No. 20-4141

In the United States Court of Appeals for the Sixth Circuit

WALTRINA MIDDLETON,

Plaintiff-Appellant,

v.

UNITED CHURCH OF CHRIST BOARD, *et. al.*

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio No. 1:19-cv-01899

BRIEF OF *AMICI CURIAE* AGUDATH ISRAEL OF AMERICA AND THE DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amicus Curiae Agudath Israel of America; *Amicus Curiae* the Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia.

(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:

The Becket Fund for Religious Liberty.

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INTEREST OF *AMICI CURIAE*[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many 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. Agudath Israel regularly intervenes at all levels of government to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

The Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia consists of 42 parishes and 4 monasteries and covers sixteen states, including states within the Sixth Circuit. The Church was established by bishops, clergymen, and laity who fled the Bolshevik Revolution and Civil War in 1920. The Church has for decades defended itself, its dioceses, parishes, monasteries and communities in the United States against attempts to induce civil courts to interfere in Canonical Church life, and likewise strongly supports other religious organizations in preserving their own constitutional rights.

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[1] No party's counsel authored this brief in whole or in part, and no one other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Neither Plaintiff-Appellant nor Defendants-Appellees consented to the filing of this brief.

INTRODUCTION

Rev. Waltrina Middleton sued the United Church of Christ ("Church") over the Church's treatment of her while she was employed as an ordained minister responsible for planning nationwide youth events. That should have been the end of this lawsuit, because the Religion Clauses require courts to protect religious organizations' ability to "select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). This First Amendment doctrine is commonly known as the ministerial exception. When the Church raised it below, Rev. Middleton made a "quick pivot" to recharacterize her case as raising Title VII hostile work environment claims and then convinced the district court that the ministerial exception does not apply to such claims. Order, RE 9, Page ID # 80.

This was error. The ministerial exception is a structural protection that prevents courts from being drawn into disputes over religious faith and doctrine—which includes disputes about who represents the faith and how they conduct themselves while doing so, regardless of how those claims are characterized.

Amici offer this brief to make two simple points. First, because the ministerial exception is a structural protection intended to protect both church and state, it is an unwaivable threshold defense that courts should consider first, even when the defendant does not raise or—as

here—only partially presses it. Second, under this Court's precedent, the ministerial exception applies to all Title VII claims, regardless of how they are labeled. The district court's contrary decision below was error.

Any other rule would invite ministers suing their religious organizations over employment discrimination to simply recast their claims as involving a "hostile work environment"—which is why almost every circuit to consider the issue has recognized that the ministerial exception applies to bar hostile work environment claims brought under Title VII. The Ninth Circuit is the outlier, and its position has been widely decried because it "undermines over a century of Supreme Court jurisprudence, runs contrary to every other [federal] Court of Appeals that has had occasion to visit the issue," and "narrows the ministerial exception nearly to the point of extinction." *Bollard v. Cal. Province of the Soc'y of Jesus*, 211 F.3d 1331, 1331 (9th Cir. 2000) (Judges Wardlaw, O'Scannlain, Kozinski, and Kleinfeld, dissenting from denial of *en banc* rehearing). These concerns are correct. In fact, hostile work environment claims are uniquely problematic because they open the entire employment relationship between a church and its ministers to judicial scrutiny and control. That constitutes far more governmental intrusion than even the mine-run Title VII termination claims commonly barred by the exception.

