet "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation").[2] By contrast, criminal assault's *mens rea* requirement entails determining the *perpetrator's* intent. *See, e.g.*, 720 Ill. Comp. Stat. 5/12-1(a) (perpetrator "knowingly engages in conduct which

[2] *See generally Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001) (recognizing that physical contact can be actionable under Title VII and "increases the severity of the situation").

places another in reasonable apprehension of receiving a battery"). So does tortious assault. Restatement (Second) of Torts § 21 (1965) (defining tortious assault as "acts intending to cause a harmful or offensive contact"). What is more, whereas Title VII cases usually involve litigation between two private parties, a criminal prosecution pits the defendant against the full prosecutorial authority of the state. If the ministerial exception genuinely barred any consideration of a religious actor's mindset, as Defendants and their amici insist, they offer no explanation for how a criminal prosecution or claim for intentional tort might proceed where a Title VII claim cannot.

As for the view that tort claims could be cabined and left unaffected by the ministerial exception because "liability for a tort generally does not accrue directly from a ministerial relationship," Op. 48 (Flaum, J., dissenting), that is equally true for claims concerning harassment by coworkers. And in all events, tort law historically *did* regulate labor disputes. *See* Restatement (First) of Torts ch. 38. They were omitted from the Second Restatement not because of any inherent differences in the types of claims, but because regulation by statute largely superseded the common law. *See* Restatement (Second) of Torts div. 9 intro. note (1979).

4. Putting what is at stake in concrete terms highlights why the constitutional justification for the freedom to select ministerial employees simply does not apply to allowing their harassment in the workplace. The harms of a discriminatory refusal to hire a Black minister are real and serious, but they are costs that the First Amendment requires both the minister and society to bear to protect the ability of churches to control their messages by choosing their messengers. But having decided

to hire a particular minister or religious-school teacher and then allowing coworkers to deface that employee's workspace with the N-word is another matter entirely. And not hiring female priests or rabbis for theological reasons is protected. But it should not be the case that religious employers that hire women for ministerial positions can allow supervisors or coworkers to sexually assault those female employees and leave them without any legal recourse. *See also* Op. 24–25 (providing examples of cases highlighting types of treatment addressed by hostile-work-environment claims).

For that reason, the "artful pleading" concerns raised by amici are insubstantial. However claims may be styled, those alleging a hostile work environment and those alleging discriminatory firing or failure to hire require different sorts of showings, for they are grounded in different legal theories. And there is no reason to think that the district courts will be so confounded by the label that a plaintiff puts on a claim as to be unable to discern the difference. Adopting the panel majority's reasoning will not send the message to employees that they should plead disingenuously; it will instead let employers know that they have the freedom to select their ministerial employees but don't have *carte blanche* to harass those employees.

5. Similarly, the difference between selection of ministers and their abusive treatment ameliorates any concerns about perverse incentives that might result from allowing hostile-work-environment claims when wrongful-termination claims are barred. The worry that an employer barred from harassing ministerial employees will instead simply fire those employees assumes that the employer has the same interest in allowing workplace harassment as it does in choosing and retaining staff. But that

is surely not so, especially when, for instance, it comes to an employer's failure to address coworkers' harassment of a valued employee.

And if an employer is so committed to harassing employees (or allowing them to be harassed by coworkers) that it would rather fire them than provide the baseline working conditions required by law, the Court would hardly do those victimized employees any favors by removing the baseline working-condition protections too. If there is a perverse incentive here, it is telling religious employers that no matter the reason, and no matter how bad the harassment, they are free from liability under Title VII for the hostile work environments that they either create or allow to be inflicted on their employees.

6. Disregarding these real threats, Defendants' amici instead raise a host of hypotheticals that are as factually unlikely as they are legally wrong. For example, one amicus brief raises the potential that a religious organization's theological opposition to gluttony might be misconstrued as harassment based on weight. Ethics & Religious Liberty Comm'n Br. 9. Another posits that an employer could be sued for comments made during a meeting in which the employer is firing a minister. Indiana Br. 8–9. These far-flung examples likely would not be actionable regardless of whether the victim is a ministerial employee, because workplace harassment is actionable under Title VII only when it is pervasive or severe and materially alters an employee's working conditions; "offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment,'" *Faragher*, 524 U.S. at 788. Title VII is not a "general civility code" but instead protects against serious discriminatory harassment. *Id.*

(citation omitted). The specter that Defendants and their amici raise of liability for insubstantial slights is no more a problem here than in Title VII cases by nonministerial employees—or cases by employees against *non*religious employers—because the law is settled on what a plaintiff must show both to make a *prima facie* case and ultimately to prevail on the merits.

