No. 19-2142

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SANDOR DEMKOVICH,

Plaintiff-Appellee,

v.

ST. ANDREW THE APOSTLE PARISH, CALUMET CITY, AND THE ARCHDIOCESE OF CHICAGO,

Defendants-Appellants.

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

BRIEF OF THE CARDINAL NEWMAN SOCIETY AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Cardinal Newman Society does not have a parent corporation and no publicly held corporation owns 10% or more stock in it.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Cardinal Newman Society's mission is to promote and defend faithful Catholic education. The Society fulfills that mission by advocating and supporting fidelity to the Catholic Church's teaching across all levels of Catholic education; identifying and promoting clear standards of Catholic identity and best practices in Catholic education; and recognizing exemplary Catholic educators and institutions committed to truth and the integral formation of their students.

The Society is dedicated to the Catholic Church's principles of faithful Catholic education in full accord with the Church's teachings. These principles are found in the Catechism of the Catholic Church, Code of Canon Law, and many Vatican documents on Catholic education, including *Ex corde Ecclesiae*, the Apostolic Constitution for Catholic Universities. The Society embraces the vision of Catholic education exemplified in the life of Saint John Henry Cardinal Newman, who argued that Catholic education must have a genuine commitment to Truth revealed by God. It is impossible for Catholic schools to maintain their fidelity to the Christian message in conformity with the magisterium of the Church, and to hire teachers committed to the Church's teachings, without the ministerial exception's protection.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and (b)(4), no counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

ARGUMENT

I. This Court should grant en banc review because the panel majority's ruling guts the ministerial exception and conflicts with the precedent of the Supreme Court, this Court, and every court of appeals to address the issue.

The way churches and other religious organizations select and supervise employees who teach and transmit their faith and lead worship "lie[s] at the core" of such institutions' "mission." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). The ministerial exception's purpose is to bar "[j]udicial review of the way in which [churches and] schools discharge those responsibilities," since such review "would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.*

The ministerial exception bars Mr. Demkovich's lawsuit here. The parties do not dispute that a Catholic Music Director is a "minister" within the ministerial exception's meaning. They also do not dispute that homosexual conduct is contrary to the Catholic Church's teaching, and that, by entering a same-sex marriage, Demkovich violated such teachings. St. Andrew's pastor therefore had every right to terminate Demkovich's employment for failing to adhere to the Church's conduct expectations, as the panel majority fully agrees.

Yet the majority allowed Demkovich to nevertheless proceed with hostile-environment claims against the church based on comments made by St. Andrew's pastor that were critical of Demkovich's lifestyle (which, again, the parties agree is immoral under the Church's

teachings). This holding allows—indeed, forces—judicial review of the very conduct the ministerial exception says is off limits. The situation would be no different if a Catholic church's female employee publicly criticized the Church's view that only men are scripturally authorized to serve as priests, causing a heated dispute during which a priest angrily called the employee a "heretic." The panel majority's view would allow a court to adjudicate a hostile-environment claim brought by the female employee—even while the panel majority acknowledges that the court has no authority to adjudicate a discharge claim based on acting inconsistently with Church teachings.

The panel majority's ruling is unprecedented. No federal appellate court has allowed a minister's hostile-environment claims to proceed once a church alleges a religious reason for the disputed conduct. The panel's ruling eliminates that consensus based on an *ad hoc* balancing of free exercise and nondiscrimination interests. But no court may restrike the balance set by the Religion Clauses of the U.S. Constitution. En banc review is necessary.

A. *Our Lady of Guadalupe* puts employment disputes between religious organizations and ministers off limits for the courts.

The panel opinion barely mentions the Supreme Court's latest word on the ministerial exception: *Our Lady of Guadalupe*. But that decision directly contradicts the panel majority's ruling: "[C]ourts are

bound to stay out of employment disputes involving those holding certain important positions with churches." *Id.* at 2060. "Judicial intervention" in a minister's employment relationship impermissibly "threatens the [church's] independence." *Id.* at 2069 (cleaned up).

The claim's nature or styling is irrelevant. *Our Lady of Guadalupe* recognized that First Amendment protection extends to disputes regarding the church's "selection or supervision of clergy" alike. *Id.* at 2061. Both types of control are essential to churches' work. *Id.* at 2055**Error! Bookmark not defined.**. Though Demkovich's hostile-work-environment claims may not involve a minister's *selection*, they do involve *supervision*, and *Our Lady of Guadalupe* bars them. *Accord Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 195 (2012) (ministerial exception ensures "the authority *to select and control* who will minister to the faithful" "is the church's alone") (emphasis added). That conflict warrants en banc review.

