No. 21-2524

In the United States Court of Appeals for the Seventh Circuit

LYNN STARKEY,

Plaintiff-Appellant,

v.

ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC., and RONCALLI HIGH SCHOOL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
Case No. 1:19-cv-3153 – Judge Richard L. Young

APPELLEES' RESPONSE BRIEF

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2524

Short Caption: Lynn Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc. et al.

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

N/A

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Attorney's Signature: /s/ John S. (Jay) Mercer Date: 1/10/2022

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STATEMENT CONCERNING ORAL ARGUMENT

The Archdiocese respectfully requests oral argument. This appeal presents important questions about the scope of the First Amendment, Title VII, and the Religious Freedom Restoration Act. Oral argument will aid the Court in considering those questions.

JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is correct.

STATEMENT OF ISSUES

1. Whether the district court correctly held that Plaintiff's claims are barred by the First Amendment's ministerial exception.
2. Whether Plaintiff's claims are statutorily barred by Title VII's religious exemption or by the Religious Freedom Restoration Act.
3. Whether Plaintiff's claims are barred by the First Amendment's doctrine of religious autonomy, prohibition on religious entanglement, or right of expressive association.

INTRODUCTION

This case strikes at the heart of the First Amendment's protections for religious autonomy. Plaintiff Lynn Starkey was a leader and Co-Director of Guidance at Roncalli Catholic High School. She lost her job after informing the school that she entered a same-sex union in knowing violation of her contract and Church teaching. She now sues, seeking to penalize the Archdiocese of Indianapolis for a religious decision about who can lead and transmit the faith in its Catholic schools.

Unsurprisingly, this suit is barred by multiple protections for religious freedom. *First*, it is barred by the ministerial exception, which applies to employment claims by "any 'employee' who leads a religious organization" or has a "role in conveying the Church's message and carrying out its mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2063 (2020). Here, Starkey played a crucial role in conveying the Catholic faith and carrying out the school's religious mission. As Co-Director of Guidance, she was contractually designated a "minister of the faith"; was tasked with forming students in the faith, praying with them, modeling the faith for them, and worshiping with them; was commissioned and held herself out as a minister; and was asked to teach and model the Catholic faith while counseling students through some of the most sensitive issues of their lives. Further, she served as a department chair and leader on the school's Administrative Council—helping make key decisions shaping the religious mission of the entire school. As the district court rightly held, these duties easily bring her within the ministerial exception.

In response, Starkey doesn't say the district court applied the wrong law. She says it resolved "disputed material facts" about her job that should have gone to a jury. But there are no disputed material facts. Starkey simply wishes the district court had *discounted* undisputed evidence of her religious duties—such as her employment contract, job description, evaluation criteria she designed, and contempo-

raneous records of her performing religious duties—in favor of self-serving claims that her job was largely academic. But plaintiffs in ministerial-exception cases routinely try to downplay or dispute the nature of their religious duties, while emphasizing their secular ones, and that has never been treated as a fact dispute for a jury. Rather, whether plaintiff's job is ministerial is a "legal" question to be resolved by "[c]ourts." *Grussgott v. Milwaukee Jewish Day Sch., Inc.,* 882 F.3d 655, 661-62 (7th Cir. 2018). And courts have uniformly resolved the ministerial exception on summary judgment or earlier—as demonstrated by both Supreme Court cases to address the ministerial exception, all seven of this Court's cases, and *every* case in *every* jurisdiction for over a decade—with no court having sent the question to a jury. Thus, the district court was right to resolve this legal question based on the entire undisputed record.

Even beyond the ministerial exception, there are numerous alternative grounds for affirmance. As a statutory matter, Starkey's claims are independently barred by Title VII's religious exemption, which permits religious groups to employ only those who abide by their religious practices; and by the Religious Freedom Restoration Act (RFRA), which prohibits applying federal law to substantially burden religious exercise unless the law satisfies strict scrutiny.

And as a constitutional matter, multiple First Amendment doctrines bar this suit regardless of whether Starkey was a minister. The religious-autonomy doctrine protects a religious organization's right to hire only persons adhering to its religious practices. The non-entanglement doctrine forbids courts from becoming entangled in religious questions—such as Starkey's request that the court (or jury) compare the gravity of various violations of Church teachings. And freedom of association protects religious groups' ability to exclude employees who would undermine the group's religious message. Given these protections, at minimum, constitutional avoidance requires construing Title VII to avoid these problems.

* * *

At the First Amendment's core is the freedom of "religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006). This is a fundamental "means by which a religious community defines itself." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). And it includes the right to form communities adhering to the widespread, millennia-old, "decent and honorable religious" belief that "same-sex marriage should not be condoned." *Obergefell v. Hodges*, 576 U.S. 644, 672, 679-80 (2015). That is what the Archdiocese seeks to do here. The district court should be affirmed.

STATEMENT OF THE CASE

I. Factual Background

A. The Archdiocese and Roncalli

The Roman Catholic Archdiocese of Indianapolis is a religious community led by the Archbishop of Indianapolis, subject to the Pope, and governed under the Code of Canon Law. SA.7-9.[1] Roncalli is an Archdiocesan high school that exists to support the Archdiocese's "mission and purposes." A.3. Its mission statement is to "form Christian leaders in body, mind, and spirit" and challenge students to "respond to the call of discipleship." SA.13; *see* A.3.

The relationship between the Archdiocese and Roncalli is governed by Catholic theology and canon law. Canon law requires the archbishop to "take care" that Catholic schools be established and "regulate and watch over" their operations. 1983

[1] "SA." denotes Appellees' supplemental appendix; "A." denotes Starkey's in-brief appendix; "Dkt." denotes district-court docket entries.

Code c.802, §1, c.804 §1. Catholic schools serve as "the principal assistance to parents" in forming children in the Catholic faith. 1983 Code c.795-96. Thus, Catholic educators must "bear witness to Christ" "by their life as much as by their instruction." *Gravissimum Educationis* §8 (1965). And canon law requires them to be "outstanding in correct doctrine and integrity of life." 1983 Code c.803, §2.

To that end, Roncalli's Principal is charged with "[h]ir[ing] faculty and staff whose values are compatible with the" school's "mission." SA.23. The Principal prefers to hire faithful Catholics in teaching, administrative, and guidance-counseling roles. SA.80. He expects all teachers and counselors to "actively seek[] opportunities to be involved in the faith formation" of students. SA.80. And Roncalli has for over thirty years included a "morals clause" in its contracts obligating teachers and guidance counselors to refrain from "any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church." SA.48.

B. Starkey's Roles in Religion and Liturgy

Plaintiff Starkey began working at Roncalli in 1978. A.3. For seven years, from 1982 to 1989, she taught New Testament. A.4. To continue teaching religion, in 1985, she applied for and received recognition as a certified catechist. A.4. Her application states she was qualified for this "ministry" because of her service with "music at Liturgy" and "help[ing] on Senior Retreats," and she listed over 300 hours of coursework on topics like "Scripture, Liturgy and Prayer." SA.178.

From 1988 to 1998, Starkey served as Choral Director, which required her to prepare students to sing at the school's monthly Mass. A.4. She also participated in the "Christian Awakening Retreat," an annual retreat for Roncalli seniors, where she facilitated discussion and delivered a talk on "God's friendship." SA.273-74; *see* A.6.

C. Starkey's Role in Guidance

In 1997, Starkey assumed a new role as Guidance Counselor. A.4. In 2007, she was promoted to Co-Director of Guidance, the role she held when this dispute arose. A.4. Principal Chuck Weisenbach testified that Starkey's "track record of … commitment to and leadership in … areas of faith formation was a part of what made [him] comfortable elevating" her to that senior position. A.14.

As Co-Director of Guidance, Starkey supervised Roncalli's guidance counselors. SA.30. That meant she mentored and evaluated the other guidance counselors and oversaw the department's social worker. SA.215-16, 246.

In May 2018, Starkey signed a "School Guidance Counselor Ministry Contract." A.4. The contract provided that Starkey "acknowledge[s] receipt of the ministry description that is attached to this contract" and agrees to "fulfill the duties" listed there. A.5. The ministry description identifies the guidance counselor as "a minister of the faith." A.5. The first "Role" it lists is that a guidance counselor "Facilitates Faith Formation," which includes the following responsibilities:

- "Communicates the Catholic faith to students and families through implementation of the school's guidance curriculum … [and] offer[s] direct support to individual students and families in efforts to foster the integration of faith, culture, and life."
- "Prays with and for students, families, and colleagues and their intentions. Participates in and celebrates liturgies and prayer services as appropriate."
- "Teaches and celebrates Catholic traditions and all observances in the Liturgical Year."
- "Models the example of Jesus, the Master Teacher, in what He taught, how He lived, and how He treated others."
- "Conveys the Church's message and carries out its mission by modeling a Christ-centered life."
- "Participates in religious instruction and Catholic formation, including Christian services, offered at the school[.]"

A.5.

The ministry description reaffirms that "Catholic schools are ministries of the Catholic Church" and that guidance counselors are "expressly charged with leading students toward Christian maturity and with teaching the Word of God" and are "vital ministers sharing the mission of the Church." A.11-12.

Angela Maly, a current guidance counselor at Roncalli, confirmed that the ministry description accurately describes "the day-to-day expectations" of the role. A.13. Maly gave numerous examples of how she "facilitat[es] faith formation among students"—praying with them, joining them on mission trips, service projects, and spiritual retreats, and counseling them from a Catholic perspective on "stress, depression, romantic relationship issues, thoughts of suicide, sexual orientation, gender identity, and questions and doubts about the Catholic faith and its moral teachings." SA.58-65.

Starkey repeatedly affirmed the faith-formation component of Roncalli guidance counselors' work. In May 2016, Starkey wrote a letter to Principal Weisenbach referencing the Archdiocese's ministry description for teachers and explaining that "[i]f school counselors had a Ministry Description, it would be identical to that of teachers, except for III.B.2 (daily lesson plans) and III.C.5 (efficient classroom routines)." SA.130. The duties Starkey identified as "identical" match those later included in the Guidance Counselor Ministry Description noted above. *Compare* SA.131-34 *with* SA.49-52.