The hypotheticals also do not warrant the *categorical* exemption that Defendants seek, because as the panel majority made clear, allowing for the possibility of hostile-work-environment claims does not foreclose theological or other defenses. *See* Op. 34. Rather, it merely recognizes that not all abusive treatment of ministerial employees is justifiable as the religious employer's selection of its clergy; and not all adjudication of those claims embroils courts in impermissible adjudication of theological disputes.

7. Finally, Defendants insist that the kinds of harassment that surely should be actionable "have never materialized in this Circuit since *Alicea-Hernandez*, or in any of the other majority-rule Circuits." Pet. Reh'g 13. But a dearth of suits that Defendants insist are legally barred does not mean that abuse doesn't happen—it just means that the lawsuits don't. If Defendants are correct that no one ever files suit because employee abuse never occurs, then there is no need for absolute freedom from liability for abusive work environments. And there surely is no need to extend the ministerial exception well beyond what it has historically protected and what is logically justified, merely to bar cases that wouldn't be brought anyway.

II. Defendants' proposed rule would violate the Establishment Clause by materially harming vast numbers of employees, whereas the panel's approach does not violate the constitutional rights of any employers.

There is also another reason to reject the bid for wild expansion of the ministerial exception: The restrictions on governmental involvement in the religious sphere that Defendants invoke, which derive principally from the First Amendment's Establishment Clause, cannot transgress the Establishment Clause's coordinate prohibition of religious exemptions from general laws when the result would be material harms to third parties. Yet the categorical rule that Defendants seek would grievously harm employees throughout this circuit; and if extended nationwide, the employees stripped of fundamental civil rights and basic workplace protections could number in the millions.[3] By avoiding that categorical approach, the panel decision not only preserved the possibility of workplace protections for employees while protecting the First Amendment rights of religious employers, but also respected the full panoply of Establishment Clause protections, which extend to employees as well as employers.

1. "[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring). For if in exempting religious enterprises or activities from general laws

[3] Defendants' amici themselves underscore the potential reach of the rule that Defendants seek. Just one amicus, the Lutheran Church–Missouri Synod, alone comprises "numerous Synod-wide related entities, . . . 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." Missouri Synod Br. 1.

the government imposes costs and burdens of that religious exercise on others, it favors the faith of the benefitted over the beliefs and rights of the burdened, violating the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

Thus, the Supreme Court invalidated a statute in *Caldor* that gave employees an unqualified right to take time off on the Sabbath day of their choosing. 472 U.S. at 705–08. The statute violated the Establishment Clause, the Court held, because it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710. In *United States v. Lee*, 455 U.S. 252 (1982), the Court rejected an employer's request for a religious exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." *Id.* at 261. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80–81 (1977), the Court held that Title VII's reasonable-accommodation provision did not require a religious exemption for an employee when affording that exemption would have imposed meaningful costs or other burdens on his employer or fellow employees. And in *Sherbert v. Verner*, the Court granted an exemption from regulations governing unemployment compensation only after confirming that the accommodation did not "abridge any other person's religious liberties." 374 U.S. 398, 409 (1963); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 739 (2014) (Kennedy, J., concurring) (an accommodation of religious exercise must not "unduly restrict other persons, such as employees, in protecting their own interests").

The Court reiterated this no-harm-to-third-parties principle in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in upholding the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5. The Court held that the Act comported with the Establishment Clause because, and only because, courts that apply it "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 544 U.S. at 720 (citing *Caldor*, 472 U.S. 703); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (religious accommodation permissible under RLUIPA because it "would not detrimentally affect others who do not share petitioner's belief").

2. Extending the ministerial exception to claims about hostile working conditions cannot be squared with that Establishment Clause mandate, because it would imperil untold numbers of employees in this circuit and potentially across the country.