ARGUMENT

I. This Court should resolve this case under the ministerial exception.

A. The ministerial exception applies here.

The ministerial exception is in the heartland of the Religion Clauses, and this case is in the heartland of the ministerial exception. As the Supreme Court has repeatedly held, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so … interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). As a result, the First Amendment protects religious organizations' ability to "select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. This is known as the "ministerial exception," and it protects both church and state—granting religious organizations space to decide their own religious affairs, and protecting the government from becoming "entangled in essentially religious controversies." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

It is plain from the face of the complaint that this is a heartland case. It is undisputed that the United Church of Christ is a church whose independence is protected by the Religion Clauses. Motion to Dismiss, RE 4, Page ID # 22. And it is also undisputed that Rev. Middleton—an

ordained Church minister whose job titles included "Minister of Faith Formation," and who was responsible for planning the Church's nationwide youth events—carried out important religious functions for the Church. *Id.*; *see also* http://waltrina.org/about/ (describing Rev. Middleton's service as an ordained minister). That relationship has broken down, and now Rev. Middleton has sued her church for employment discrimination under Title VII and analogous state laws.

That should have been the beginning and the end of the case. As *Our Lady* recognized, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 140 S. Ct. at 2060; *accord Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 942 (6th Cir. 1992). Yet Rev. Middleton has invited federal courts to decide questions that go to the heart of her relationship with her church.

How religious communities should best handle disputes between ministers—and between ministers and their flock—is a millennia-old and quintessentially religious question,[2] one that the Religion Clauses unambiguously reserve to religious communities themselves. That is true whether or not the parties invite the courts to resolve it. *See* Section I(B), *infra*. Wading into Rev. Middleton's dispute with her church would unconstitutionally violate the independence of the United Church of

[2] *See, e.g.*, *Exodus* 18:13-26 *and Matthew* 18:15-17 (establishing dispute resolution requirements for religious communities).

Christ and entangle the judiciary in disputes about religious faith and doctrine.[3]

As explained in Section II below, the district court's holding to the contrary misread or ignored Supreme Court and Circuit cases, and instead relied on contrary dicta from an unpublished ruling decided before the relevant precedent. Indeed, Rev. Middleton's case—which relies on evidence spanning six years of employment and extends beyond supervisors to include peers and even lay members of her religious community—is far more entangling than other employment discrimination claims regularly foreclosed by the ministerial exception.

B. This Court should rule on the ministerial exception at the outset.

The court below ruled for the Church on other grounds, but this Court should affirm under the ministerial exception. *Wallace v. Oakwood Healthcare*, 954 F.3d 879, 886 (6th Cir. 2020) ("[T]his court can affirm … on any grounds supported by the record"). The ministerial exception is a threshold issue that cannot be waived. This Court has a duty to rule on its application to hostile work environment claims first, in order to avoid

[3] Of course, a minister who was the victim of abuse may still be able bring a successful tort claim, as such claims may not inherently implicate the ministerial relationship the way Title VII claims do. But, as the district court recognized, that is not this case. Order, RE 9, Page ID # 90 (allegations are "unprofessional and unpleasant," not "physically threatening or humiliating").

allowing federal courts to be further drawn into the merits of this dispute between a minister and her church.

1. The ministerial exception cannot be waived.

The Church correctly states that "[r]ecent decisions hold that even hostile work environment claims should be subject to the ministerial exception," but says that "there is no need to reach that issue in this case." UCC Br. 16. Not so. As this Court has held, "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). *Hosanna–Tabor's* "clear language recognizes that the Constitution does not permit private parties to waive the First Amendment's ministerial exception." *Id.* (citing *Hosanna-Tabor*, 132 S. Ct. at 702-05). That is because "[t]his constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes." *Id.*

Indeed, *two* sets of important First Amendment interests are at issue: the Church's own constitutionally protected right to autonomy with respect to "the selection of the individuals who play certain key roles," *Our Lady*, 140 S. Ct. at 2060, and the judiciary's independent duty not to get "embroil[ed] … in line-drawing and second-guessing regarding [religious] matters about which it has neither competence nor legitimacy." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1265 (10th

Cir. 2008) (McConnell, J.); *accord Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) ("[T]he ministerial exception … is not subject to waiver or estoppel. A federal court will not allow itself to get dragged into a religious controversy even if a religious organization wants it dragged in." (cleaned up)).

