SUPREME COURT OF NEW JERSEY
DOCKET NO. 085213

Victoria Crisitello, *Plaintiff-Respondent*, v. St. Theresa School, *Defendant-Petitioner*.	On Certification from the Superior Court of New Jersey, Appellate Division Docket No. A-4713-18T3 Sat below: Hon. Garry S. Rothstadt, J.A.D. Hon. Jessica R. Mayer, J.A.D. Hon. Ronald Susswein, J.A.D. Including the July 24, 2018, Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-1294-16T4 Sat Below: Hon. Marie P. Simonelli, J.A.D. Hon. Garry S. Rothstadt, J.A.D. Hon. Greta Gooden Brown, J.A.D. Civil Action

BRIEF *AMICUS CURIAE* OF AGUDATH ISRAEL OF AMERICA IN SUPPORT OF DEFENDANT-PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States, including at the United States Supreme Court. *See*, *e.g.*, *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020). Agudath Israel has numerous Agudath-Israel affiliated synagogues throughout the country and maintains an office in New Jersey to advocate for the New Jersey Orthodox Jewish community.

Amicus respectfully submits this brief in support of the position that the First Amendment's church[1] autonomy doctrine protects religious schools and other religious institutions from interference with their internal operations and governance. Religious institutions—especially religious schools that seek to inculcate religious beliefs, values, and conduct in their students—should have the ability to require that their employees conduct themselves in ways that conform to and do not contradict the religious beliefs and practices of the particular institution. To allow civil courts to interfere with the autonomy of religious institutions to make employment decisions based on their religious tenets could undermine the ability of those institutions to carry out their religious missions, and

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[1] *Amicus* follows the practice of the United States Supreme Court and uses the term "church" generically to mean religious institutions of all different faith traditions.

result in both an unconstitutional infringement of their First Amendment Free Exercise rights and judicial entanglement in fundamentally religious questions in violation of the First Amendment's Establishment Clause.

PRELIMINARY STATEMENT

A century and a half ago, the United States Supreme Court recognized that "full, entire, and practical freedom for all forms of religious belief and practice … lies at the foundation of our [nation's] political principles." *Watson v. Jones*, 80 U.S. 679, 728 (1871). That guarantee, referred to as the church autonomy doctrine, provides religious institutions the power to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).[2] This "general principle of church autonomy" also protects religious institutions' decision-making "in closely linked matters of internal government." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020).

Here, allowing plaintiff's suit to proceed would violate the church autonomy doctrine, because the suit would interfere with St. Theresa's right to decide matters of religious faith, doctrine, and internal governance. Specifically, St. Theresa terminated plaintiff because her repudiation of

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[2] The United States Supreme Court and other courts variously refer to this doctrine as "church autonomy," "religious autonomy," or "ecclesiastical abstention." In this brief, we use "church autonomy," but the terms are largely used interchangeably.

Catholic moral doctrine meant that keeping her on would interfere with St. Theresa's internal operations and the Church's ability to govern itself. Because St. Theresa had a sincere religious reason for terminating plaintiff that was meant to protect the internal operations of the Church, the First Amendment requires that her lawsuit be dismissed.

Indeed, the Appellate Division's ruling demonstrates just how entangled church and state become when civil courts do not follow the First Amendment. As a result of its failure to observe the church autonomy doctrine, the Appellate Division found itself dictating to St. Theresa how it should investigate and punish violations of its Catholic moral code, ranking the relative importance of St. Theresa's religious beliefs, and conducting an unconstitutional inquisition into St. Theresa's religious practices. Any one of these violations should require reversal; taken together, the case is overwhelming.

Permitting these unconstitutional intrusions into church government poses a threat to all faith groups across New Jersey. Orthodox Jewish schools, just as Catholic schools, should be allowed to dismiss teachers whose conduct violates the basic tenets of those religious institutions, as this is essential for the autonomy of those schools. Requiring a religious school to keep a teacher on staff who flagrantly and publicly violates a fundamental tenet of that school's religious beliefs would undermine the ability of such schools to carry out their religious mission and interfere

directly with their responsibility to inculcate their religious beliefs and values in their students.

This Court should therefore vindicate the First Amendment rights of religious institutions across the State of New Jersey and reverse the lower court's decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on and incorporates by reference the procedural history and statement of facts as presented by St. Theresa School.