Likewise, in 2015, Starkey participated in drafting and establishing performance criteria for guidance counselors under the Catholic Educator Advancement Program (CEAP). SA.81, 253-54. CEAP allows educators "to advance in their career levels and pay scale" based on performance. SA.81. The criteria Starkey helped establish for a "Distinguished School Counselor" included the following:

- "School counselor embodies the charisms[2] of Saint John XXIII and lives out his traits."
- "School counselor encourages students' spiritual life and resources in counseling conversation as appropriate (i.e. encouraging prayer/reflection, sharing one's own spiritual experiences as appropriate; encouraging retreat, parish, youth ministry, mission work)."
- "School counselor consistently attends their Sunday liturgy or church service."

SA.116-18.

Roncalli counselors were in fact evaluated according to these criteria. For example, one former counselor, Autumn Currens, explained in a CEAP-required self-assessment that she fulfilled these "Spirit of Roncalli Formation" criteria by "highly encourag[ing] students to attend retreat" and "encouraging faith with my students." SA.128; *see* SA.264-65. Currens noted she had become "more confident in" doing so by observing retreat herself, undertaking the Rite of Christian Initiation of Adults (the process for entering the Catholic Church), and Mass attendance. SA.128.

Michelle Fitzgerald, Roncalli's other Co-Director of Guidance, also went through CEAP. SA.119-24; *see* SA.82. In her self-assessment, Fitzgerald explained that she meets with students individually at least once a year "but often times, much more" and discusses "personal and social issues … and faith formation." SA.120-21. Fitzgerald stated she "love[s] … sharing [her] experience and faith with others," and was "working the first retreat of the year, and plan[ning] to help more with St. Vincent de Paul," a food pantry. SA.123; *see* SA.63. She also emphasized:

> I consistently attend Sunday church service, all masses at Roncalli, and morning communion services when I am able. I consistently use spiritual life and resources in my counseling conversations as well as sharing my own spiritual experiences. … I am faithful, and have no problems sharing my beliefs

[2] "[C]harisms" are "graces of the Holy Spirit" helping faithful Catholics "'undertake various tasks and offices for the renewal and building up of the Church.'" Catechism of the Catholic Church §§798-99.

> and my love of God. In a faith-based school, I feel this definitely is a strength when working with young people who are seeking direction.

SA.123.

Consistent with the ministry description and her fellow guidance counselors, Starkey attended Roncalli's monthly Masses, singing and receiving Communion with her students. A.6. As counselor, Starkey gave other staff guidance on how to incorporate students of different faiths into Catholic liturgy, A.6, by preparing students for "congregational responses" and helping them adapt to the Catholic version of the "Lord's Prayer." SA.143.

Starkey also attended "Days of Reflection." A.6. These are annual gatherings "required only for the small group of faculty members 'who are impacting kids in their spiritual life on a day-to-day basis.'" A.6-7. Guidance counselors are included, in part because they are the only Roncalli staff who meet one-on-one with every student. A.6-7. At the gathering, Principal Weisenbach delivers a "call-and-response Commissioning Prayer." A.7. In a typical prayer, faculty state they "accept the responsibilities of [their] ministry," "promise to share [their] faith with others," and "promise to form youth and support families in the faith by following the example of our Master Teacher, Jesus Christ." A.7. The leader then states: "I hereby commission you to faithfully and joyfully serve as ministers of the faith." A.7.

Counselors under Starkey's leadership also worked with students through the Student Assistance Program (SAP). A.13 (now named STAND UP). SAP helps identify and support "at-risk" students struggling with issues like domestic dysfunction, death in the family, or substance abuse. A.13-14. Starkey, who served as the program's lead "facilitat[or]," SA.222-23, "confirmed that her work with SAP required her to help students with their 'most sensitive' and 'personal issues.'" A.14. And "[i]n line with the expectations laid out in her employment documents … Roncalli

plainly anticipated that matters of faith and doctrine would inform a guidance counselor's approach" in doing so. A.14; *see* SA.36, 60-61.

Even apart from SAP, guidance counseling was deeply personal and spiritual. For instance, Maly testified her work at Roncalli involves "assist[ing] students with their social, mental, academic, emotional, and spiritual needs." SA.59. That assistance has included discussions of "anxiety, stress, depression, romantic relationship issues, thoughts of suicide, sexual orientation, gender identity, and questions and doubts about the Catholic faith and its moral teachings." SA.59-60. In addressing these issues, Maly strives to "show[] the face of Christ to the Roncalli family" and offer guidance consistent with "Catholic teaching." SA.59. She "explained that prayer is an 'essential component[]' of her work, including the academic and career counseling aspects of her job." A.8.

D. Starkey's Role in Roncalli's Leadership

Starkey also held unique senior leadership roles for Roncalli.

First, as Co-Director of Guidance, Starkey was Department Co-Chair. A.15. She was therefore responsible for conducting monthly department meetings, formulating guidance curriculum, managing the budget, and working with the Principal in hiring and supervising guidance personnel. Dkt.114-2.App.113.

Second, Starkey served on Roncalli's Administrative Council—its "main leadership body." A.7. During Starkey's tenure, the Council met weekly and always opened in prayer. SA.218, 228-29.

"According to Principal Weisenbach, '[m]ost faculty and staff recognize the Administrative Council as the lifeblood of decision-making at the school'" and the Council and the Department Chairs are collectively "responsible for 95% of Roncalli's daily ministry, education, and operations.'" A.7. Other than the Principal and

Assistant Principal for Academic Affairs, "the Director of Guidance is the *only* staff member that serves on" both those bodies. A.15 (emphasis added).

During Starkey's tenure, as today, the Council informed key decisions relating to the life of the school, including issues core to Roncalli's religious mission. For example, the Council planned all-school liturgies; determined the qualifications for who could serve as Eucharistic ministers; discussed a student "morality survey" on drug and alcohol use, bullying, and sexual activity; discussed how to infuse faith formation into the athletic program; and discussed contemporary research on how to minister to adolescents identifying as transgender, A.16; SA.147, 220.

"Starkey was an active participant in these discussions." A.16. After the Parkland shooting, for example, Starkey stated her support for holding a "prayer service to honor kids who were killed." SA.161-62, 232-35; *see* A.16. In another meeting, Starkey informed the Council about SAP efforts to address suicide prevention. SA.165, 240. In another, she contributed to a conversation on how Roncalli should present itself to potential applicant families as a Catholic option "for faith formation" and "religious education." SA.165, 167-68; *see also* SA.76.

As Council member, Starkey also led all-school reflections and prayers over the school's PA system. SA.265-68; *see* SA.77; A.8. In one reflection, Starkey said, "There is a tangible, obvious spirit at Roncalli, and I really believe it is God's Spirit working through the faculty and students here." SA.173. She encouraged students to "include God in our own daily life," and concluded by thanking God for "all the ways in which your loving Spirit makes a difference," asking God "to open our hearts and minds so we can know, love, and understand you more and more," and asking "Saint John XXIII" to "pray for us!" SA.173; *see also* SA.174.

Further, Starkey participated in a regular Council discussion on *Living as Missionary Disciples: A Resource for Evangelization*. SA.237-39; *see* A.15. That book, published by the U.S. Conference of Catholic Bishops, is designed to assist "pastoral

leaders" as they "develop, enhance, and review their own local strategies" of evangelization. SA.238-39; *see* SA.76-77.

E. Starkey's Nonrenewal

In May 2018, Starkey renewed her employment for the 2018-19 school year by signing the "School Guidance Counselor Ministry Contract." SA.47-48. The contract stated: "The School Guidance Counselor shall be deemed to be in default under this contract in the event of … any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church." SA.48. A similar default provision was included in Starkey's annual employment contracts for over 30 years. *See, e.g.*, SA.55-57; SA.276. Starkey's contract also provided she would "be in default under this contract" for "any breach of duty," including "[r]elationships that are contrary to a valid marriage as seen through the eyes of the Catholic Church." SA.48.

In August 2018, an Archdiocesan priest learned that Starkey's Co-Director, Fitzgerald, had entered a same-sex union. SA.189.[3] Because this conduct violated Fitzgerald's contract and Church teaching, Fitzgerald was placed on paid administrative leave. SA.189. That month, Starkey told Roncalli leadership she was also in a same-sex union. SA.189. At the end of the school year, Starkey received a letter from the Principal explaining that because this conduct violated her contract and Church teaching, "we cannot offer you a contract for the 2019-2020 year." SA.97; *see* SA.83, 94.

After separating from Roncalli, Starkey began working as a guidance counselor at a public school, where she makes "more than [her] previous salary at Roncalli." SA.202.

[3] The Archdiocese stipulated to this paragraph's facts for summary-judgment purposes only. Dkt.114-1 at 17 n.3.

II. Procedural Background

In July 2019, Starkey sued the Archdiocese and Roncalli (collectively "Archdiocese") asserting six claims: three under Title VII (unlawful termination, retaliation, and hostile work environment); a retaliation claim under Title IX; and two state tort claims for interference with contract and with an employment relationship. SA.191-96.

In March 2020, the Archdiocese moved for judgment on the pleadings. Dkt.59. The Archdiocese argued it was exempt from Starkey's Title VII claims under Title VII's religious exemption, which permits religious employers to employ only individuals abiding by religious standards of conduct. Dkt.59 at 9-12. The Archdiocese also argued Starkey's Title IX claim was preempted by Title VII, and that all Starkey's claims were barred by the First Amendment's protections for church autonomy and expressive association. *Id.* at 16-17, 19-33.

The district court dismissed the Title IX claim as preempted but otherwise denied the motion. SA.277-302. Taking a "narrow" view of Title VII's religious exemption, the court held it applies only when plaintiffs claim "religious discrimination," which Starkey hadn't done. SA.282-91. It also rejected the Archdiocese's church-autonomy defense, reasoning that the First Amendment offers no protection for employment decisions unless the employees are "ministers." SA.294. And it held that the right of expressive association doesn't apply in "the employment context." SA.298.[4]

Discovery into Starkey's ministerial role at Roncalli followed. In December 2020, the Archdiocese moved for summary judgment on the ministerial exception.