Thus, this Court has recognized that it has an independent obligation to consider whether the ministerial exception applies. For instance, in *EEOC v. Harris Funeral Homes, Inc.*, this Court resolved a ministerial exception defense that was presented on the face of the case, even though it was only raised by amici and the defendant-employer had expressly waived it. 884 F.3d 560, 581 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Other courts have raised the exception *sua sponte* to observe the "constitutional limits on judicial authority." *E.g., Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018). This Court has an independent obligation to determine whether the ministerial exception applies to hostile work environment claims like Rev. Middleton's—and if it does, to refrain from being drawn into the dispute at all.

2. The ministerial exception should be decided first.

Courts have long recognized that the "very process of inquiry" into internal church affairs can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). Nowhere is that better established than in the context of ministerial decisions.

Indeed, courts have recognized that part of the reason that "Title VII [cannot] be applied to decisions affecting the employment of their clergy" is that the judicial reviews of such decisions 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); *accord EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (applying *Catholic Bishop* in a ministerial exception case, finding that EEOC investigations into church affairs violated Religion Clauses). In a case like this one involving an employment dispute between a minister and her church, "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).

That is why this Court has held that "[t]he ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss." *Conlon*, 777 F.3d at 833. It is also why courts have regularly placed limits on discovery and trial to prioritize resolution of ministerial exception defenses, and have allowed interlocutory appeals when those defenses are denied. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (bifurcated discovery); *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013) (interlocutory appeal); *see also Catholic Univ. of Am.*, 83 F.3d at 468 (ruling on the ministerial exception before considering other meritorious defenses). Indeed, other courts of appeals have explained it

is "closely akin" to an "official immunity," which protects "from the travails of a trial and not just from an adverse judgment," and which is "irrevocably" lost when a case proceeds to the merits before resolving the defense. *McCarthy*, 714 F.3d at 975; *Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238, 1242 (10th Cir. 2010) ("[T]he ministerial exception, like the broader church autonomy doctrine, can be likened to … qualified immunity." (internal quotation marks omitted)).

Threshold resolution serves the purposes of the ministerial exception: "[b]y resolving the question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters." *Bryce v. Episcopal Church*, 289 F.3d 648, 654 n.1 (10th Cir. 2002). The EEOC gives the same counsel: the ministerial exception "should be resolved at the earliest possible stage before reaching the underlying discrimination claim." EEOC Compliance Manual Section 12: Religious Discrimination, EEOC-CVG-2021-3 (Jan. 15, 2021).

This Court should consider and rule on the ministerial exception first for another reason as well: to protect the rights of religious communities like *amici*, which have congregations in the Northern District of Ohio. If this Court affirms on other grounds, the district court's ruling that the ministerial exception does not apply to hostile work environment claims under Title VII will stand, and *amici*'s religious communities will face increased exposure to unconstitutional and invasive employment discrimination lawsuits repackaged as "hostile work environment" cases.

To avoid that outcome, this Court should rule on the ministerial exception first.

II. The district court erred in finding that there is a "hostile work environment" exclusion from the ministerial exception.

In the district court's view, "hostile workplace claims" generally do not fall "within the ambit of the ministerial exception." Order, RE 9, Page ID # 83. That view cannot be squared with precedent or the logic of the ministerial exception.

As this Court has made clear, the ministerial exception applies to all employment discrimination claims under Title VII. Such claims all "relate[] to [a plaintiff's] status and employment as a minister of the church," which are matters courts may not adjudicate. *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). That rule is fully applicable to Title VII hostile work environment claims, and doubly so since the unique elements of such claims and the relevant affirmative defenses would result in government entanglement with internal religious affairs. In keeping with the Supreme Court's protective application of the ministerial exception, most courts to consider this question have so held.

Only the Ninth Circuit, in a pair of pre-*Hosanna-Tabor* opinions, has held that hostile work environment claims may sometimes proceed—and its rulings came over strong dissents, have since been walked back in

part by the circuit, and have been expressly rejected by the Tenth Circuit and other courts.