ARGUMENT

I. The church autonomy doctrine protects religious institutions' employment decisions that affect matters of faith, doctrine, and internal governance, regardless of whether the employee is a "minister."

Courts have long recognized that disputes between a religious organization and its employees can raise significant First Amendment issues. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 715-20 (1976). In one particular set of religious employment cases, the United States Supreme Court and other courts have recognized the so-called "ministerial exception," which bars a particular subset of these employment disputes. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Whether the ministerial exception applies is based on the *function* the employee plays within the religious organization: If an employee is a "minister"—a legal term of art that can include "teachers at religious schools," *Our Lady of Guadalupe*, 140 S. Ct. at 2055—the

employee cannot hold the religious employer liable, even if there was no "religious reason" for the employment decision, *Hosanna-Tabor*, 565 U.S. at 194-95.

Here, St. Theresa has ably explained why the ministerial exception bars plaintiff's suit. Rather than address that question, *Amicus* submits this brief to explain that this suit must also be dismissed for a separate reason even where an employee is not considered to be a "minister": the church autonomy doctrine's prohibition on interference with internal church operations.

Anchored in both the Free Exercise Clause and Establishment Clause of the First Amendment to the United States Constitution, the church autonomy doctrine recognizes and protects "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring, joined by Kagan, J.). This "general principle of church autonomy" encapsulates "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061. Indeed, the church autonomy doctrine guarantees religious institutions the power to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116.

The church autonomy doctrine covers a broader family of complementary protections, of which the ministerial exception is one "component."

Our Lady, 140 S. Ct. at 2060; *id.* at 2061 ("none" of the Supreme Court's prior church autonomy cases "was exclusively concerned with the selection or supervision of clergy."); *see also id.* at 2061-62 (discussing historic church autonomy issues such as church property disputes, professional teaching licenses, and control over religious schools); *McKelvey v. Pierce*, 173 N.J. 26, 44 (2002) (ministerial exception arises "under the church autonomy doctrine") (citing *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002)).

As this Court has recognized, one of the other components of the church autonomy doctrine involves claims that "would require excessive procedural or substantive interference with church operations." *McKelvey*, 173 N.J. at 52. *See also Kedroff*, 344 U.S. at 107-108 ("Legislation that regulates church administration [or] the operation of the churches … prohibits the free exercise of religion."); *Hosanna-Tabor*, 565 U.S. at 188 ("interfere[nce] with the internal governance of the church" prohibited). With respect to employment disputes, this particular subset of the church autonomy doctrine is *broader* than the ministerial exception because it applies to claims brought by all employees, including those brought by employees who do not qualify as "ministers." *See, e.g., Bryce*, 289 F.3d at 658 n.2 (determining plaintiff's ministerial status was "unnecessary … under the broader church autonomy doctrine"); *McKelvey*, 173 N.J. at 52 (same). At the same time, the protection against interference with internal church operations is *narrower* than the ministerial

exception because it applies only where the religious organization offers a "religious-based justification for its actions" and points to "internal governance rights" that would be affected. *McKelvey*, 173 N.J. at 52. *Compare Hosanna-Tabor*, 565 U.S. at 194 ("religious reason" not required to make out ministerial exception defense).

As a result, the ministerial exception would not bar an employment suit by a janitor at a religious Jewish school if the janitor did not perform important religious functions. But the janitor's suit would nevertheless be barred by the church autonomy doctrine if the janitor were fired for religious reasons related to interference with church operations, such as if the janitor began proselytizing the students at the school to leave Judaism and join another religion. Adjudicating a claim brought by that janitor "would require excessive procedural or substantive interference with church operations" and would therefore be barred by the First Amendment. *McKelvey*, 173 N.J. at 52.

In sum, the First Amendment's church autonomy doctrine "prohibits civil court review" of employment decisions based on religious belief or practice. *Bryce*, 289 F.3d at 655. *See also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261, 1265 (10th Cir. 2008) (church autonomy prevents courts from "second-guessing" religious practices); *McKelvey*, 173 N.J. at 44-45 (church autonomy bars disputes "where the alleged misconduct is 'rooted in religious belief'"); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 197 n.15 (2d Cir. 2017) ("a religious reason … proffered" for termination

can independently bar a claim and render "a foray into the ministerial exception" unnecessary); *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., joined by Kagan, J., concurring) (noting EEOC's admission that "principles of religious autonomy" can, independent of the ministerial exception, foreclose federal employment discrimination claims); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (quoting *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991)) (noting constitutional significance of the ability of religious employers to "create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities'").