[4] A collateral-order appeal from this decision was dismissed, with the caveat that such an appeal might be permitted if the case proceeded past "summary judgment" or "to trial." Order, *Starkey v. Roman Catholic Archdiocese of Indianapolis*, No. 20-3265 (7th Cir. July 22, 2021).

Dkt.114-1 at 18-31. It also asserted a RFRA defense, *id.* at 31-32, and sought reconsideration of the defenses previously rejected on the pleadings, *id.* at 32-35.

The district court agreed with the ministerial-exception argument and granted summary judgment. Recounting Starkey's employment responsibilities, Judge Young explained that "Roncalli expressly entrusted Starkey with the responsibility of communicating the Catholic faith to students and fostering spiritual growth," and Starkey "served in a senior leadership role in which she helped shape the religious and spiritual environment at the school and guided the school on its religious mission." A.18-19. Adjudicating her claims would thus "interfere[] with a church's selection or supervision of its ministers." A.20. The court declined to reach the Archdiocese's other defenses, A.20-21, and entered final judgment. A.1.

SUMMARY OF ARGUMENT

I. The district court correctly held that this case is barred by the ministerial exception, which prohibits claims that would interfere with a religious group's selection of those who perform religious functions. As the district court explained, Starkey played a crucial role in conveying the Catholic faith to students and carrying out the school's religious mission. She was designated in her contract as a minister; was tasked with forming students in the faith, praying with them, and worshiping with them; was commissioned and held herself out as a minister; and was asked to teach and model the Catholic faith while counseling students through some of the most sensitive issues of their lives. Beyond that, she served in a key leadership role supervising other guidance counselors, developing religious criteria to evaluate their work, and helping shape the religious mission of the entire school. These responsibilities easily bring her within the ministerial exception.

II. Starkey's claims are also barred by Title VII and RFRA. Title VII states that it "shall not apply" to a religious organization "with respect to the employment of

individuals of a particular religion," and it defines "religion" to include "all aspects of religious observance and practice." Here, it is undisputed that the Archdiocese based its employment decision on the "particular" "religious observance and practice" of marriage. Thus, it is protected by Title VII.

Likewise, RFRA prohibits any application of federal law that would substantially burden religious exercise, unless the application satisfies strict scrutiny. Here, punishing the Archdiocese for asking its leaders to follow Church teaching would substantially burden its religious exercise. And applying Title VII in this way cannot satisfy strict scrutiny, particularly when both Title VII and the First Amendment protect the right of religious organizations to choose employees based on religious practices.

III. Lastly, Starkey's claims are barred by several First Amendment doctrines regardless whether she is a minister. First, the doctrine of religious autonomy protects a religious group's right to select members who adhere to its religious practices. Second, the doctrine of non-entanglement forbids courts from accepting Starkey's request to assess the gravity of different violations of Church teachings. Third, the right of expressive association protects religious groups' ability to exclude employees who would undermine the group's religious message. Finally, the doctrine of constitutional avoidance requires the Court to construe Title VII to avoid these constitutional problems.

ARGUMENT

I. Starkey's claims are barred by the ministerial exception.

Carefully reviewing undisputed facts and binding precedent, the district court concluded "Starkey qualified as a minister, and … the ministerial exception bars all" her claims. A.3. The district court was correct; this Court should affirm.

A. The ministerial exception bars claims by ministers suing over their employment.

The First Amendment protects religious organizations' "autonomy with respect to internal management decisions that are essential to [their] central mission." *Our Lady*, 140 S.Ct. at 2060. One "component" of this religious-autonomy doctrine is the "ministerial exception." *Id.* at 2060-61; *accord, e.g.*, *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 976 (7th Cir. 2021) (en banc).

Under the ministerial exception, "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. This is required by both Religion Clauses: the "Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181, 184 (2012).

This Circuit has repeatedly "confirm[ed] the ministerial exception's strength." *Demkovich*, 3 F.4th at 984. And whether the plaintiff falls within the exception is a "legal" question for resolution by "[c]ourts." *Grussgott*, 882 F.3d at 661-62; *accord, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015).

Starkey in passing characterizes *Grussgott* as having said this question is "usually … left for a jury." Br.18. But *Grussgott affirmed* the district court's grant of summary judgment to the defendant, holding the plaintiff "f[ell] under the ministerial exception as a matter of law." 882 F.3d at 657. Indeed, both Supreme Court cases, all seven of this Court's cases,[5] and *every* post-*Hosanna-Tabor* case in *any* juris-

[5] *Demkovich*, 3 F.4th at 973, 985 (motion to dismiss); *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570-71 (7th Cir. 2019) (summary judgment); *Grussgott*, 882 F.3d at 658-61 (same); *Schleicher v. Salvation Army*, 518 F.3d 472, 475-77 (7th Cir. 2008) (motion to dismiss); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-43 (7th Cir. 2006) (same); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703-04 (7th Cir. 2003) (same);

diction[6] that has resolved the applicability of the ministerial exception has done so on summary judgment or earlier, with *no* court having sent the question to a jury. And this Court recently warned that allowing such cases to proceed too far can itself, through the "prejudicial effects of incremental litigation," "impinge on rights guaranteed by the Religion Clauses." *Demkovich*, 3 F.4th at 982-83 (citations omitted). The district court was therefore correct to resolve this question on summary judgment.

B. Starkey was a minister.

The district court also resolved the question correctly. Undisputed evidence shows "Roncalli expressly entrusted Starkey" not only "with the responsibility of communicating the Catholic faith to students" but also with "guiding" the school in its religious "mission." A.15, 19. Thus, Starkey easily qualifies as a minister.

Although the rule is "label[ed]" the "ministerial" exception, it isn't limited to ordained ministers. *Our Lady*, 140 S.Ct. at 2060-61. Rather, the exception covers any employee of a religious organization who "serve[s] a religious function." *Sterlinski*, 934 F.3d at 570. This Court has therefore applied the exception to a wide array of employees—from an organist (*Sterlinski*) to a rehabilitation-center administrator (*Schleicher*) to a press secretary (*Alicea-Hernandez*).

One of the most common applications—including both applications by the Supreme Court—is to educators at religious schools. *E.g.*, *Grussgott*, 882 F.3d 655 (teacher); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (principal). That is because "educating young people in their faith, inculcating its teachings,

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Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 185-88 (7th Cir. 1994) (same).

[6] SA.304 (collecting pre-2021 cases); *see also, e.g.*, *Orr v. Christian Bros. High Sch., Inc.*, 2021 WL 5493416, at *1 (9th Cir. Nov. 23, 2021) (summary judgment); *Simon v. Saint Dominic Acad.*, 2021 WL 6137512, at *4 (D.N.J. Dec. 29, 2021) (motion to dismiss).

and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady*, 140 S.Ct. at 2064. Thus, religious organizations "must be free to choose those" tasked with forming students or helping lead a religious school. *Hosanna-Tabor*, 565 U.S. at 196.

Our Lady demonstrates the point. There, the Court applied the exception to bar discrimination claims by two teachers at Catholic elementary schools. The Ninth Circuit had held that the exception didn't apply, noting the teachers lacked "clerical titles" or "formal religious schooling." 140 S.Ct. at 2067. But the Supreme Court reversed, explaining "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064. On this understanding, the plaintiffs were ministers. "Educating and forming students in the Catholic faith lay at the core of the mission of the schools where [the plaintiffs] taught," and the plaintiffs' "employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission." *Id.* at 2066. Entertaining their claims would therefore "threaten[] the school[s'] independence in a way that the First Amendment does not allow." *Id.* at 2064, 2069.

Our Lady made clear that an employee's religious function alone can trigger the exception. But the Court also indicated other considerations may "shed light on" the inquiry, even if they need not be "assessed" in "every case." 140 S.Ct. at 2063, 2068. These other "considerations" include the employee's "formal title," "the substance reflected in that title," and "her own use of that title." *Hosanna-Tabor*, 565 U.S. at 192. All confirm Starkey was a minister.

1. Starkey was charged with religious functions.

As Co-Director of Guidance, Department Chair, and member of Roncalli's Administrative Council, Starkey was "expected … to play an important role in 'transmitting the [Catholic] faith to the next generation.'" *Grussgott*, 882 F.3d at 661 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

First, like the *Our Lady* schools, "[e]ducating and forming students in the Catholic faith lay at the core of [Roncalli's] mission." 140 S.Ct. at 2066; *supra* pp.4-7. And Starkey's "employment agreements and faculty handbooks specified in no uncertain terms that [Starkey was] expected to help … carry out this mission." 140 S.Ct. at 2066. Starkey's job description identified the "guidance counselor" as "a minister of the faith," charged with "foster[ing] the spiritual … growth of" her students. SA.49. And it listed as top duties "communicat[ing] the Catholic faith … through implementation of the school's guidance curriculum"; "[p]ray[ing] with and for students"; and "[t]each[ing] and celebrat[ing] Catholic traditions and … observances." *Id.*; *see also* SA.63-64, 78-79.

Starkey's work was also "evaluated to ensure that [she was] fulfilling" these responsibilities. *Our Lady*, 140 S.Ct. at 2066; *see, e.g.*, SA.139-40. Indeed, Starkey herself helped develop the evaluation criteria and apply them to counselors she supervised. According to those criteria, a "Distinguished School Counselor" "embodies the charisms of Saint John XXIII and lives out his traits"; "encourages students' spiritual life and resources in counseling" by "encouraging prayer/reflection, sharing one's own spiritual experiences as appropriate[, and] encouraging retreat, parish, youth ministry, mission work"; and "consistently attends their Sunday liturgy or church service." SA.116-18. And counselors endeavored to meet these criteria, with Starkey's Co-Director (among others) explaining she did so by discussing "faith formation" with students and "consistently us[ing] spiritual life and resources in [her] counseling conversations as well as sharing [her] own spiritual experiences." SA.119-24; *see also* SA.125-29.