A. Hostile work environment claims violate the ministerial exception.

1. Controlling precedent forecloses Title VII employment discrimination claims over the church-minister relationship.

The district court held that "the Supreme Court expressly limit[ed] its decision in *Hosanna-Tabor* to tangible employment actions." Order, RE 9, Page ID # 83. Similarly, Appellees here argue only that "tangible employment actions cannot form the basis of Appellant's hostile work environment claim." UCC Br. 17. But circuit precedent after *Hosanna-Tabor* makes clear that the ministerial exception applies to Title VII claims broadly—including hostile work environment claims in their entirety.

In *Hosanna-Tabor*, the Supreme Court explained that "[s]ince the passage of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. at 188 (internal citation omitted). Recently, the Court reaffirmed the strength of the exception, explaining that it applies "to laws governing the employment relationship between a religious

institution and certain key employees." *Our Lady*, 140 S. Ct. at 2055. Both *Hosanna-Tabor* and *Our Lady* applied the exception to bar ministers' employment discrimination claims, including claims arising under the Age Discrimination in Employment Act and the Americans with Disabilities Act. *See id.* at 2058, 2062.

Applying *Hosanna-Tabor*, this Court has concluded that the ministerial exception "precludes application of Title VII and other employment discrimination laws to claims concerning the employment relationship between a religious institution and its ministers." *Conlon*, 777 F.3d at 833 (quoting *Hosanna-Tabor*, 565 U.S. at 188) (cleaned up). Thus, the Court held that the exception bars "challenge[s] under federal or state employment discrimination laws," and "[i]t matters not whether the plaintiff is claiming a specific violation under Title VII or any other employment discrimination statute." *Id.* at 837. The district court here erred by disregarding this clear, controlling circuit precedent holding that *all* Title VII employment discrimination claims are subject to the ministerial exception.[4]

[4] The district court cited *Ogle v. Hocker*, 279 F. App'x 391, 395 (6th Cir. 2008) in part for the proposition that "the inquiry into a hostile work environment … can be applied based solely on secular rules." Order, RE 9, Page ID # 83 (quoting *Ogle*). But this was dicta, since the claims in *Ogle* involved defamation that occurred outside of the employment context. And that (unpublished) dicta is outdated, given this Court's recognition in *Conlon* that *Hosanna-Tabor* firmly established the

Even before *Conlon*, circuit precedent demonstrated that the ministerial exception applies to hostile work environment claims. Thirty-five years ago, agreeing with other circuits that "the First Amendment prevent[s] application of Title VII protection" to ministers, the Court explained that where a claim "relates to [a person's] status and employment as a minister of the church," it "concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law." *Hutchison*, 789 F.2d at 396. Later, the Court described the ministerial exception as broadly barring "claims involving the employment relationship between a religious institution and its ministerial employees." *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *partially overruled on other grounds in Hosanna-Tabor*, 565 U.S. at 195 n.4 (citing *Lewis*, 978 F.2d 940). The Court expressly noted that the exception "is often raised in response to employment discrimination claims under Title VII." *Id.*

This Court's approach is consistent with that of all other circuits to address the question, except the Ninth. The Fifth Circuit, which first recognized the ministerial exception, applied the doctrine as an exception to Title VII itself (and, later, similar laws). *See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (exception bars "the application of the provisions of Title VII to the employment relationship existing

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ministerial exception as a categorical bar on judicial adjudication of religious leadership disputes under Title VII.

between … a church and its minister"). The Eleventh Circuit has done the same. *See Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1301 (11th Cir. 2000) ("Title VII is not applicable to the employment relationship between a church and its ministers."). Citing *McClure*, the Tenth Circuit expressly applied the exception to a hostile work environment claim, holding that the First Amendment barred "*any* Title VII action brought against a church by one of its ministers." *Skrzypczak*, 611 F.3d at 1246 (emphasis added). And the Seventh Circuit has said that "[t]he 'ministerial exception' applies without regard to the type of claims being brought." *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003).[5]