II. The church autonomy doctrine prohibits plaintiff's lawsuit.

A. St. Theresa terminated plaintiff's employment because it would interfere with church operations and governance.

The undisputed facts here show that the church autonomy doctrine applies to prohibit plaintiff's suit.

St. Theresa exists "to provid[e] a quality education in a Catholic environment." Pa140. As an arm of the Catholic Church, the school has a sincere religious belief that premarital sex is immoral. Pa147; Catechism of the Catholic Church § 2353. Plaintiff knew this, Pa223, and she signed employment agreements committing to follow the Catholic Church's moral standards, Pa149-50. When St. Theresa's principal discovered from plaintiff's pregnancy that plaintiff had violated this moral standard,

plaintiff's employment was terminated but she was paid through the end of the school year. Pa230.

Because St. Theresa's personnel decision was firmly "rooted in religious belief," and continuing her employment would cause "interference with church operations," the First Amendment's church autonomy doctrine bars plaintiff's claims. *McKelvey*, 173 N.J. at 44, 52. Forcing St. Theresa to retain a teacher who violates the school's sincere religious beliefs would cause significant "interference with church operations," *id.*, and deprive St. Theresa of its right "to select [its] own leaders, define [its] own doctrines, resolve [its] own disputes, and run [its] own institutions." *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring).

Like other religious schools, "religious education and formation [are] the very reason for the existence" of St. Theresa. *Our Lady*, 140 S. Ct. at 2055. And teachers play a "critical and unique role … in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). St. Theresa furthers its mission through the example of teachers who "exhibit the highest Christian ethical standards." Pa262; Pa221. The requirement that teachers abide by the code of ethics is "integral" to St. Theresa's mission. Pa310. For a civil court to "disagree" with this religious judgment would cause "considerable ongoing government entanglement in religious affairs" that "raises concern

that a religious organization [like St. Theresa] may be chilled in its free exercise activity." *Amos*, 483 U.S. at 343 (Brennan, J., concurring).

For this reason, the Religion Clauses of the First Amendment preclude inquiry into whether St. Theresa "followed its own laws and procedures" in applying its religious beliefs or into "the conformity of the members of the church to the standard of morals required of them." *Milivojevich*, 426 U.S. at 713-14. Nor may a court "make its own interpretation" of St. Theresa's religious doctrine or "assess[] the relative significance" of religious tenets. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969). Once it was established—and here it is undisputed—that plaintiff was terminated for violating St. Theresa's sincere religious beliefs, the First Amendment required dismissing the suit.

B. Other courts routinely dismiss religious school employee lawsuits similar to plaintiff's because they violate church autonomy.

Other courts have dismissed lawsuits brought by religious school employees because allowing them to proceed would interfere with church operations and governance, thus violating the church autonomy protected by the First Amendment. For example, in *Curay-Cramer* a teacher at a private Catholic school was fired after she signed her name to a pro-choice advertisement in the local newspaper. 450 F.3d at 132. The teacher sued under Title VII and claimed that "she was fired for conduct

less egregious under Catholic doctrine than conduct of male employees who were treated less harshly." *Id.* The Third Circuit rejected her claims.

Importantly, the Court noted that "[i]n order to assess th[e] claim of the relative harshness of penalties for 'similar conduct,' we would have to measure the degree of severity of various violations of Church doctrine." *Id.* at 137. The Third Circuit explained that "[t]his exercise would violate the First Amendment" because were the Court required to, for example, "treat Jewish males or males who oppose the war in Iraq the same as a Catholic female who publicly advocates pro-choice positions, we would be meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy." *Id.* at 139, 141.