Our Lady also emphasized the teachers did not just "provide instruction about the Catholic faith" but "were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." 140 S.Ct. at 2066. So too here. Starkey was expressly charged with "assis[ting] the students

in … Christian development" and "[m]odel[ing] the example of Jesus," SA.27, 66. And Starkey's contract required her "personal conduct" to "convey and be supportive of the teachings of the Catholic Church," SA.48, 87—the provision whose breach led to this suit. Thus, "[h]ow [Starkey's] employment ended—with a dispute over religious doctrine—cements the religious character of [her employment] relationship." *Demkovich*, 3 F.4th at 979.

The *Our Lady* plaintiffs also "prayed with their students, attended Mass with the[m], and prepared the[m] for their participation in other religious activities." 140 S.Ct. at 2066. Starkey did all this and more: She prayed with students in the classroom, SA.182; led schoolwide prayers, SA.174-75, 267; prepared music for all-school Masses, SA.78, 82, 103; participated in the senior retreat, SA.82, 273-74; and gave other staff religious guidance on incorporating students of different faiths into Catholic liturgy, SA.143.

Indeed, this case is in multiple respects *easier* than *Our Lady*. For one thing, the *Our Lady* teachers claimed they weren't ministers because they didn't exercise "close guidance and involvement" in "students' spiritual lives." 140 S.Ct. at 2068 (cleaned up). But Starkey's role was precisely to exercise close guidance and involvement in students' spiritual lives. Counselors are the only Roncalli faculty who meet with every student one-on-one at least once a year, and they are "often the first to identify when students are grappling with difficult social, mental, academic, emotional, family, or spiritual issues." SA.79. Starkey likewise worked with students through SAP, which she "confirmed … required her to help students with their 'most sensitive' and 'personal issues.'" A.14 (quoting SA.175). Thus, Starkey's job involved guiding students through personal "struggles" on matters of profound moral and spiritual consequence in the Catholic faith, and even on the "faith and its moral teachings" themselves. SA.59-61 (also listing, *e.g.*, "depression," "thoughts of

suicide," and sexuality). And "Roncalli plainly anticipated that matters of faith and doctrine would inform" that work. A.14.

Second, this case is easier than *Our Lady* because Starkey wasn't just a teacher; she was *elevated* from her New Testament teacher and counselor role and made "one of a select group of school leaders responsible for guiding Roncalli in its mission." A.15. As Co-Director of Guidance, Starkey oversaw the other counselors—including the spiritual functions they performed. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006) ("To the extent that [an employee] supervises spiritual functionaries, at least some of the functions he performs are, by definition, spiritual ones."). Further, Starkey held the *only* position at Roncalli, aside from the Principal and Assistant Principal, serving on both the Administrative Council and the Department Chairpersons group. A.15. These leadership bodies were responsible for "95% of Roncalli's daily ministry, education, and operations" (SA.75), including issues central to its religious mission. *See* A.15-16 (examples).

That leadership role alone disposes of this case. Even the *Our Lady* dissenters recognized that a religious organization's "leaders" are covered by the exception. 140 S.Ct. at 2067 n.26; *see also Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., joined by Kagan, J., concurring) (exception covers "any 'employee' who leads a religious organization"). This makes good sense, since if an organization's purpose is to pass along a religious faith, then its leaders by definition perform "important religious functions" in guiding it to that end. *Hosanna-Tabor*, 565 U.S. at 192. Accordingly, multiple courts have held religious-school principals to be ministers because they "managed" and "evaluated" other employees to "execute the School's religious education mission." *Fratello*, 863 F.3d at 209.[7] So too here.

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[7] *See also, e.g., Orr*, 2021 WL 5493416, at *1; *Zaleuke v. Archdiocese of St. Louis & Assumption Catholic Church – O'Fallon*, 2021 WL 5161732, at *7 (E.D. Mo. Nov. 5, 2021);

2. Other considerations confirm Starkey was a minister.

Under *Our Lady*, Starkey's religious functions alone suffice to trigger the ministerial exception. 140 S.Ct. at 2063-66; *see Sterlinski*, 934 F.3d at 570. But the other "considerations" in *Hosanna-Tabor* reinforce that conclusion.

Title. First, *Hosanna-Tabor* looked to the plaintiff's "title" to evaluate whether the school "held [her] out as a minister." 565 U.S. at 191. Here, Roncalli held Starkey out as a minister by identifying her in her job description as a "minister of the faith," SA.49, and by giving her a "Ministry Contract," SA.47, 53.

Her job title—Co-Director of Guidance—likewise reflects "an important position of trust." *Our Lady*, 140 S.Ct. at 2063. As the district court noted, "the term … *Guidance* … suggests that those who fill that role are tasked with guiding students as they mature and grow into adulthood." A.19. And Co-*Director* shows she had a leadership "role[] distinct from … most" other employees. *Hosanna-Tabor*, 565 U.S. at 191. And "if a more esoteric title is needed," Starkey also sought and received the title of certified "catechist[]" as a New Testament teacher. *Our Lady*, 140 S.Ct. at 2067; *see supra* p.5.

On appeal, Starkey says title favors her because "Co-Director of Guidance" is "common[ly]" used in secular schools too. Br.31-32. But so is "teacher"—yet *Our Lady* indicated that title could support ministerial status. 140 S.Ct. at 2067. The Court's understanding was informed by the context: the plaintiffs were teachers *at Catholic schools*. *Id.* So too here. Of course "guidance" at a secular school might lack religious connotations. But not so at Roncalli, where the "school would expect faith to play a role in that work." A.19.

Rehfield v. Diocese of Joliet, ___ N.E.3d ____, 2021 WL 382458, at *8-14 (Ill. Feb. 4, 2021); *Pardue v. Ctr. Consortium Schs. of Archdiocese of Wash.*, 875 A.2d 669, 675-78 (D.C. 2005).

Substance reflected in title. This consideration asks whether "the substance of [the plaintiff's] title as conveyed to her and as perceived by others entails" the passing on of faith. *Grussgott*, 882 F.3d at 660. In *Grussgott*, for example, the court concluded that this consideration weighed in favor of treating the plaintiff as a minister because she was "expected … to integrate religious teachings into [her] lessons" and had "significant religious teaching experience" when hired. *Id.* at 659.

So too here. Starkey's performance criteria and job description show she was expected to "foster the integration of faith" in her students' lives and "communicat[e] the Catholic faith to students and families through" her "guidance curriculum." SA.66-69, 118, 130. And she had significant religious training and experience before advancing to Co-Director of Guidance, having taught New Testament for seven years, listed over 300 hours of relevant coursework to become a certified catechist, and prepared music for liturgies—all of which played a crucial role in her promotion. SA.82.

Moreover, Starkey's Administrative Council service required her to undertake continued religious education, including book studies on the "principles of evangelization and missionary discipleship" and forming others in the Catholic faith. SA.76-77, 237-39. And Starkey's position would have been "perceived by others" to reflect a religious role, *Grussgott*, 882 F.3d at 660, as demonstrated by the fact that "the Director or Co-Director of the Guidance Department is recognized by faculty and staff as a key, visible leader of the school." SA.79. Thus, "the substance reflected [her] title as used by the defendants and conveyed to [Starkey] entails proficiency in religious leadership," supporting "the ministerial exception here." *Fratello*, 863 F.3d at 208.

On appeal, Starkey claims "[s]he did not receive any religious education or training *to be* Co-Director of Guidance." Br.32 (emphasis added). But she doesn't deny that her previous religious training and experience motivated *her elevation* to

Co-Director. *Grussgott*, 882 F.3d at 659. And she doesn't deny she received such training *while on* the Administrative Council.

Employee's use of title. Finally, the use-of-title consideration asks whether the employee "held herself out" as a minister. *Hosanna-Tabor*, 565 U.S. at 191. The answer here is yes. First, guidance counselors participated in the annual Day of Reflection commissioning ceremony, in which the assembled faculty publicly committed in prayer to serve as a "minister of the faith." SA.77-78, 88-91, 272-73. Starkey says she (and some other staff) "do[] not recall participating" in the ceremony. Br.8. But Starkey admitted she "generally attended" the Days of Reflection, SA.272-73; Principal Weisenbach testified that at the Days of Reflection he leads the commissioning ceremony, and provided written documentation of it, SA.78; *see* SA.88-91; and another counselor *does* recall it, SA.65. Given this firsthand and documentary evidence, Starkey's claim that "she does not remember" it "does not raise a genuine issue whether" it happened. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002).

Likewise, just as the *Hosanna-Tabor* plaintiff identified as a minister to claim a "housing allowance on her taxes," 565 U.S. at 191-92, so Starkey identified Roncalli counselors as ministers in seeking a financial benefit. *Accord* Br.28. In 2016, discussion arose about moving guidance counselors to hourly pay. Resisting this change, Starkey crafted a strongly worded letter to the rest of Roncalli leadership, arguing "school counselors qualify for a salaried contract to the same degree as [Roncalli] teachers do," because they perform the same "Ministry" functions. SA.130. The Principal agreed, stating Starkey provided "very clear reasons why a guidance counselor qualifies for the same ministerial exemption as the teachers." SA.135. So when the chips were down prior to litigation, Starkey did not hesitate to claim ministerial status.

3. Starkey's counterarguments are meritless.

In the face of all this, Starkey offers several counterarguments, all meritless.

Nonperformance. First, Starkey argues that even if her contract and job description required her to perform religious duties, she in practice didn't perform all duties described. According to Starkey, then, the district court erred by "deferring" to "two pieces of paper" (*i.e.*, her signed, written agreement), Br.34, rather than deriving a fact dispute from her mid-litigation, self-serving testimony.

But this argument ignores Starkey's numerous, undisputed, contemporaneous statements confirming these duties and applying them to other counselors, *supra* pp.6-10, and Judge Young's holding that it was undisputed she *did* "in fact perform[]" religious functions. A.15, 17. And it founders on precedent. *Our Lady* relied on the plaintiffs' "employment agreements and faculty handbooks" to find religious duties, despite the plaintiffs' claim that they "merely taught 'religion from a book.'" 140 S.Ct. at 2066, 2068. *Sterlinski* relied on a church document describing the religious importance of organ playing, despite the plaintiff's claim that he "was just 'robotically playing the music that he was given.'" 934 F.3d at 569. And *Grussgott* relied on the school's written description of its curriculum as religious, despite the plaintiff's claim that her teaching "was historical, cultural, and secular, rather than religious." 882 F.3d at 659. Of course an employee may fail to fulfill assigned religious duties—but that doesn't undermine applicability of the ministerial exception; it suggests the "church may decide that [the employee] *ought* to be fired." *Sterlinski*, 934 F.3d at 571.