In short, controlling precedent squarely forecloses Title VII by a minister against her church, including Title VII hostile work environment claims. Such claims are categorically barred by the First Amendment because they assert employment discrimination and arise solely by virtue of the plaintiff's employment as a minister of a church. These claims have no independent existence under tort or criminal law, but are grounded in "laws governing the employment relationship

[5] A divided panel of the Seventh Circuit later carved out an exception for some hostile work environment claims, but that opinion was promptly vacated and en banc argument was recently heard. *Demkovich v. St. Andrew the Apostle Par.*, 973 F.3d 718, 736 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020; argued Feb. 9, 2021).

between a religious institution and certain key employees"—a constitutionally privileged relationship. *Our Lady*, 140 S. Ct. at 2055.

2. Hostile work environment claims raise even more constitutional problems than termination claims.

Hostile work environment claims run headlong into the twin constitutional problems that gave rise to the ministerial exception: infringing a religious group's Free Exercise "right to shape its own faith and mission through its appointments" and violating the Establishment Clause prohibition on government entanglement "in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89.

a. Adjudicating hostile work environment claims would entangle courts in religious affairs.

If anything, hostile work environment claims require far more entanglement with church affairs than the termination claims regularly barred by the ministerial exception. In the latter case, courts need only analyze and adjudicate the end of the ministerial relationship. And even that is too much, since "a church's decision to fire a minister" is "a matter strictly ecclesiastical." *Id.* at 194-95.

But a hostile work environment claim is exponentially more invasive. Proving the claim requires a showing that, when viewed in the totality of the circumstances, "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 560,

562 (6th Cir. 1999) (internal quotation marks omitted). To decide a hostile work environment claim, a judge (or jury) must undertake an extensive examination of the entire work environment, potentially over the whole span of a minister's service with her church. Hostile work environment claims thereby extend judicial control over the whole of a ministerial relationship.

Resolving such claims requires courts to evaluate the church's internal dispute resolution mechanisms, the amount and type of control over ministers, and (in this case) how ministers and church members interact. It requires "a searching and therefore impermissible inquiry into church" affairs, in the form of both discovery into and trial regarding church governance. *Milivojevich*, 426 U.S. at 723.

For example, an inquiry into basic elements of the claim—whether alleged harassment affected the conditions of employment—necessarily requires a trier of fact to scrutinize and ultimately second-guess the conditions of employment of a minister. But those conditions are the church's alone to control. Courts have explained that "*all matters* touching th[e] relationship" "between a church and its pastor" "are of ecclesiastical concern," and "there is no exception to the bar against interfering with matters of church administration." *Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church*, 64 F.3d 664 (6th Cir. 1995) (table op.) (emphasis added); *see McClure*, 460 F.2d at 559 ("Matters touching this relationship must necessarily be recognized as of prime ecclesiastical

concern."). And imposing judicial scrutiny on the "terms and conditions of employment" in a religious organization necessarily runs the risk of "excessive entanglement." *Catholic Bishop*, 440 U.S. at 502-03; *accord Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 829 (D.C. Cir. 2020) (noting that the "terms and conditions of employment" of teachers entail "nearly everything that goes on in religious schools" (cleaned up)).

Evaluating the church's affirmative defenses raises similar problems. Churches may argue that they "exercised reasonable care to prevent and correct" alleged harassment and the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities." *Williams*, 187 F.3d at 567. But determining the "reasonableness" of a church's actions would require judges and juries to scrutinize the reasoning behind and reasonableness of a church's approach to handling internal disputes. Separating out secular and religious reasons for these actions would impermissibly involve "a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., joined by Kagan, J., concurring). Thus, the very process of deciding hostile work environment claims would impermissibly entangle the courts in religious questions.

b. Hostile work environment claims threaten religious autonomy.