Similarly, in *Little v. Wuerl*, the Third Circuit held that applying Title VII to an employee terminated from a Catholic school for marrying in violation of canon law raised First Amendment problems because an "inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's … practices make her unfit to advance that mission." 929 F.2d at 949. The Third Circuit explained that "[i]t is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts" because "[e]ven if the employer ultimately prevails, the process of review itself" leads to "excessive entanglement." *Id.*

In *Hall v. Baptist Memorial Health Care Corp.*, a plaintiff sued her religious college employer under Title VII claiming that she was unlawfully fired based on her religion. 215 F.3d 618 (6th Cir. 2000). The plaintiff's employer was affiliated with the Southern Baptist Convention and held Baptist religious views on sexuality, but the plaintiff herself attended and led a non-Baptist church that advocated for different views on these religious questions. She was terminated for advocating her non-Baptist religious views and brought suit under Title VII. The Sixth Circuit dismissed the plaintiff's suit, concluding that even if other employees may have violated different religious beliefs held by the religious college, "[t]he First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices." *Id.* at 626. That meant, for example, that courts could not "requir[e] consistency" in investigating violations of religious beliefs, because "courts are not in the business of enforcing religious orthodoxy." *Id.* (quotation marks omitted).

Taken together, these examples from federal courts of appeals show that the church autonomy doctrine is routinely brought to bear to prohibit lawsuits brought by non-ministerial employees against their religious employers. The First Amendment requirements of non-interference and non-entanglement dictate that civil courts must abstain from deciding inherently religious matters touching on church operations or governance. *See McKelvey*, 173 N.J. at 52.

III. The Appellate Division's reasoning illustrates the church-state entanglement that the church autonomy doctrine is designed to avoid.

The Appellate Division's entanglement in religious questions vividly demonstrates why the church autonomy doctrine must be observed. In both its 2018 and 2020 opinions, the Appellate Division substantively interfered with St. Theresa's protected independence on matters of religious faith, doctrine, and internal governance, in three broad ways. Each of these errors is a sufficient basis for reversal alone.

First, the Appellate Division usurped St. Theresa's right to religious governance by deciding when and how St. Theresa must enforce and investigate its religious code of ethics in order to avoid civil liability.

Second, the Appellate Division interpreted religious doctrine and weighed the religious significance of various violations of St. Theresa's religious code of ethics.

Third, the Appellate Division's "very process of inquiry" led to impermissible entanglement between government and religion.

A. The lower court unlawfully dictated when and how St. Theresa must investigate and enforce violations of its religious code of ethics.

When and how St. Theresa should investigate and enforce its religious code of ethics are solely matters of internal religious governance. The "First Amendment does not permit federal courts to dictate to religious institutions … how to enforce their religious practices." *Hall*, 215 F.3d at 626. Instead, St. Theresa is free to "select [its] own leaders, … resolve

[its] own disputes, and run [its] own institution[]" without interference from secular courts. *Amos*, 483 U.S. at 341 (Brennan, J., concurring).

That principle should have controlled here, especially because plaintiff *admitted* she was terminated for religious reasons. Pa25; Pa429-30 (accepting plaintiff's concession at her deposition that she "understood premarital sex to be a violation of Catholic tenets"). Instead, the Appellate Division expressed its skepticism that premarital sex violated Catholic doctrine, noting that "the handbook and related documents … did not mention premarital sex as prohibited conduct." Pa429-30; Aa28-29. The Court then erroneously "dictate[d]" to St. Theresa "how to enforce [its] religious practices," *Hall*, 215 F.3d at 626, by decreeing that St. Theresa could not fire any employee for violating its religious code of ethics until after probing "to detect whether any of its employees" violated "any" other religious tenet. Aa8, 12. The Appellate Division had no authority or competence to decide when a religious institution should enforce religious tenets. Deciding whether someone violated Catholic moral teaching constitutes reversible error.

Notably, the Appellate Division's determination that St. Theresa must investigate "to detect whether any of its employees violated" its religious code of ethics is inconsistent with Supreme Court precedent. In *Our Lady*, the plaintiff argued the ministerial exception did not apply to her because she was not a practicing Catholic and therefore not in "good standing" with the Catholic Church—a requirement of her employment

agreements. 140 S. Ct. at 2069. In effect, the teacher asserted that the religious school forfeited its ministerial exception defense because it had not adequately enforced its religious beliefs against her.

The Supreme Court disagreed, explaining that "acceptance of that argument would require courts to delve into the sensitive question of what it means to be a 'practicing' member of a faith, and religious employers would be put in an impossible position." *Id*. Specifically, the Supreme Court noted the difficulties in enforcing such a standard, as "it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job. Was [the religious organization] supposed to interrogate [plaintiff] to confirm that she attended Mass every Sunday?" *Id*.