Starkey's *amicus* likewise insists it "makes no sense" to defer to the Archdiocese's written expectations. AU Br.10-11. But that's a quarrel with binding law: "[I]t is the school's expectation—that [the plaintiff] would convey religious teachings to her students—that matters." *Grussgott*, 882 F.3d at 661; *Our Lady*, 140 S.Ct. at 2066. And this analysis makes *especially* good sense here, since far from the Archdi-

ocese unilaterally foisting religious expectations on Starkey's role, Starkey helped set the expectations herself. *Supra* pp.7-8. And undisputed evidence shows they mattered. Maly confirmed the ministry description fairly described a counselor's "day-to-day expectations," giving concrete examples of how she comports with them. SA.64. And multiple counselors in performance evaluations attested to how they imbued their work with faith-formation in striving to meet the religious evaluation criteria Starkey crafted. *Supra* pp.8-9.

Addressing Maly's testimony, Starkey claims it "conflict[s]" with an affidavit submitted by former counselor Autumn Currens, where Currens says she didn't pray one-on-one with students and "'rarely' incorporated religious beliefs or teachings." Br.37-38. But this doesn't show a conflict over *duties*; it simply shows that, as in any workplace, some employees fulfill their duties more than others. And Currens's made-for-litigation affidavit must be read in light of her pre-litigation self-evaluation, where she highlighted how she *did* incorporate religion with students, "highly encourag[ing] students to attend retreat" and "encouraging faith with my students." SA.128.

Starkey's other attempts to conjure a fact dispute similarly fail to address the Archdiocese's expectations, and regardless fail on their own terms. Starkey says she referred students to the "Social Worker" "most of the time" when they raised "non-academic" issues, Br.23—neglecting to mention she *supervised* the Social Worker. SA.246. Likewise, Starkey claims when the Administrative Council discussed religious topics she "deferred to" other members. Br.40. But this is just a semantic game about what topics were "religious," given the undisputed evidence of her active participation in discussions about, *e.g.*, prayer services, suicide prevention, Catholic identity, and infusing faith into athletics. *Supra* p.11; *see* SA.76.

Finally, Starkey admits she "help[ed] students with 'sensitive' and 'personal' issues," but says this isn't "inherently religious." Br.38. But counselors help guide

students through issues of intense significance to Catholic teaching, like "depression," "thoughts of suicide," "sexual orientation, [and] gender identity." SA.59. So unless the Archdiocese has the "power" to choose who fills that position "without interference," "a wayward minister's … counseling could contradict the church's tenets and lead [others] away from the faith"—exactly why the ministerial exception exists. *Our Lady*, 140 S.Ct. at 2060.

Novel test. Stymied by the governing ministerial-exception framework, Starkey proposes her own: "an employee must at a minimum perform important, sustained, and public religious functions." Br.20. But none of her nonbinding decisions articulates any such test. *Cf. id.* And the Supreme Court has repeatedly rejected such "rigid formula[s]," *Hosanna-Tabor*, 565 U.S. at 190, instead "call[ing] on courts to take all relevant circumstances into account" in determining whether a position "implicated" the exception's "fundamental purpose." *Our Lady*, 140 S.Ct. at 2066-68.

Indeed, precedent forecloses imposing *any* of Starkey's elements as essential, much less all of them. Starkey says a court must decide for itself whether her "religious activities" were "important" or "inconsequential." Br.36-37. But this Court rejected the same invitation in *Sterlinski*, explaining "[i]f the Roman Catholic Church believes" an employee's activities are "vital to its" mission, judges are in no position "to disagree." 934 F.3d at 570. Starkey's "sustained" or "frequent" requirement, Br.37, 40, reiterates the "stopwatch" test rejected in *Hosanna-Tabor*, where the Court held "the relative amount of time … spent performing religious functions" can't be "determinative" (even "largely" so). 565 U.S. at 193-94; *cf. Grussgott*, 882 F.3d at 661 (plaintiff "was tasked with specific religious duties *on occasion*" (emphasis added)). And Starkey's "public" or "transparent" requirement, Br.14, appears to restate items already examined under the employee's "use of her title," *Grussgott*, 882 F.3d at 659—and *Our Lady* expressly states that consideration needn't be met or even analyzed in every case, 140 S.Ct. at 2063.

In any event, even if Starkey's test were the law, it's met here. "In the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life,'" *id.* at 2064-65, and Starkey was charged not just with conveying Church teachings to students *en masse* in a classroom, but with applying those teachings in personal, one-one-one counseling sessions—an "important" function by any measure. These duties were also "frequent" and "sustained"; *e.g.*, as Administrative Council member, she was tasked with addressing sensitive issues "in light of [Roncalli's] Catholic faith" "[n]early every week." SA.75. And her role was "public"—she was expressly identified in her job description as a "minister of the faith," publicly commissioned as a minister, and publicly led all-school prayers, among other religious duties.

Starkey's grab-bag of nonbinding cases not only fail to support her new test, but also are factually distinct. *DeWeese-Boyd* and *Bohnert* turned on the notion that the plaintiff (unlike Starkey) wasn't charged with "spiritual guidance." *De-Weese Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1013 (Mass. 2021); *see Bohnert v. Roman Catholic Archbishop of S.F.*, 136 F. Supp. 3d 1094, 1114 (N.D. Cal. 2015). *Herx* adopted the formulaic ministerial-exception approach that *Our Lady* and *Sterlinski* later rejected. *Compare Herx v. Diocese of Ft. Wayne-S. Bend, Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014), *with Our Lady*, 140 S.Ct. at 2066-68, *and Sterlinski*, 934 F.3d at 570. In *Richardson* and *Aparicio*, which involved an "instructor of exercise science" and a fundraiser, respectively, the courts didn't find the plaintiffs to have been charged with *any* religious duties—unlike here. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1139, 1145 (D. Or. 2017); *Aparicio v. Christian Union, Inc.*, 2019 WL 1437618, at *7 (S.D.N.Y. Mar. 29, 2019). And in *Billard*, the defendants didn't assert a ministerial-exception defense, and the plaintiff was a substitute teacher, not (as here) a key school leader. *Billard v. Charlotte Catholic High Sch.*, 2021 WL 4037431, at *6, 14 (W.D.N.C. Sept. 3, 2021).

Pretext. Next, grasping for some Circuit authority, Starkey tries to distort *Sterlinski* (which found the ministerial exception *satisfied*), arguing the Archdiocese's "assertion that [she] is a minister is pretextual." Br.14, 22. Her primary basis is that, in the 2016 hourly-pay discussions, an Archdiocesan human-resources representative said an attorney told her that "school counselors and social workers do not meet the definition for the ministerial exemption." Br.26-28, 30 (citing Dkt.127-8 at 2). This argument fails at multiple levels.

First, Starkey's misunderstands *Sterlinski*. *Sterlinski* didn't invite an inquiry into whether the religious employer honestly believes the employee is *a minister*. That, again, is a "legal" question. *Grussgott*, 882 F.3d at 662 (rejecting expert opinion "on the ultimate question of whether Grussgott was a ministerial employee"). Rather, *Sterlinski* indicated a ministerial-exception defense might fail if the plaintiff shows the employer didn't honestly believe the employee's *activities were religious*. 934 F.3d at 571 ("A church claiming 'minister' status for bus drivers would invite a finding of pretext, but a church claiming that persons who chant, sing, or play music during a service *perform religious functions* is on solid ground." (emphasis added)). And even there, *Sterlinski* was clear that the window for judicial inquiry is narrow ("if the Roman Catholic Church believes that organ music is vital to its religious services, … who are we judges to disagree?") and triggered only in extreme circumstances (noting the issue could arise where "a church insists that *everyone* on its payroll, down to custodians and school-bus drivers, is a minister"). *Id.* at 570-71. But the alleged 2016 opinion doesn't even go to any such inquiry, since (as the district court recognized) that opinion—from a lawyer and focused on the legal "definition" of a minister under the Fair Labor Standards Act, Dkt.127-8 at 2—concerns the "pure question of law" of ministerial status. *Conlon*, 777 F.3d at 833; A.17 n.3.

Second, on any understanding of the pretext inquiry, the 2016 events cut *against* pretext. That's because Starkey *opposed* the lawyer's legal conclusion that Roncalli counselors weren't ministers—and Principal Weisenbach and the Archdiocese *agreed* with her and *rejected* the opinion, continuing to treat counselors as ministers. SA.135; *accord* SA.83, 256-57. Thus, far from being "hoked up for the occasion," the Archdiocese's position has been consistent since "well before" this litigation began. *Sterlinski,* 934 F.3d at 571.

On appeal, Starkey offers various other grounds for finding "pretext." Br.28-31. But below, Starkey devoted one sentence to pretext, and the sole "evidence" she cited was the 2016 legal opinion. Dkt.126 at 24. These arguments are therefore waived. *See, e.g., Bunn v. Fed. Deposit Ins. Corp.*, 908 F.3d 290, 297-98 (7th Cir. 2018).

In any event, they are meritless. First, Starkey suggests she can't be a minister because she is "not … a practicing Catholic" (though she held herself out as Catholic for decades and continued receiving Holy Communion alongside her students). Br.28. But *Our Lady* rejected that contention, explaining a "co-religionist" requirement "would risk judicial entanglement in religious issues" and put religious employers "in an impossible position." 140 S.Ct. at 2068-69.