For related reasons, adjudicating hostile work environment cases by ministers will cast a deep chill over religious expression and harm the day-to-day governance of religious communities. The judicial inquiries discussed above will inherently and uniquely pressure churches, "wary of [agency] or judicial review of their decisions," to make not just *termination* decisions but virtually *all* internal ministerial personnel decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.).

For instance, knowing that communications with other ministers may be judicially scrutinized will affect the way ministers in senior leadership roles approach their religious duties, carry out the church's mission and, specifically, communicate with the ministers they are leading. But "[a] religious body's control over [ministers] is an essential component of its freedom to speak in its own voice." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring). And knowing that communications from church members could be made an issue in a hostile work environment case (as they have been here here) could have a dramatic effect on how ministers interact with members of their own flock.

Similarly, permitting hostile environment claims will create perverse incentives for religious communities, pressuring them to either immediately terminate wayward ministers instead of seeking to rehabilitate them, or to overlook clergy misconduct for fear that removing problematic ministers will lead to lawsuits. *Skrzypczak*, 611 F.3d at 1245 (noting that adjudication of claims like this one would pressure a church to focus on "lower[ing] its exposure to liability rather than" making decisions "that best further its religious objectives" (cleaned up)). This dynamic would necessarily burden not only the church-minister employment relationship, but also distort internal church doctrine and discipline. And that is impermissible: "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady*, 140 S. Ct. at 2060. Thus, again, adjudication of hostile work environment claims would violate the principle that "civil authorities have no say over matters of religious governance." *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013).

Under the district court's approach, the ministerial exception will become little more than a pleading game, since termination claims can often be repackaged as hostile work environment claims. And that's exactly what happened below. What appeared to both the parties and the district court to be a claim "challenging the tangible employment actions Defendants took against Middleton" was recast "with a quick pivot" as a

claim alleging a "hostile work environment" "after Defendants raised the ministerial exception." Order, RE 9, Page ID # 80. Nor is this an isolated problem. Other plaintiffs too are reframing termination claims as hostile work environment claims in transparent attempts to avoid the ministerial exception. *See, e.g.*, *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 776 (N.D. Ill. 2018) (noting that after the court dismissed wrongful-termination claims on ministerial exception grounds, the plaintiff "then filed an amended complaint, alleging much of the same discriminatory conduct, but modifying his claims to challenge the hostile work environment, rather than the firing itself"). The First Amendment's guarantee of religious autonomy should not be so easily manipulated.

* * * *

The First Amendment "protect[s] [churches'] autonomy with respect to internal management decisions," especially those regarding ministers. *Our Lady*, 140 S. Ct. at 2060. Hostile work environment claims by ministers inherently usurp this autonomy over internal religious decisions and are therefore barred by the First Amendment.

B. The claims in this case raise the same issues and would result in the same harms that the ministerial exception is intended to prevent.

Rev. Middleton's claim only confirms the need to apply the ministerial exception to hostile work environment claims, for adjudicating them would involve both intrusion into and entanglement with religious affairs. Her complaint takes issue with:

- How the Church chose Rev. Middleton's supervising minister, and the identity of that minister, Complaint, RE 1, Page ID # 3-4 ¶13;
- How other ministers evaluated Rev. Middleton's performance and behavior at Church events; *id.* at Page ID # 4-5, 8 ¶¶15, 17-18, 31;
- How lay Church members interacted with Rev. Middleton, and how other Church ministers counseled Rev. Middleton to respond to them, *id.*;
- How the Church resolved internal disputes, and how other ministers responded to her use of these internal mechanisms, *id.* at Page ID # 4-5 ¶¶16-17, 19;
- The Church's failure to promote her to a more senior spiritual leadership position, and her eventual demotion, which she states was because she took actions "during General Synod … that some groups were not comfortable with," *id.* at Page ID # 5, 7-8 ¶¶20-21, 25, 28;
- Who the Church chose to replace her or promote instead, *id.* at Page ID # 7-8 ¶¶26, 28; and,
- Her termination, *id.* at Page ID # 8 ¶30.