That same reasoning applies here. Just as determining whether a plaintiff employee is a practicing Catholic is a "sensitive question" to be avoided, so too is the question of how St. Theresa should enforce and investigate violations of its religious code of ethics *against all of its employees*. And since the United States Supreme Court has refused to require religious schools to interrogate their employees to identify deviations from religious obligations, the Appellate Division cannot mandate how St. Theresa must probe and "detect whether any of its employees" violated "any" other religious belief. Aa8, 12. New Jersey courts cannot play the role of orthodoxy police.

B. The lower court impermissibly interpreted religious doctrine and ranked the relative importance of St. Theresa's Catholic religious beliefs.

The Appellate Division also violated St. Theresa's protected autonomy on matters of faith, doctrine, and religious governance by interpreting religious doctrine and ranking the relative importance of various Catholic religious beliefs. "[L]itigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). A secular court cannot "make its own interpretation" of religious doctrine or "assess[] the relative significance" of religious tenets. *Presbyterian Church*, 393 U.S. at 450. Indeed, the interpretation of doctrine and the relative significance of religious tenets are "at the very core of a religion." *Id.* Yet, in its attempt to ensure that St. Theresa enforced its religious code of ethics in a manner satisfactory to a secular court, Pa430, the Appellate Division committed both errors.

The Appellate Division decided St. Theresa could not enforce its religious code of ethics until after investigating "to detect whether any of its employees violated Catholic tenets or breached" the religious code of ethics. Aa8. It also held St. Theresa could be held liable for enforcing its religious code of ethics if it did not do so in a way that the Appellate Division judged to be consistent. Aa26. But to determine whether St. Theresa adequately investigated violations of "Catholic tenets," the Appellate Division would have to interpret Catholic doctrine. *See* Aa15; Pa418

(crediting testimony on the relative religious significance of divorce and premarital sex). And to determine whether St. Theresa enforced its religious code of ethics consistently, secular courts would have to interpret and adjudicate whether other employees violated the requirement that "[c]hurch personnel shall conduct themselves in a manner that is consistent with the discipline, norms and teachings of the Catholic Church," or whether and how any violations of the code of ethics would be punished. Pa262; Pa387.

But the Appellate Division has no authority to identify violations and measure appropriate enforcement of "the discipline, norms and teachings of the Catholic Church." *See Presbyterian Church*, 393 U.S. at 450. Whether to trust employees and enforce religious violations only when their existence is volunteered is a morally fraught question of internal governance. So too is the question of whether a particular violation is religiously significant enough to investigate. Religious bodies, not the courts, are alone competent to develop religiously-based judgments on these questions. *Kedroff*, 344 U.S. at 116. But under the Appellate Division's rulings, secular courts can make those decisions for religious organizations and impose an external standard on how they carry out their religious practices and whether they apply sufficient rigor in doing so. The Appellate Division's opinions therefore "inhibit[] the free development of religious doctrine and … implicat[e] secular interests in matters

of purely ecclesiastical concern." *Milivojevich*, 426 U.S. at 710; *see also Amos*, 483 U.S. at 343-44 (Brennan, J., concurring).

Additionally, while engaging in its pretext inquiry, the Appellate Division "assess[ed] the relative significance" of religious tenets, something secular courts may not do. *Presbyterian Church*, 393 U.S. at 450. For example, the Appellate Division asserted that lying, cheating, and divorce have the same religious significance as premarital sex. Aa15-16, Pa418. To apply the Appellate Division's rule, the trial court determined employees "in violation of [St. Theresa's] ethics code by virtue of engaging in premarital sex, being divorced, or *for any other reason*" were "similarly situated." Pa456 (emphasis added); *see also* Pa430. But a comparison between, say, divorce and premarital sex is probative only if divorce is as inconsistent with Church teaching, as a moral and theological matter, as premarital sex—a religious question not amenable to resolution by civil courts. Unlike religious organizations, civil courts, are simply not competent to "assess[] the relative significance" of divorce, premarital sex, and other violations of religious tenets, *Presbyterian Church*, 393 U.S. at 450, because "[r]eligious questions are to be answered by religious bodies." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013). The Appellate Division erred by concluding otherwise.[3]

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[3] The Appellate Division's suggestion, Aa24 n.7, that plaintiff might have become pregnant via in vitro fertilization serves only to prove the point—the Catholic Church is unequivocal that the use of in vitro fertilization is "morally unacceptable." Catechism of the Catholic Church § 2377.