Second, Starkey says "timing … is evidence of pretext," because "Roncalli did not introduce Starkey's Ministry Description until 2018." Br.29. But the relevant duties are those at the time of the challenged employment action, *see Sterlinski*, 934 F.3d at 569-70, whenever introduced. In any event, Starkey's own actions show that the 2018 ministry description merely formalized the duties counselors were *already* expected to perform. Again, in 2016, Starkey herself affirmed that counselors had duties "identical to that of teachers" in their "Ministry Description." *Supra* p.7. And in 2015, she developed evaluation criteria making counselors' pay turn on discharging those religious duties. *Supra* pp.7-8.

Third, Starkey asserts that "Roncalli never admonished Starkey for failing to conform to the documents' supposed altered expectations." Br.30. But Roncalli *did* compensate counselors relative to their effectiveness at discharging their religious duties, according to criteria Starkey herself developed. *Supra* pp.7-9. And the Archdiocese *did* hold Starkey (and her Co-Director Fitzgerald) accountable for failing to conform to her contract—in particular, its decades-long requirement that her "personal conduct or lifestyle" not be "at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church." SA.48.

Fourth, Starkey argues the ministerial exception shouldn't apply because the Archdiocese's "online job application" stated it would comply with "equal opportunity laws." Br.31. But "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer." *Grussgott*, 882 F.3d at 658 (citing *Tomic*, 442 F.3d at 1041-42). And in any event, the Archdiocese *isn't* violating equal opportunity laws when it asks ministers to abide by Church teachings on marriage. That request is protected by the First Amendment and is in any event based on "behavior rather than status." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 860 (7th Cir. 2006).

Parade of horribles. Finally, Starkey and her *amicus* fall back on the claim that affirmance "could have sweeping implications for employees of religious institutions," Br.35, making even "coaches," "janitors" and "bus driver[s]" ministers, AU Br.5, 10, 16. But the same parade of horribles was presented in *Our Lady*—and rejected, 7–2. *See* 140 S.Ct. at 2082 (Sotomayor & Ginsburg, JJ., dissenting).

And of course this Court need not address any employee other than Starkey to resolve this appeal, *cf.* A.18-19 (expressly *disclaiming* analysis would cover "custodian[s]" and "bus driver[s]"), much less announce any "expediency" for triggering the exception, Br.34. As guidance counselor, Starkey was charged with bringing Catholic teaching to bear on "some of the most sensitive issues in a young person's

life," A.18-19—duties she repeatedly contemporaneously affirmed. And as an Administrative Council member, she was charged with doing the same for challenges facing the *entire school*—duties she undisputedly discharged. She therefore had "the ability to shape the practice of [Roncalli's] faith," bringing her well within the ministerial exception. *Grussgott*, 882 F.3d at 661.

C. All Starkey's claims are barred.

After finding Starkey a minister, the district court correctly rendered judgment for the Archdiocese on all her claims. A.19-21. The exception bars any claim interfering with "a church's … authority to select, supervise, and if necessary, remove a minister." *Our Lady*, 140 S.Ct. at 2060. Here, all Starkey's claims challenge her nonrenewal in a ministerial role—triggering the exception.

Starkey doesn't dispute that if she is a minister, her Title VII claims are barred. Br.42. But she claims the district court erred by dismissing her state-law claims, which assert the Archdiocese committed a tort by "directing" or "forcing Roncalli to not renew Starkey's contract." SA.195-96. These claims, like the Title VII claims, seek to penalize the Archdiocese for declining to retain her as a minister. But Starkey asserts that since the state-law claims "are against the Archdiocese only, not Roncalli," and since the Archdiocese denied qualifying as her "employer" under Title VII, Dkt.20 ¶3, the ministerial exception cannot apply. Br.42-44.

This theory fails. The applicability of the ministerial exception—a *First Amendment* doctrine—doesn't depend on any statutory definition of "employers" and "employees." *Cf.* 42 U.S.C. §2000e(b), (f). It depends on whether the plaintiff is a "minister"—one "charged" with "conveying [a religious organization's] message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192. If so, the organization "must be free to choose those who will" fill the role. *Id.* at 188, 196.

Accordingly, courts routinely apply the exception to dismiss claims by Catholic-ministry employees against *both* the ministry *and* its diocese, regardless whether one or both formally constituted the plaintiff's "employer." *See, e.g.*, *Fratello*, 863 F.3d 190; *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012). And courts have applied the exception to dismiss a minister's claims urged solely against a *non*-employer—including tortious-interference claims like Starkey's. *Bell v. Presbyterian Church*, 126 F.3d 328, 331-33 (4th Cir. 1997).

The district court was right to do likewise. If the court is barred from interfering with how Roncalli selects or supervises ministerial roles, it necessarily must also be barred from interfering with how the Archdiocese supervises Roncalli's selection and supervision of ministerial roles. Roncalli is "a ministry of" the Archdiocese, *id.* at 332; *see* SA.1, 14, and the Archbishop is Roncalli's sole corporate member, SA.1. The ministerial exception is about church autonomy; it's not an invitation to keep suing higher until you reach the Pope. *Cf. McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 304 F. Supp. 3d 514, 517, 521 (N.D. Miss. 2018) (entity asserting exception was allegedly a "separate and autonomous" organization entirely, so challenged decisions were not "internal decisions within the hierarchy of a single organization"). Indeed, a contrary rule would allow every employment claim barred by the exception to be litigated after all, provided the plaintiff rewords it as a state tort suit against whichever supervisor or board member encouraged the disputed decision.

Alternatively, Starkey suggests a more sweeping reason her state-law claims survive—that "state law business tort claims" as such are exempt. Br.43. But the ministerial exception depends on a claim's *effect*, not on how it's styled. If the "cause of action … would otherwise impinge on the Church's prerogative to choose its ministers," it is barred—whether it is "federal or state." *Werft v. Desert Sw. Ann. Conf. of United Methodist Church*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004); *see also, e.g.,*

Lee v. Sixth Mount Zion, 903 F.3d 113, 119-20 (3d Cir. 2018); *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576-78 (1st Cir. 1989). Many courts have therefore applied the exception to bar state-law tort and contract claims, including tortious-interference claims like Starkey's.[8]

Lacking actual authority, Starkey points to an alleged "conce[ssion]" by the *Demkovich* parties that the exception doesn't apply to "civil tort claims." Br.43. But the *Court* said no such thing: It said the exception "may" not apply to tort claims asserted against "*individuals* within" religious organizations, 3 F.4th at 982 (emphasis added), a suggestion unhelpful to Starkey here. Nor did the *Demkovich* defendant "concede" that *all* torts survive the ministerial exception; it suggested some do, depending on "the elements of the claim." *See* OA Audio 7:15-8:09, *Demkovich*, No. 19-2142 (7th Cir. Feb. 9, 2021). That is the Archdiocese's position here. If a state-law claim *wouldn't* interfere with a church's selection and supervision of its ministers—*e.g.*, a slip-and-fall on the church steps, or a contract claim for unpaid salary—it wouldn't be barred. The problem for Starkey is that her state-law claims fall on the wrong side of the line.

II. Starkey's claims are barred by statute.

The ministerial exception suffices to resolve this appeal. But Starkey's claims are also barred by Title VII and RFRA. So the Court may "avoid addressing" the "constitutional question[]" of the ministerial exception by "tak[ing] up the statutory question first," affirming on these alternative grounds. *Akram v. Holder*, 721 F.3d 853, 858 (7th Cir. 2013); *see also Fidelity & Deposit Co. of Md. v. Edward E. Gillen Co.*, 926 F.3d 318, 324 (7th Cir. 2019) (Court "may affirm a judgment on any ground supported by the record").

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[8] *See, e.g., Bell*, 126 F.3d at 332-33; *El-Farra v. Sayyed*, 226 S.W.3d 792, 796-97 (Ark. 2006); *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 (Va. 2001).

A. Starkey's claims are barred by Title VII.

Title VII does not apply when, as here, a religious employer makes an employment decision based on an individual's religious belief or conduct. The statute's religious exemption provides as follows:

> This subchapter shall not apply to … a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. §2000e-1(a).[9] The Archdiocese and Roncalli are a "religious corporation" and "educational institution," so they're entitled to invoke the exemption, as Starkey hasn't disputed.

The question, then, is the exemption's scope—"a question of first impression in this Circuit." *Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1087 (7th Cir. 2014). Resolving it requires interpreting Title VII according to its text. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1738-39 (2020).

And the exemption's text is straightforward. The "subchapter" covered is all of Title VII. *See* Pub. L. 88-352, §702. And Title VII expressly defines "religion": it includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. §2000e(j). "When a statute includes an explicit definition, [courts] must follow" it. *Digit. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 776-77 (2018). Doing so here yields the following: "This subchapter [*i.e.*, Title VII] shall not apply to" a religious employer "with respect to the employment of individuals of a particular [religious "belief," "observance," or "practice"]." 42 U.S.C. §§2000e-1(a), 2000e(j).

That plain-text reading forecloses Starkey's claims. The Archdiocese declined to

[9] Title VII also includes a separate exemption specific to religious schools, whose operative language is functionally identical to §2000e-1(a). 42 U.S.C. §2000e-2(e)(2). For simplicity, we focus on the general exemption.

renew Starkey's contract because she rejects the Church's "belief" and "practice" of marriage between one man and one woman. Dkt.1 ¶45; Dkt.20 ¶45. Under the exemption, Title VII does not apply to that decision. Rather, the Archdiocese is free to "employ only persons whose beliefs and conduct are consistent with [its] religious precepts." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *see also, e.g., Bear Creek Bible Church v. EEOC*, 2021 WL 5449038, at *5-6 (N.D. Tex. Nov. 22, 2021) (under "[t]he plain text of this exemption," "a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief.").

The district court rejected this straightforward analysis, holding the exemption applies only when the plaintiff's Title VII claim is of "religious discrimination." SA.285. Thus, because Starkey asserts discrimination based on sex and sexual orientation, not religion, the exemption doesn't apply. SA.282-91.