In the midst of the ongoing global pandemic, consider just one class of essential workers who might be harmed by extension of the ministerial exception: nurses. *See Morrissey-Berru*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). Indeed, counsel for Defendants here specifically posited at oral argument in *Morrissey-Berru* that the exception could be expanded to some nurses. *See* Transcript of Oral Argument at 20, *Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No. 19-267).[4]

[4] The following exchange occurred:

> JUSTICE KAGAN: A nurse at a Catholic hospital who prays with sick patients and is told otherwise to tend to their religious needs.
>
> MR. RASSBACH: I—I think a nurse doing that kind of counseling and prayer may well fall within the exception.

Nursing is one of the largest professions in the country—comprising 3.1 million employees in 2019.[5] Approximately 1.86 million work in hospitals;[6] and religious hospitals account for more than one-fifth of all hospital beds.[7] Approximately 868,000 more nurses work in outpatient care, residential care, nursing homes, and educational services,[8] many of which are religiously affiliated.

To the extent that religious employers would argue that their nurses fall within the ministerial exception, the effect of Defendants' proposed expansion of the exemption would be significant and detrimental. After all, nursing is one of the professions most rife with harassment—harassment that is often based on sex.[9] That is likely because approximately 89% of registered nurses are women, while physicians are historically a male-dominated profession.[10] And race-based and other harassment is also rampant.[11] One study found that "forty percent of nurses felt bullied by physicians."[12] Another "collected a series of dark but completely routine anecdotes

---

[5] U.S. Bureau of Lab. Stat., Occupational Outlook Handbook (2019), https://perma.cc/KEQ8-6CEG

[6] *Id.*

[7] MergerWatch, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report* 4, https://perma.cc/7PRB-86VQ

[8] Occupational Outlook Handbook, *supra* note 5.

[9] Seun Ross *et al.*, *Sexual Harassment in Nursing: Ethical Considerations and Recommendations*, OJIN: The Online Journal of Issues in Nursing (2019), https://perma.cc/E92B-PFUL

[10] *See, e.g.*, U.S. Bureau of Lab. Stat., Labor Force Statistics from the Current Population Survey (2019), https://perma.cc/UJ4W-PJ6Z

[11] *See, e.g.*, Jessica Castner, *Healthy Environments for Women in Academic Nursing: Addressing Sexual Harassment and Gender Discrimination*, OJIN: The Online Journal of Issues in Nursing (2019), https://perma.cc/B622-QPU6

[12] Jason Silverstein, *Violence Is Just Part of the Job When You're a Nurse*, Vice (Feb. 27, 2018), https://perma.cc/BGH8-YYFP

about doctors who created 'an environment of fear,' intensity, and intimidation."[13] Yet another found sexual harassment to be "widespread misconduct in hospitals and other health care settings, deeply woven into the fabric of their workplaces."[14] In all, "women of every rank—from surgeons to nurses to residents" face workplace harassment—abuse that Title VII protects against.[15]

Under Defendants' proposed rule, the message that religiously affiliated healthcare facilities would receive is that as long as they can plausibly describe their nurses as ministers, they don't have to do anything to address these problems. And nurses at those facilities would receive the corresponding message that they just do not deserve the fundamental legal protections against sexual and other workplace harassment.[16]

To make matters worse, there are large swaths of the country in which the *only* hospitals are religiously affiliated.[17] So if religious employers are successful in arguing that nurses are "ministers," as counsel suggested during the *Morrissey-Berru* oral argument, then nurses in those regions would not even be put to the cruel choice

---

[13] *Id.*

[14] Elizabeth Chuck, *#MeToo in Medicine: Women, Harassed in Hospitals and Operating Rooms, Await Reckoning*, NBC News (Feb. 20, 2018), https://perma.cc/ZMX3-TDHF

[15] *Id.*

[16] That is to say nothing of the possibility of employers' asserting the ministerial exception to try to exempt themselves from other legal protections, such as OSHA guarantees of a safe work environment (including PPE protections during a pandemic), which are likewise critical to the health and safety of employees. *See, e.g.*, U.S. Dep't of Lab., Occupational Safety and Health Administration, COVID-19 Regulations (2020), https://perma.cc/T6G7-4UD2

[17] *See, e.g.*, MergerWatch, *supra* note 7, at 6–7 (listing regions in which the sole community hospitals are Catholic hospitals).

of either accepting harassment or finding a new post; for them, the choice is likely to accept the harassment or else give up their profession entirely. With the nationwide shortage of nurses already so severe, conditions that drive yet more nurses from the field will mean that patients will suffer mightily also.