C. The lower court's "very process of inquiry" led to excessive entanglement.

The Appellate Division's decision independently warrants reversal because its mode of analysis will inevitably result in excessive entanglement in religious governance. The Religion Clauses prohibit courts from hearing cases when the *process* of adjudication itself requires intrusive inquiries into religious matters. Indeed, inquiries into "religious views ... [are] not only unnecessary but also offensive," as "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

For this reason, courts routinely hold that such proceedings are "*in themselves*" impermissibly "extensive inquir[ies] into religious law and practice, and hence forbidden by the First Amendment." *Young v. N. Ill. Conf.*, 21 F.3d 184, 187 (7th Cir. 1994) (cleaned up). Thus, in *Catholic Bishop*, the Supreme Court described the First Amendment dangers inherent in judicial supervision of the relationship between religious schools and their teachers. 440 U.S. at 501-04. Because teachers play a "critical and unique role … in fulfilling the mission of a church-operated school," evaluating the terms and conditions of their employment "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 501-02. Under these circumstances, "[i]t is not only the conclusions that may be reached by [the government] which may impinge

on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.*; *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (applying *Catholic Bishop* to hold EEOC investigations into church affairs violated Religion Clauses); *id.* at 467 ("Having once been deposed, interrogated, and haled into court," religious institutions would carry out their religious missions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the … needs of the [institution]." (cleaned up)); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church[.]").

Entangling inquiries into a religious group's protected autonomy are barred by the First Amendment because, "once exposed to discovery and trial, the constitutional rights of [religious organizations] to operate free of judicial scrutiny would be irreparably violated." *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990); *see also Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011) ("entanglement of the civil justice system with matters of religious policy mak[es] the discovery and trial process itself a first amendment violation"). Stated differently, the church autonomy doctrine is "closely akin" to "official immunity" and protects against "the travails of a trial and not just from an

adverse judgment." *McCarthy*, 714 F.3d at 975. Indeed, courts have a *duty* to avoid entanglement in religious affairs. *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 121-22 (3d Cir. 2018) (collecting cases). Thus, "the *mere adjudication* of [religious] questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., joined by Kagan, J., concurring) (emphasis added).

The Appellate Division's decisions ignored this relevant case law, and the Court's errors are evident in both of its opinions. In its first decision, the Appellate Division reversed the trial court and remanded for additional discovery on whether St. Theresa "treated the same way" all "similarly situated employees." Pa425; Pa430. The Court asserted that because other behavior, such as "being divorced," was "equivalent of plaintiff's alleged violation," no inquiry into the "propriety of [St. Theresa's] 'dogma and polity'" were necessary. Pa418-19. As a result, the Appellate Division expressly held that "plaintiff can have discovery on the issue of defendant's treatment of all 'similarly situated' employees who defendant knew were in violation of its ethics code." Pa430. But contrary to the Appellate Division's reassurances, allowing this case to proceed to intrusive discovery—including about the purported sins of other employees—risks "embroil[ing]" civil courts "in line-drawing and second-guessing regarding [religious] matters about which [they have] neither competence nor legitimacy." *Colo. Christian Univ.*, 534 F.3d at 1265; *see also Fratello*, 863

F.3d at 203 (recognition of "judicial incompetence with respect to strictly ecclesiastical matters" goes back to the Founding).

Worse still, in its second opinion, the Appellate Division concluded that St. Theresa could be held liable solely because of its alleged failure to attempt "to detect whether any of its employees violated" its religious tenets. Aa8, 12. As noted previously, holding St. Theresa liable was only possible because the Appellate Division answered inherently religious questions by comparing plaintiff's acknowledged violation of St. Theresa's religious beliefs to other employees' alleged sins, such as "whether any employee ever cheated, lied, … failed to tell the truth," or "otherwise violated any of the Church's doctrines." Aa12, 16. In essence, by permitting this suit to proceed, the Appellate Division arrogated to itself the power to weigh the relative significance of St. Theresa's religious beliefs, and the relative moral weight of the sins of others, which then allowed it to dictate how St. Theresa, a religious organization, must investigate and enforce its religious code of ethics. The Appellate Division should have avoided these multiple errors on the front end by recognizing that discovery and adjudication would necessarily entail these types of forbidden inquiries into religious questions on the back end.