That interpretation is irreconcilable with the text. The exemption has a simple structure: "[law X] shall not apply" to religious employers "with respect to [conduct Y]." The *law* that shall not apply is "[t]his subchapter"—*i.e.*, *all* of Title VII, not just the ban on religious discrimination. And the *conduct* protected is the "employment of individuals of a particular" "belief," "observance," or "practice." Thus, the meaning is clear: When a religious employer engages in the relevant conduct—making an employment decision based on an individual's religious "belief," "observance," or "practice"—Title VII doesn't apply, regardless how the plaintiff articulates her claims. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Oxford J.L. & Relig. 368, 376 (2015) ("[T]here is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to" "sex" discrimination.).

This point is further reinforced by the *other* half of §2000e-1(a)—the "alien" exemption. Section 2000e-1(a) includes *two* exemptions introduced with the same language: "This subchapter shall not apply *to an employer with respect to the employment of aliens outside any State*, or to a religious [employer] with respect to the employment of individuals of a particular religion … ." (emphasis added). If the religious exemption were somehow limited only to certain types of Title VII claims (*i.e.*, religious discrimination), one would expect the alien exemption to have a parallel limitation (*i.e.*, claims of race or national-origin discrimination). But courts have imposed no such limitations on the alien exemption, and the religious exemption "must be read equally broadly." *Bear Creek*, 2021 WL 5449038, at *6.

Caselaw confirms the Archdiocese's reading. While this issue is "disputed" among "lower courts." *Bostock*, 140 S.Ct. at 1781 (Alito, J., dissenting), the better-reasoned cases support the Archdiocese, including on facts analogous to those here. *See* Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 Tex. Rev. L. & Pol. 295 (2016).

For example, in *Curay-Cramer*, a Catholic school dismissed a teacher for engaging in pro-choice advocacy in violation of Catholic teaching. 450 F.3d at 132. The teacher sued under Title VII for sex discrimination, alleging the school treated her more harshly than male teachers who violated other Catholic teachings. *Id.* But the Third Circuit rejected her claim under Title VII's religious exemption, explaining, "Congress intended the explicit exemptions of Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Id.* at 141 (quoting *Little*, 929 F.2d at 951). Because the school had "offer[ed] a religious justification" for its decision—the teacher's violation of Church doctrine by promoting abortion—her claim was barred, even though she complained of sex (rather than religious) discrimination. *Id.* at 141-42.

Other decisions likewise apply the exemption to bar sex-discrimination claims like Starkey's. *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1502-04 (E.D. Wis. 1986), *aff'd in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987). And recent Supreme Court statements support this result. In *Bostock*, the Court listed Title VII's religious exemption among the "doctrines protecting religious liberty" available in "future cases" asserting sexual-orientation discrimination—which wouldn't make sense unless the exemption can apply to such claims. 140 S.Ct. at 1754. And in *Our Lady*, which involved claims of age and disability discrimination, Justices Sotomayor and Ginsburg described the exemptions as still "protect[ing] a religious entity's ability to make employment decisions … *for religious reasons*." 140 S.Ct. at 2072, 2075 (Sotomayor, J., dissenting) (emphasis added).

In rejecting the Archdiocese's plain-text reading here, the district court worried accepting it would "swallow Title VII's rules," amounting to a "complete exemption" from claims based on "race, color, sex or national origin" discrimination. SA.285-87. But that misunderstands the Archdiocese's position. The argument isn't that religious employers enjoy a "complete exemption" from all Title VII claims; it's that they're exempt *when* their employment decision is based on an individual's particular religious belief, observance, or practice (regardless what type of discrimination is alleged). They remain subject to all Title VII claims when it is not.

Because Starkey's suit is "prohibited by Title VII's plain terms," that is "the end of the analysis," *Bostock*, 140 S.Ct. at 1743—the Archdiocese prevails.

B. Starkey's claims are barred by RFRA.

Starkey's claims are also barred by RFRA. A panel of this Court has held that RFRA doesn't apply where the federal Government isn't a party. *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015). But the Supreme

Court recognized in *Bostock* that RFRA "operates as a kind of super statute" and "might supersede Title VII's commands in appropriate cases." 140 S.Ct. at 1754. And this Court doesn't follow "prior opinions" that have been "overruled *or undermined* by the decisions of a higher court." *Woodring v. Jackson County*, 986 F.3d 979, 993 (7th Cir. 2021); *cf. Hankins v. Lyght*, 441 F.3d 96, 103-04 (2d Cir. 2006) (splitting with *Listecki*).

Applied here, RFRA requires affirmance. RFRA prohibits any "application" of any "Federal law" that would substantially burden religious exercise unless that application satisfies strict scrutiny. 42 U.S.C. §§2000bb-1(a)-(b), 3(a). Here, punishing the Archdiocese for asking its leaders to follow the Church's teachings on marriage would put "substantial pressure on" it "to modify" its religiously-motivated conduct, "undermin[ing its] ability to give witness to the moral teachings of [its] church," *Korte v. Sebelius*, 735 F.3d 654, 682-85 (7th Cir. 2013)—a substantial burden, *id.*, as Starkey never contested below.

Starkey's suit could therefore proceed only if penalizing the Archdiocese's exercise were the "least restrictive means of furthering" a "compelling" interest. 42 U.S.C. §2000bb-1(b). As Starkey noted below, Title VII serves the important end of "permit[ting] equal opportunities in employment." Dkt.126 at 29. But the question isn't whether there is "a compelling interest in enforcing" Title VII "generally"; it's whether "such an interest [supports] denying an exception to" the Archdiocese here. *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021); *see Korte*, 735 F.3d at 685. Applying that test, "the state's interest in eliminating employment discrimination"—however important generally—"is out-weighed by a church's constitutional right of autonomy in its own domain." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996).

In any event, penalizing the Archdiocese wouldn't be the least restrictive means of pursuing any antidiscrimination interest, given Title VII's many "excep-

tions … for secular purposes." *Bear Creek*, 2021 WL 5449038, at *24 & n.22; *see* 42 U.S.C. §2000e(b) (exempting employers with fewer than fifteen employees); *id.* §2000e-2(f) (exempting employers disfavoring Communists); *id.* §2000e-2(i) (exempting some employers favoring Indians). So while Title VII exempts the Archdiocese, *supra* Part II.A, even if it didn't, the Archdiocese would be "entitled to an exemption" under RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014).

III. Starkey's claims are barred by the First Amendment.

Starkey's claims are also barred by multiple, overlapping First Amendment protections: the doctrine of religious autonomy, the prohibition on religious entanglement, and the freedom of expressive association. At minimum, these serious constitutional issues should be avoided by interpreting Title VII's religious exemption according to its plain text.

A. Starkey's claims are barred by religious autonomy.

The "well-established" principle of religious autonomy protects religious organizations' "'independence in matters of faith and doctrine and in closely linked matters of internal government.'" *Demkovich*, 3 F.4th at 975 (quoting *Our Lady*, 140 S.Ct. at 2061); *accord, e.g.*, *Korte*, 735 F.3d at 677-79. One "component" of religious autonomy is the ministerial exception, *Our Lady*, 140 S.Ct. at 2060, which protects hiring decisions about *ministers* even when they are not made "for a religious reason," *Hosanna-Tabor*, 565 U.S. at 194. But religious autonomy also extends beyond the ministerial exception to protect "personnel decision[s]" for *non-ministers* that are "based on religious doctrine." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002).

Bryce is instructive. There, a church's youth minister sued under Title VII, alleging church officials' statements about homosexuality and her same-sex union constituted sex discrimination. 289 F.3d at 651-53. The Tenth Circuit declined to decide

whether the plaintiff was a "minister" for ministerial-exception purposes. *Id.* at 658 n.2. Instead, it held the "broader church autonomy doctrine" "extends beyond the specific ministerial exception" to include "personnel decision[s]" "'rooted in religious belief.'" 289 F.3d at 656-58 & n.2 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Because the plaintiff challenged "a personnel decision based on religious doctrine," her suit was barred. *Id.* at 660; *see also, e.g., Garrick v. Moody Bible Inst.*, 412 F. Supp. 3d 859, 871-73 (N.D. Ill. 2019) (citing *Bryce*, applying "overarching principle of religious autonomy" to dismiss challenge to doctrinally-rooted employment decision, regardless whether plaintiff was a minister); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 293-94, 296 (Ind. 2003) (applying "church autonomy" as described by "[t]he *Bryce* court" to bar tortious-interference claim against archdiocese, though plaintiff lacked "ministerial-type duties").

This principle fully applies here. Starkey doesn't dispute her nonrenewal was "based on religious doctrine," *Bryce*, 289 F.3d at 660—namely, her same-sex union in violation of her contract and Church teaching. SA.97; *see* SA.83, 94. Thus, as in *Bryce* and *Garrick*, allowing her claims to proceed "would impermissibly inject the auspices of government into religious doctrine and governance." *Garrick*, 412 F. Supp. 3d at 871-72. Indeed, this is a quintessential "dispute[] involving religious governance." *Demkovich*, 3 F.4th at 975. If the Catholic Church cannot apply canon-law standards of conduct to Catholic educators in Catholic schools, then the promise of "independence in matters of faith and doctrine and in closely linked matters of internal government" means nothing. *Id.*

Without addressing *Bryce* or *Garrick*, the district court said applying religious autonomy to non-ministers "would render the ministerial exception superfluous." SA.294. But that is mistaken. Both this Court and the Supreme Court have noted that the ministerial exception is just one "component" of the broader church-autonomy doctrine. *Our Lady*, 140 S.Ct. at 2060-61; *Demkovich*, 3 F.4th at 976. The

ministerial exception provides strong medicine when the plaintiff is a *minister*—protecting *all* employment decisions for *any* reason, religious or not. *Hosanna-Tabor*, 565 U.S. at 178-79. But religious autonomy also protects employment decisions about *non-ministers* for *religious* reasons. Otherwise, religious organizations couldn't hire "only those committed to th[eir] mission." *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

B. Starkey's claims are barred because they would impermissibly entangle the Court in religious questions.

Starkey's claims are also barred because they require "religious line-drawing" that would "impermissibly entangle[]" the Court in religious questions. *Grussgott*, 882 F.3d at 660 (citing *Amos*, 483 U.S. at 343). But "federal courts are not empowered to decide (or to allow juries to decide) religious questions." *McCarthy v. Fuller*, 714 F.3d 971, 980 (7th Cir. 2013).