B. *Alicea-Hernandez* anticipated the Supreme Court's ruling and correctly dismissed a minister's hostile-environment claim.

This Court anticipated the Supreme Court's ministerial-exception analysis in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003). When a ministerial employee claimed the Archdiocese of Chicago subjected her to the "prolonged humiliation and emotional stress of working under unequal and unfair conditions," a

classic hostile-environment claim, *id.* at 702, the Court held that the only question was "whether Alicea-Hernandez's position . . . can functionally be classified as ministerial," *id.* at 703. This Court refused to consider the "nature" of her Title VII claims because the "'ministerial exception' applies *without regard to the type of claims being brought*." *Id.* (emphasis added). Once this Court determined that "Alicea-Hernandez served a ministerial function," it ruled that "her Title VII claims [were] . . . barred by the First Amendment." *Id.* at 704.

The panel majority here should have done the same. Instead, the majority argued that no hostile-work-environment claim was at issue in *Alicea-Hernandez*, contrary to (1) that case's litigation history, En Banc Pet. 9; (2) the panel's dissenting judge, who authored *Alicea-Hernandez*, *see Demkovich v. St. Andrew the Apostle Parish*, No. 19-2142, 2020 WL 5105147, at *16–17 (7th Cir. Aug. 31, 2020) (Flaum, J., dissenting); and (3) both the Ninth Circuit's and Tenth Circuit's readings of the opinion, *see Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 960 n.4 (9th Cir. 2004); *id.* at 979 (Trott, J., dissenting); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010).

One panel of this Court cannot implicitly overrule another. *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002). Yet the panel opinion did just that. Again, en banc review is warranted.

C. No other circuit allows ministers to bring hostile-work-environment claims when the church alleges a religious justification for the disputed conduct.

The panel majority's ruling exacerbates a circuit split. En Banc Pet. 5–6, 11–14. What's more, it was inaccurate for the panel majority to say that it was "join[ing] the Ninth Circuit." *Demkovich*, 2020 WL 5105147, at *1. Even the Ninth Circuit balks at entertaining a minister's hostile-work-environment claims when a church alleges "doctrinal reasons" for the disputed conduct, *Elvig*, 375 F.3d at 963, or "embrac[es] the behavior at issue as a constitutionally protected religious practice," *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). And here, all agree that Demkovich was a minister, and that the conduct underlying his complaint was "motivated by . . . the Church's religious beliefs, if not actually required by those beliefs." *Demkovich*, 2020 WL 5105147, at *4. So the Ninth Circuit would have dismissed Demkovich's complaint in its entirety.

But the panel majority refused, allowing Demkovich's hostile-environment claims to proceed regardless of the church's doctrinal interests and the entanglement that court adjudication will entail. *Id.* at *15–16. No other circuit would allow this extreme invasion of churches' autonomy. *Skrzypczak*, 611 F.3d at 1244–46 (First Amendment bars a minister's hostile-environment claim regardless of whether the church alleges a religious justification); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000)

(First Amendment "prohibit[s] a church from being sued under Title VII by its clergy"); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (same). This, too, warrants en banc review.

II. Secular labels do not control the ministerial exception's scope.

When a conflict arises, "the free exercise of religion" "prevails over the interest in ending discrimination embodied in Title VII." *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994). The term "ministerial exception" is shorthand for that constitutional principle. And it is well established that the government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Yet the panel majority nullifies the ministerial exception by employing secular labels that lack constitutional significance.

Churches' autonomy depends on their ability to control the ministerial employment relationship, free from government "influence." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Whether the government's orders relate to a church's obvious or indirect employment actions makes no difference. The First Amendment guarantees churches' religious and ecclesiastical autonomy.

The panel majority strips that autonomy based on nuances that have no relevance in setting the limits on court power over a church. The panel majority holds that churches' *tangible* employment actions

(like hiring or firing) are beyond a court's reach, but their *intangible* employment actions (like instructing a minister on church doctrine, or issuing warnings for doctrinally errant conduct) are not. *Demkovich*, 2020 WL 5105147, at *8–9. But both types of ministerial decisions constitute the free exercise of religion, and both entail the same types of entanglement that the First Amendment prohibits.

This litigation is a case in point. After the district court dismissed Demkovich's discriminatory discharge complaint based on the ministerial exception, Demkovich filed an amended complaint repackaging "much of the same discriminatory conduct" as a hostile-environment claim, "rather than the firing itself." *Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp. 3d 772, 776 (N.D. Ill. 2018).