This is especially true given the evidence already in the record at the time of the Appellate Division's initial decision. The Appellate Division noted that "plaintiff's deposition testimony [stated] that she was aware that the church did not condone premarital sex." Pa414. In other words,

the Court acknowledged that St. Theresa had a sincerely held religious belief about sexuality and that plaintiff understood that adherence to that belief was a condition of continuing employment. That was enough to end the inquiry and dismiss this case.

Instead, the Appellate Division "troll[ed] through" St. Theresa's religious beliefs, *Mitchell*, 530 U.S. at 828, ranked the relative severity of various alleged violations, and mandated how St. Theresa was required to enforce its religious code of ethics. Pa418; Pa430; Pa456; Aa8, 12, 16. The Appellate Division relied on *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), to engage in this inquiry, but *Cline* is inapposite. In *Cline*, the plaintiff "presented a variety of concrete evidence casting into doubt" the religious reason for termination. 206 F.3d at 667. This evidence showed the religious school focused more on the pregnancy than on the plaintiff's premarital sex and included the religious school's statement that the plaintiff may not have been terminated had she informed the school of the pregnancy sooner. *Id.*

Simply put, that is not this case. Here, plaintiff failed to introduce any evidence suggesting that she was terminated pretextually and for non-religious reasons.[4] Rather, the Appellate Division was forced to rely on the *absence* of evidence—namely, St. Theresa's supposedly-inadequate

[4] The Sixth Circuit has indicated the additional evidence in *Cline* is its distinguishing factor. *See Sharma v. Ohio State Univ.*, 25 Fed. App'x 243, 248 (6th Cir. 2001) (citing *Cline* for the proposition that the plaintiff may prevail by marshalling evidence establishing there is no legitimate reason for the termination).

investigation into its employees' violations of its religious code of conduct—to deny St. Theresa summary judgment.

Furthermore, the Sixth Circuit did not consider the First Amendment issue raised in this case and merely compared individuals of both sexes who violated the Church's prohibition on premarital sex. *Id*. at 667. By contrast, the Appellate Division extensively interrogated St. Theresa's religious beliefs and demanded a comparison of individuals who violated other religious tenets—such as cheating, lying, or failing to tell the truth, Aa15-16—the very inquiry rejected by other courts on First Amendment principles. *Hall*, 215 F.3d at 626; *Curay-Cramer*, 450 F.3d at 139-40. The Appellate Division should not have entangled itself with Catholic doctrine in this way.

IV. Church autonomy is particularly critical for Orthodox Jews and other religious minorities.

An additional reason that this Court should reverse the Appellate Division is the especially negative effect on minority religious groups like *Amicus*. Church autonomy is critical for minority religious groups whose beliefs and practices may be unfamiliar or not widely held. This is particularly true for Orthodox Jews in New Jersey, where religious animosity and anti-Semitism are unfortunately not uncommon. Municipal officials in New Jersey have sometimes been "influenced … by vocal anti-Orthodox-Jewish sentiment expressed by some residents at public meetings" and "engaged in unlawful discrimination aimed at halting an unwanted

'infiltration' by Orthodox Jews." State of New Jersey, Office of the Attorney General, *Attorney General Porrino Announces State Lawsuit Charging Mahwah Township Council with Excluding Orthodox Jews* (Oct. 24, 2017), https://nj.gov/oag/newsreleases17/pr20171024a.html; *Porrino v. Township of Mahwah*, No. 17-cv-11988, Dkt. No. 1-1 (D.N.J. removed Nov. 22, 2017).[5]

Because the religious beliefs and practices of Orthodox Jews—and indeed, other adherents of minority faiths—may be unfamiliar or not well-understood, subtler forms of judicial misunderstanding are possible. "In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Our Lady*, 140 S. Ct. at 2066. Moreover, "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might