3. While amici disagree that religious hospitals would broadly qualify for the ministerial exception and that nurses could be considered ministerial employees other than, perhaps, in extraordinary circumstances, there is no question that as employers attempt to expand *what* the ministerial exception covers, so too do they attempt to expand *who* is considered ministerial.

In that regard, too, the dangers of expansive assertions of the ministerial exception are not limited to any one profession or type of employer: Law firms and advocacy groups are already expansively advising religiously affiliated employers on how to "squeeze into the cleft" of the ministerial exception so as to avoid any possibility of being subject to Title VII.[18] Far from merely explaining the law, some now advise that "religious institutions should begin to revisit whether their employees *could be* covered under the ministerial exception."[19] In other words, employers are being advised to reclass their employees so as to evade the law.

Employers are told, for example, to "distribut[e] religious duties to as many staff members as is reasonably appropriate," including "[a]ssigning employees responsibilities in prayer and devotions," so that "a religious organization can

---

[18] *See, e.g.*, McGuireWoods, *U.S. Supreme Court Broadens Ministerial Exemption to Employment Discrimination Claims* (July 10, 2020), https://perma.cc/Q3EB-HV6S

[19] Seyfarth, *US Supreme Court Expands Ministerial Exception for Religious Organizations* (July 9, 2020), https://perma.cc/S4TZ-NZ8F (emphasis added).

increase the *perception* that employees who have those duties are ministers."[20] The Christian Legal Society recommends "inserting statements of faith or other doctrinal language into employee handbooks," as part of getting employees classified as ministers.[21] Alliance Defending Freedom advises that, "for legal purposes," religious employers "should take particular care to highlight responsibilities that involve communicating the faith or other spiritual duties that directly further the religious mission."[22] For example, "if a church receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the church's faith, provide religious resources, or pray with callers."[23] And First Liberty advises religious schools that for *all* their staff, "each employee's job description and responsibilities should be drafted to emphasize the religious nature of the employee's role as a messenger or teacher of its faith."[24]

In sum, the blanket exemption that Defendants and their amici seek will only encourage more employers to be ever more aggressive in attempting to categorize their employees as ministers, in an effort to avoid even the possibility of liability for allowing or perpetrating hostile work environments. There could be no legal recourse for employees who suffer rank abuse, even when that abuse is completely unrelated

---

[20] Conner & Winters, *Mitigating Risk with the Ministerial Exception* (Mar. 2019), https://perma.cc/5WKN-KBC2 (emphasis added).

[21] Christian Legal Society, *Church Guidance for Same-Sex Issues* 10 (2015), https://perma.cc/DKC2-HPXW

[22] Alliance Defending Freedom, *Protecting Your Ministry* 13 (2018), https://perma.cc/2KSY-KNCC

[23] *Id.*

[24] First Liberty, *Religious Liberty Protection Kit for Christian Schools* 34, 36 (2016), https://perma.cc/848S-XHUA

to any doctrine or religious justification and has nothing to do with religious institutions' choices about who will preach and teach the faith. And vast numbers of employees may be left out in the cold. It's hard to imagine more perverse incentives.

4. The panel decision, by contrast, protects fundamental civil rights and the physical safety of employees while also guaranteeing the rights of employers. That is because the decision is not categorical—it does not say that *every* hostile-work-environment claim can go forward. Rather, the panel held only that the First Amendment does not categorically bar all claims regardless of the particular facts and circumstances. *See* Op. 2.

5. In response, Defendants and their amici contend that courts are incapable of determining whether alleged abuse is grounded in religious doctrine. We do not believe, however, that courts are so incompetent to differentiate between applying neutral law to an employer's conduct even if the employer happens to be religious, on the one hand, and deciding whether some religious belief is theologically correct, on the other. Courts must and routinely do determine, for example, whether religious beliefs are "sincerely held," *see, e.g.*, 42 U.S.C. §§ 2000bb–2000bb-4, and whether religiously affiliated organizations are "places of worship," *Lutheran Soc. Serv. v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (citation omitted). *See also* Op. 30–31 (listing cases and types of judgments that courts routinely make). And "[t]he limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters." *Bollard*, 196 F.3d at 950. Defendants' lack of faith in the judiciary is unwarranted.