But churches' First Amendment protection does not turn on how an employment claim is characterized. Otherwise, plaintiffs can end-run the ministerial exception by disguising every termination claim as a hostile-environment claim. In fact, a strong argument could be made that a court is better able to judge whether a tangible employment action is discriminatory based on neutral, objective criteria without religious entanglement, than to pass judgment on whether verbal "harassment" and subjective slights are religiously motivated or doctrinally sound. Since the former is off limits under *Our Lady* and *Hosanna-Tabor*, the latter plainly is.

The majority opinion attempts to make this result more palatable by labeling the Church's teaching on sexuality and marriage "verbal abuse" or "harassing behavior." *Demkovich*, 2020 WL 5105147, at *9–10. But "courts have never embraced a categorical 'harassment exception' from First Amendment protection for speech that is within the ambit of federal anti-discrimination laws." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J.). "[G]overnment may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989)—especially when that idea is religious and discussed by a priest.

Nor may courts send "a signal of official disapproval of [the Catholic Church's] religious beliefs" by labeling its tenets objectively "offensive." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Upholding Demkovich's claims means that "a reasonable person [would find Reverend Dada's comments] hostile or abusive." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Branding Catholic orthodoxy on sexuality and marriage offensive is thus the panel majority's primary—and constitutionally unacceptable—effect. *Demkovich*, 2020 WL 5105147, at *14–15.

III. The panel majority's ruling defeats the ministerial exemption's purpose and unconstitutionally burdens religious speech and conduct.

The panel majority's ruling puts churches and religious organizations in an untenable position. Consider the decision's application in the context of Catholic schools, the promotion of which is one of amicus's primary missions. A Catholic school has freedom to hire and fire ministers based on alignment with the Catholic Church's religious teachings about sex, sexual orientation, and marriage. *Demkovich*, 2020 WL 5105147, at *8. But if a Catholic school minster engages in a course of conduct that violates the Catholic Church's teachings, and the school persistently communicates that the minister has strayed from the school's moral expectations and should repent, the school can now be forced to endure a secular trial. *Id.* at *9–10, *14.

That result places an unconstitutional burden on the teaching and maintaining of Catholic doctrine. For example, the Catholic Church's Code of Canon Law requires that "those who are designated teachers of religious instruction in schools … are outstanding in correct doctrine." Canon 804 §2. Taking as an example the sexual orientation at issue here, a Catholic school religion teacher who teaches a class about Saint Pope John Paul II's *Theology of the Body* would be required to communicate the following Church teachings:

- God designed marriage exclusively as a fruitful, sexual union of one man and one woman, a spousal communion that the Bible literally and figuratively describes as "one flesh." Genesis 2:24; Matthew 19:5; Mark 10:8 (NRSV-CE).

- Jesus Christ condemned all "porneiai," or sexually immoral acts, which encompasses all sexual sins that the Torah forbids, including same-sex acts. Mark 7:20–23; Leviticus 18:22, 20:13.
- "Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered[,]' . . . contrary to the natural law[,] . . . [and u]nder no circumstances can they be approved." Catechism of the Catholic Church (2d ed.) ¶ 2357.
- And while "[e]very sign of unjust discrimination" toward those with same-sex attractions "should be avoided," *id.* ¶ 2358, "[h]omosexual persons are called to chastity," *id.* ¶ 2359.

Under the panel majority's reasoning, if that teacher is homosexual and finds the Church's teachings offensive but is told repeatedly by the school that he must educate students on the sinfulness of homosexuality, the school's doctrinally driven edicts would create a *prima facie* hostile-environment claim for the objecting teacher.

This leaves the school with two bad options. First, the school could cave to the government-imposed liability threat by changing its religious beliefs. That result would unconstitutionally "punish the expression of religious doctrines." *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990). Second, the school could refuse (clandestinely or overtly) to hire anyone perceived to be homosexual to forestall lawsuits, even though the Catechism teaches that individuals with a same-sex orientation "must be accepted with respect, compassion, and sensitivity." Catechism of the Catholic Church (2d ed.) ¶ 2358. Yet in this way, the panel opinion creates the perverse incentive for religious organizations to

refuse to hire gay and lesbian ministerial employees—a tangible employment decision that the panel majority's opinion fully protects.

Thus, the panel majority's ruling both infringes on the right of religious employers to manage their ministerial employees and creates a disincentive to hire ministerial employees in legally protected classification. The ruling is an unconstitutional intrusion on ecclesiastical authority, subjecting religious bodies to hostile-environment claims that the courts have no authority to adjudicate.

CONCLUSION

This Court should grant en banc review and hold that the ministerial exception applies to Demkovich's claims.

Respectfully submitted,

/s/ John J. Bursch

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the page limitation of Fed. R. App. P. 29(a)(5) and Circuit R. 29 because it consists of 2,582 words and does not exceed 2,600 words.

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ John J. Bursch
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Dated: October 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ John J. Bursch
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