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[5] Animus against Orthodox Jews has led to repeated litigation in New Jersey. *See, e.g., ACLU v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987) (*eruv* dispute); *Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 239 N.J. Super. 89 (1989) (neighborhood association sought to exclude synagogue); *Landau v. Township of Teaneck*, 231 N.J. Super. 586 (1989) (neighbors sought to invalidate sale of land to synagogue); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (*eruv* dispute); *Grewal v. Jackson Township*, Case No. OCN-C-000064-21, Dkt. No. 1 (N.J. Sup. Ct., filed Apr. 27, 2021) (discriminatory zoning practices); *WR Prop. LLC & Agudath Israel of Am. v. Township of Jackson*, Case No. 3:17-cv-03226-MAS-DEA (D.N.J. settled May 5, 2021) (zoning dispute); *Kurlansky v. 1530 Owners Corp.*, Case No. 2:21-cv-12770-CCC-JSA (D.N.J. complaint filed June 21, 2021) (Fair Housing Act and New Jersey Law Against Discrimination claims).

affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336.

Therefore, while the present case concerns the religious teachings of a Catholic school, the Appellate Division's reasoning is even more threatening to religious institutions whose beliefs and practices are not as widely-known as the Catholic Church's. In practice, this would mean that religious beliefs and practices that are unfamiliar or that could be interpreted differently among similar religious communities would be especially vulnerable to judicial second-guessing. For example, were other courts to follow the Appellate Division's reasoning, Orthodox Jewish schools could be held liable for refusing to hire or dismissing teachers who did not keep the Jewish Sabbath, who refused to keep kosher on school premises, or whose conduct in other ways constituted a public violation of tenets of Orthodox Jewish beliefs and observances that those schools seek to inculcate in their students. Indeed, because the Appellate Division suggested that Catholic religious beliefs do not really prohibit premarital sex, Aa28-29; Pa407; Pa429 (St. Theresa's religious code of ethics "did not mention premarital sex as prohibited conduct"), even while acknowledging that plaintiff "understood premarital sex to be a violation of Catholic tenets," Pa429-30, a secular court following the Appellate Division could question aspects of Jewish belief and observance as well, such as whether pushing a baby stroller is truly a violation of the Jewish Sabbath.

Moreover, a religious group's decision regarding the relative significance of violating different religious obligations would also be threatened by the Appellate Division's reasoning. For example, if a religious employee of a synagogue or yeshiva sued after being terminated for publicly transgressing some aspect of Jewish observance, a secular court could hold that the violation was not significant enough to warrant termination. But courts are forbidden from "differentiat[ing] between the severity of violating" different religious tenets. *Hall*, 215 F.3d at 626. A secular court should not be allowed to determine which tenets of faith warrant employment actions by a religious institution and which do not. Some institutions may choose to emphasize certain observances more than other institutions of the same faith, and some may make employment decisions based on those issues while others may not. As the United States Supreme Court stated, "[i]ntrafaith differences … are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981). "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect," and "it is not within the judicial function and judicial competence to inquire whether [one believer or another] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 715-16.

Religious organizations belonging to minority faiths with unfamiliar religious beliefs may "regard the conduct of certain functions as integral to [their] mission," but secular courts could "disagree." *Amos*, 483 U.S. at 343 (Brennan, J., concurring). These religious organizations would then be pressured "to characterize as religious only those activities about which there likely would be no dispute, even if [they] genuinely believed that religious commitment was important in performing other tasks as well." *Id*. As a result, a religious organization's "process of self-definition would be shaped in part by the prospects of litigation" instead of its sincerely held religious beliefs. *Id*. at 343-44. This "danger of chilling religious activity" is especially pronounced for minority faiths and is all the more reason to reverse the Appellate Division. *Id*. at 344.

CONCLUSION

The church autonomy doctrine bars plaintiff's lawsuit. Ruling otherwise would violate the Religion Clauses' promise of church independence on matters of faith, doctrine, and internal governance. The Appellate Division disregarded the First Amendment when it interpreted and ranked the relative importance of St. Theresa's beliefs, decided St. Theresa's religious obligations for itself, and dictated how St. Theresa must investigate violations of its religious code of ethics by third parties. Allowing these unconstitutional intrusions to stand and plaintiff's claim to proceed threatens not just St. Theresa's First Amendment rights, but those of minority-faith groups across New Jersey.

The Court should reverse the decision below and direct that the suit be dismissed.

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Respectfully submitted.

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**Pro hac vice* admission pending