On appeal, Rev. Middleton relies on *all* of these allegations—including the ones that focus on the Church's hiring and firing decisions—even complaining that the district court did not give adequate weight to her allegations about the Church's "failure to promote, its repeated demotions, and the eventual discharge of Dr. Middleton." Middleton Br.

20; *see id.* at 18-19. But those actions fall within the heartland of what the ministerial exception protects: "the authority to select and control who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 195. Rev. Middleton's claims would require discovery, factfinding by a judge or jury, and adjudication regarding much of the Church's internal religious affairs. Those inquiries would include how the Church selects ministers, how the Church's religious leaders communicate with one another and with lay Church members, how the Church mediates internal disputes between ministers, how the Church makes hiring and promotion decisions for ministers, and how Rev. Middleton herself performed her spiritual responsibilities. Thus, the First Amendment "requires dismissal of this employment discrimination suit." *Id.* at 194.

C. Other courts have expressly barred hostile work environment claims by ministers.

Other circuits and district courts to consider this issue have generally concluded that the ministerial exception specifically bars Title VII hostile work environment claims. As discussed, in *Skrzypczak*, the Tenth Circuit held that a hostile work environment claim was barred by the ministerial exception as a matter of law: "[t]he types of investigations a court would be required to conduct in deciding [hostile work environment] claims brought by a minister could only produce by [their] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." 611 F.3d at 1245 (cleaned up). *Skrzypczak* explained

that adjudicating a hostile work environment claim would "infringe on a church's right to select, manage, and discipline [its] clergy free from government control and scrutiny by influencing it to employ ministers that lower its exposure to liability rather than those that best further [its] religious objective[s]." *Id.* (cleaned up). Thus, the court concluded that "any Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers." *Id.* at 1246.

Likewise, in *Alicea-Hernandez*, the Seventh Circuit made clear that "[t]he 'ministerial exception' applies without regard to the type of claims being brought," and therefore rejected claims relating to, among other things, "poor office conditions," "exclusion from management meetings and communications," and "denial of resources necessary for her to perform [plaintiff's] job." 320 F.3d at 700, 703. The Court rejected the plaintiff's request to "look to the nature of her claims" under Title VII. *Id.*

Many other courts and legal scholars have explained that the ministerial exception bars hostile work environment claims by ministers. *See, e.g.*, *Koenke v. Saint Joseph's Univ.*, 2021 WL 75778, at *3 (E.D. Pa. Jan. 8, 2021) (applying Supreme Court precedent and refusing to draw a distinction between "employment discrimination claims based on *tangible* adverse employment actions" and claims based on "other *non-tangible* employment discrimination claims, such as a hostile work

environment claim"; "the ministerial exception bars all of Plaintiff's employment discrimination claims").[6]

D. The Ninth Circuit's rulings are wrong.

Despite this consensus, the district court chose to follow the minority rule in the Ninth Circuit, which—in a split from the other circuits—has held that Title VII hostile work environment claims are not barred by the ministerial exception unless the defendant "offer[s] a religious justification for the" alleged hostile treatment. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004). Appellees echo the Ninth Circuit's approach. *See* UCC Br. 17-18. But the Ninth Circuit's cases—which were decided before the Supreme Court's decisions in *Hosanna-Tabor* (2012) and *Our Lady* (2020), and this Circuit's in *Conlon* (2015)—are wrong. That is reason enough to give them little weight.