Indeed, *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002), to which one of Defendants' amici points, shows just how capable the courts are: There, a lesbian couple sued a church for sexual harassment after one of the couple had been fired based on her sexual orientation. *Id.* at 653. The plaintiffs alleged that harassing comments were made when church leaders were discussing doctrine about same-sex relationships and determining whether the plaintiff's sexual orientation required that she be fired. *Id.* The court affirmed the grant of summary judgment, dismissing the claims not on the basis of the ministerial exception but because the complained-of comments were statements of church doctrine and thus were constitutionally protected. *Id.* at 659.[25] Correspondingly, the Ninth Circuit allowed the employee's claims to go forward in *Bollard*, where the alleged harassment had nothing to do with church doctrine. *See* 196 F.3d at 947. Both decisions thus reflect that the constitutional "rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant," but that the same rationale does not warrant protecting sexual harassment, disability-related harassment, or the hurling of racial epithets at coworkers or subordinates, *see id.*

Under the panel decision here, the results in both *Bryce* and *Bollard* would be unchanged, because all valid claims and all valid defenses are preserved. Yet despite

[25] Though the Tenth Circuit eventually decided that hostile-work-environment claims are precluded by the ministerial exception, *see Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1245 (10th Cir. 2010), amici believe that the court's earlier approach in *Bryce* more appropriately recognized how meaningful defenses may be adjudicated and the rights of religious institutions protected without the wholesale barring of all potentially valid claims.

the courts' proven ability to apply secular law without improperly intruding on the rights of religious institutions, Defendants press for their absolutist approach because bright-line rules are easy to apply. Perhaps. But efficiency considerations do not justify abdicating the judicial function, especially at so great (and constitutionally impermissible) a cost to so many employees.

6. Finally, and at their most expansive, Defendants and their amici argue that any inquiry into harassing behavior in the workplace at a religiously affiliated entity would violate the First Amendment. But the reasoning behind that argument—the idea that religious entities must be broadly free from any possibility of judicial intervention—would apply equally to claims by both ministerial and nonministerial employees. For example, if a janitor at a religious organization (who is by any reasonable meaning of the word not a minister) was routinely called a "bitch[]" and a "fag" (as Mr. Demkovich was here) and brought suit under Title VII, there should be no question that the claim could go forward. Defendants do not explain why the exact same judicial inquiry, though permissible for a nonministerial employee, would be unduly intrusive and therefore absolutely prohibited for every possible claim or fact pattern involving ministerial employees.

Nor can they. As already explained, the justification for the ministerial exception is *not* an absolute immunity from the application of secular laws to religious organizations. The exception exists because judicial review of decisions to select ministers presents too great a danger that courts will be forced to adjudicate religious questions. Just as that logic does not apply to nonministerial employees, it also does not apply to hostile working conditions—conditions that very often result not from an

organization's affirmative choice to harass its employees, but from management's failure to deal with abusive coworkers.

CONCLUSION

The Court here is presented with two options: It can preserve for employees the fundamental and hard-won civil-rights protections that the Constitution and Congress have afforded and the courts have always recognized, while also fully protecting the rights of religious organizations when those civil-rights protections implicate the development or transmission of religious beliefs. Or the Court can accept Defendants' invitation to expand the ministerial exception to bar every possible hostile-work-environment claim that might be brought by ministerial employees, even when an employer's action has nothing whatever to do with religion. Because the Constitution demands the former and forbids the latter, the Court should adopt the panel majority's reasoning and remand for adjudication of the parties' claims and defenses.

Respectfully submitted,

/s/ *Bradley Girard*

RICHARD B. KATSKEE
BRADLEY GIRARD
Counsel of Record
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

Counsel for Amici Curiae

Date: January 5, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rule 32, I certify that this brief:

(i) complies with the type-volume limitation of Circuit Rule 29 and the Clerk's instructions because it contains 5,966 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Circuit Rule 32(b) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 12 points or larger.

/s/ *Bradley Girard*

CERTIFICATE OF SERVICE

I certify that on January 5, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Bradley Girard*