Here, Starkey doesn't dispute her same-sex union violated her contract and Church teaching. Instead, to support her sex-discrimination claim, Starkey wants to look for evidence that *other* employees violated *other* Church teachings and were *not* dismissed—like "heterosexual employees" who engaged in "divorce and remarriage without annulment, unmarried co-habitation, [or] marriage without the sacrament." Dkt.67 at 13-14, 25; *see also* SA.191. But that comparison is probative only if these violations of Church teaching are equally weighty as entering a same-sex union—a theological question not amenable to resolution by civil courts. *See Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002) ("another employee is 'similarly situated'" to plaintiff only if she is "directly comparable to her in all material respects" (cleaned up)).

Multiple cases demonstrate the point. For example, in *Curay-Cramer*, where a Catholic teacher was fired for her pro-choice advocacy, the teacher sought to prove discrimination by showing that male employees had violated other Church teach-

ings and "were treated less harshly." 450 F.3d at 132. But the Third Circuit rejected that attempt, concluding that "measur[ing] the degree of severity of various violations of Church doctrine" to assess sex discrimination "would violate the First Amendment." *Id.* at 137, 139.

Likewise, in *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), a Baptist college employee was fired for becoming a lay minister in a church that affirmed homosexual conduct. The employee tried to prove discrimination by pointing to other employees who weren't fired despite violating other Baptist teachings—such as becoming ordained in a church that permitted women's ordination. *Id.* at 626-27. But the Sixth Circuit affirmed judgment for the college because the plaintiff was "requesting [the] court to tell the College that it must be opposed to the ordination of women with the same degree of conviction and intensity" as it opposed homosexuality or else "suffer liability under Title VII"—which the court couldn't do. *Id.* at 626 (cleaned up).

Starkey's claims fail for the same reason. Starkey doesn't dispute that her same-sex union violates Church teaching; instead, she says she is entitled to fish for evidence that she's been treated worse than other employees whose opposite-sex sexual conduct does, too. But even if her fishing expedition found such evidence, it would be relevant only if the different types of conduct constitute "comparable rule or policy violations" in the eyes of the Catholic Church. *Patterson v. Ind. Newspapers, Inc.*, 589 F.3d 357, 366 (7th Cir. 2009). And *that* is a religious question. No neutral "principle of law or logic" "can be brought to bear" to determine whether different violations of different Church teachings are "similar" as a matter of federal law. *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990).

The very types of evidence the district court would have to consider prove the point. For example, Starkey argues that employees in opposite-sex adulterous marriages, or who married without the sacrament, are comparable to her. Dkt.67 at 13,

25. But the Catechism differentiates between adultery in opposite-sex marriages (addressed in the Catechism chapter on matrimony) and "homosexual acts" (addressed in the Catechism chapter on the Sixth Commandment as an "offense[] against chastity"). *Compare* Catechism ¶¶1625-66 *with id.* ¶¶2357-59, 2351-56. Similarly, the Code of Canon Law allows for the later validation of heterosexual "marriage without the sacrament," 1983 Code c.1156-60, but same-sex relationships can "[u]nder no circumstances … be approved." Catechism ¶2357.

To compile a list of suitable comparators for Starkey, then, the court (or jury) would have to "troll[] through [the Archdiocese's] religious beliefs," *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality), picking and choosing which conduct contrary to Catholic teaching it views as sufficiently similar to Starkey's conduct, guided by its own (or Starkey's) moral sensibilities. But that type of "religious line-drawing" is "impermissibl[e]." *Grussgott*, 882 F.3d at 660. If the Archdiocese "wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory and therefore warrants Title VII liability." *Hall*, 215 F.3d at 626-27.[10]

C. Starkey's claims are barred by freedom of association.

Starkey's claims are also barred by freedom of association, which protects the right of expressive associations, religious or otherwise, to disaffiliate with those who undermine their message. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *see also, e.g., Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018).

Dale is the leading case. There, a former scoutmaster sued the Boy Scouts,

[10] Starkey's state-law claims are equally entangling. They require her to show the Archdiocese's actions lacked "justification," *Bradley v. Hall*, 720 N.E.2d 747 (Ind. Ct. App. 1999), and Starkey says she hopes to prove this by finding evidence she was treated worse than other employees who violated other Church teachings. Dkt.67 at 25; *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (adjudicating tortious-interference claim would "excessively entangle[] [the court] in religious affairs").

claiming his dismissal for being "an avowed homosexual and gay rights activist" violated state antidiscrimination law. 530 U.S. at 643-45. But the Supreme Court held the First Amendment foreclosed this claim, explaining that freedom to associate "presupposes a freedom not to associate," and forced association with the plaintiff would undermine the Scouts' ability to express its view opposing homosexual conduct. *Id.* at 647-48.

Likewise, in *Walker*, a university denied recognition to a Christian student group because the group excluded members "who engage in or affirm homosexual conduct." 453 F.3d at 857. This Court, however, applied *Dale* to protect the student group. As the Court explained, forcing the group to include those members "significantly affect[ed]" its "ability to express its disapproval of homosexual activity," and the university's interest in prohibiting sexual-orientation discrimination didn't outweigh the First Amendment. *Id.* at 862-64.

Under *Dale* and *Walker*, an expressive-association defense involves two questions: whether the organization "engage[s] in some form of expression"; and whether the forced association would "significantly affect [its] ability to advocate" its viewpoints. *Dale*, 530 U.S. at 648, 650. If so, "the First Amendment prohibits" it, absent a showing that the action satisfies strict scrutiny. *Id.* at 648, 659.

Here, neither Starkey nor the district court disputed that the Archdiocese is an expressive association or that forcing it to retain Starkey would impair its expression. *See* Dkt.67 at 30-34. Nor could they: "Religious groups" like the Archdiocese "are the archetype of" expressive associations. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring). And "it would be difficult for [the Archdiocese] to sincerely and effectively convey" its millennia-old message disapproving homosexual conduct "if, at the same time, it must" employ representatives who reject the message and "engage in that conduct," *Walker*, 453 F.3d at 863—particularly highly visible school leaders charged with counseling students who may

struggle with the same Church teachings.

Instead, the district court held freedom of association doesn't apply in "the employment context," citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984). SA.298-99. But *Hishon* didn't say employment claims are *per se* exempt from expressive-association defenses; it simply held the defendant there (a large, for-profit law firm) hadn't shown the relevant association (considering a woman for partnership) would in fact "inhibit[]" expression of its "ideas and beliefs." 467 U.S. at 78. There is no "employment" exemption from the First Amendment; indeed, the law in *Dale* itself encompassed efforts to "obtain employment." 530 U.S. at 661-62; *id.* at 698 (Stevens, J., dissenting). Unsurprisingly, then, numerous courts have held that freedom of association *does* apply to employment claims.[11] And the EEOC in *Hosanna-Tabor* expressly conceded the same. EEOC Br., *Hosanna-Tabor*, 2011 WL 3319555, at *31 (U.S. Aug. 2, 2011).

Starkey argued below that Title VII "serves a compelling interest in eradicating all forms of invidious discrimination." Dkt.67 at 31-32. But as to religious organizations who believe "same-sex marriage should not be condoned," the Supreme Court has emphasized they must have "proper protection as they seek to teach" that belief, *Obergefell*, 576 U.S. at 679; *see Fulton*, 141 S.Ct. at 1881-82—not that the government has a compelling interest in undermining their message by forcing them to accept leaders who disagree. Likewise, Starkey suggested freedom of association can't bar her state-law claims because they "involve no governmental action." Dkt.67 at 34. But judicial enforcement of private tort claims is governmental action

[11] *See, e.g.*, *Bear Creek*, 2021 WL 5449038, at *26-28; *Our Lady's Inn*, 349 F. Supp. 3d at 822; *Boy Scouts v. Wyman*, 335 F.3d 80, 86, 91 (2d Cir. 2003) (Scouts may "under any reading of *Dale*" exclude "gay activists" from "employment positions" involving "leadership"); *Chi. Area Council of Boy Scouts v. City of Chi. Comm'n on Hum. Rels.*, 748 N.E.2d 759, 769 (Ill. App. Ct. 2001) (similar); *Priests for Life v. HHS*, 7 F. Supp. 3d 88, 109 (D.D.C. 2013).

subject to the First Amendment. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). And the Supreme Court has specifically applied associational freedom to bar a private tort claim like Starkey's. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Thus, Starkey's claims are barred.

D. Constitutional avoidance requires affirmance.

At minimum, constitutional avoidance requires the Court to interpret Title VII to avoid the serious constitutional issues presented by Starkey's claims. Interpreting Title VII to require the Archdiocese to retain Starkey would (at least) raise "serious First Amendment questions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504 (1979). So the statute must be interpreted to avoid that result unless there is "clear expression of an affirmative intention of Congress" to require it. *Id.* There is no such expression here. Rather, Title VII expressly *exempts* religious organizations that hire individuals of a particular religious belief, observance, or practice. *Supra* II.A. Thus, constitutional avoidance, as well as Title VII's plain text, requires affirmance. *See Curay-Cramer*, 450 F.3d at 137-42 (applying constitutional avoidance).

CONCLUSION

This Court should affirm judgment for the Archdiocese.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the length limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Luke W. Goodrich
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Dated: January 10, 2022

CERTIFICATE OF SERVICE

I certify that on January 10, 2022, the foregoing brief was served on counsel for all parties by means of the Court's ECF system.

/s/ Luke W. Goodrich
Luke W. Goodrich

STATUTORY ADDENDUM

Title VII of the Civil Rights Act of 1964 (42 U.S.C.):

***

SEC. 2000e. DEFINITIONS

***

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

***

SEC. 2000e-1. EXEMPTION

(a) Inapplicability of subchapter to certain aliens and employees of religious entities.— This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

***

Religious Freedom Restoration Act of 1993 (42 U.S.C.):

***

SEC. 2000bb-1. FREE EXERCISE OF RELIGION PROTECTED

(a) In general.— Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception.— Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

***

SEC. 2000bb-3. APPLICABILITY

(a) In general.— This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.