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[6] *See also Preece v. Covenant Presbyterian Church*, 2015 WL 1826231, at *7 (D. Neb. Apr. 22, 2015) (holding ministerial hostile work environment claims cause "excessive government entanglement with religion in violation of the First Amendment"); *Ogugua v. Archdiocese of Omaha*, 2008 WL 4717121, at *5 (D. Neb. Oct. 22, 2008) (similar); *Gomez v. Evangelical Lutheran Church*, 2008 WL 3202925, at *9 (M.D.N.C. Aug. 7, 2008) (hostile work environment claims "relate directly to internal church governance, which the First Amendment protects from outside interference"); *Ajabu v. St. James United Methodist Church*, 2006 WL 2263976, at *2 (M.D. Ga. Aug. 8, 2006) (similar); *accord* Br. of Legal Scholars, *Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142, 2020 WL 6264922 (7th Cir. Oct. 14, 2020).

Moreover, almost from the day they were decided, the Ninth Circuit's rulings attracted substantial dissents, and later were rejected by other circuits. Judges Wardlaw, O'Scannlain, Kozinski, and Kleinfeld dissented from the denial of rehearing en banc in *Bollard*, warning the decision "undermines over a century of Supreme Court jurisprudence, runs contrary to every other [federal] Court of Appeals that has had occasion to visit the issue," and "narrows the ministerial exception nearly to the point of extinction." 211 F.3d at 1331. In *Elvig*, Judge Gould concurred despite "misgivings whether *Bollard* was correctly decided," and Judge Trott dissented, explaining that the amorphous nature of hostile work environment claims "will involve, by necessity, penetrating discovery and microscopic examination … of the Church's disciplinary procedures." 375 F.3d at 970, 973. Likewise, Judges Kleinfeld, O'Scannlain, Callahan, Bea, Gould, and Bybee wrote or joined three separate dissents from en banc rehearing in *Elvig*. 397 F.3d 790 (9th Cir. 2005). They decried the "false distinction" between hostile work environment claims and hiring/firing claims, explaining that "[c]hurches' supervision of ministers is as important to church autonomy as churches' hiring and firing." *Id.* at 799. They also agreed with the perverse incentive noted above, that "churches will fire ministers who they think expose them to the risk of damage awards and hire those who they think will not." *Id.*; *see also* Br. of Indiana and 5 Other States at 8-9, *Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142 (7th Cir. Oct. 13, 2020)

(noting that the Ninth Circuit's approach "creates a paradoxical world where the ministerial employee could not bring suit based on termination, but could do so for anything said in a termination or disciplinary meeting").

Finally, after *Elvig*, a different Ninth Circuit panel held that a hostile work environment claim based on disability was barred by the exception because it implicated the minister's "working conditions and the church's decision regarding whether or not to accommodate a minister's disability," matters that are "part of the minister's employment relationship with the church." *Werft v. Desert Sw. Ann. Conf. of the United Methodist Church*, 377 F.3d 1099, 1103-04 (9th Cir. 2004).

To the extent it even remains good law, the Ninth Circuit's focus on any "religious reason" for the challenged actions "misses the point of the ministerial exception": "The purpose of the exception is not to safeguard" a church's control over its ministers "only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (cleaned up). After all, even if the church disdained the conduct at issue—and even if it for some reason *wanted* the courts to consider the claims—the ministerial exception is "a structural limitation imposed *on the government* by the Religion Clauses, a limitation that can never be waived." *Conlon*, 777 F.3d at 836 (emphasis added); *accord Tomic*, 442

F.3d at 1042. Churches and ministers must resolve their own leadership disputes. Courts cannot.

By following controlling precedent and judicial consensus on this issue rather than the Ninth Circuit, this Court would vindicate the First Amendment, respect the structural boundaries on its authority, and "avoid[] the kind of arbitrary and confusing application the Ninth Circuit's approach has created." *Skrzypczak*, 611 F.3d at 1244-46.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below on the basis that Rev. Middleton's Title VII hostile work environment claims are barred by the ministerial exception.

Dated: February 10, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation for an *amicus* brief because it contains 6,331 words. *See* Fed.R.App.P.29(a)(5). This 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 (Century Schoolbook 14-point type) using Microsoft Word 2016.

Dated: February 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amicus Brief was filed this 10th day of February, 2021, through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: February 10, 2021

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