No. 21-2524

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
The Honorable Richard L. Young
Case No. 1:19-cv-03153

BRIEF OF THE INSTITUTE FOR FREE SPEECH AND PROFESSOR JAMES PHILLIPS *AS AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2524

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

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

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

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Institute for Free Speech and James Phillips

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Attorney's Signature: /s/ Miles Coleman Date: 1/18/2022

Attorney's Printed Name: Miles Coleman

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

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Attorney's Signature: /s/ Abigail L. Wood Date: 1/18/2022

Attorney's Printed Name: Abigail L. Wood

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

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INTEREST OF *AMICI CURIAE*[1]

Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. Besides scholarly and educational work, the Institute represents individuals and civil-society organizations in litigation to secure their First Amendment liberties.

Dr. James Phillips is an assistant professor of law at Chapman University's Fowler School of Law where he teaches courses in advanced constitutional law (law and religion), civil procedure, and professional responsibility.[2] His scholarship includes research and writing on the meaning, interpretation, and application of the First Amendment.

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[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part, or contributed money intended to fund preparing or submitting the brief. No person other than the Institute and its counsel have contributed money intended to fund preparing or submitting this brief. Counsel thanks University of Chicago Law School students Courtney Baer, Kevin Chapman, Briana Katinic, Robert McCutcheon, Ricardo Taboada, Stephen Vukovits, and Keith Zimmerman for their assistance on this brief.

[2] Institutional name provided for identification purposes only. The positions expressed in this brief are those of Prof. Phillips, and they should not be attributed to or presumed to be representative of the views of Chapman University or the Fowler School of Law.

SUMMARY OF ARGUMENT

While the District Court correctly held that the ministerial exception shields the Roman Catholic Archdiocese of Indianapolis, Inc. and Roncalli High School, Inc. from liability for Lynn Starkey's claims, the First Amendment doctrine of expressive association provides this Court with an alternative ground to affirm.

Courts evaluate whether the doctrine of expressive association applies by considering three questions: (1) Is the organization an expressive association? (2) If so, does the forced inclusion of an individual in the expressive association significantly burden its expression, deferring to the association's own view of what would impair its expression? (3) If so, can the government's action survive strict scrutiny? The answer to each of these questions here supports application of the doctrine and affirmance of the lower court's judgment.

As to the first question, Roncalli and the Archdiocese—a private religious school and ecclesiastical district of the Roman Catholic Church, respectively—are, by nature and purpose, expressive. As to the second question, any governmental action that forces Roncalli and the Archdiocese to employ Ms. Starkey, whose beliefs and behaviors she admits diverge starkly from Catholic teaching and doctrine, would significantly burden and undermine the message Roncalli and the Archdiocese convey. And as to the third, no compelling governmental interest outweighs the expressive association interests of Roncalli and the Archdiocese. Thus, each step of the analysis favors Roncalli and the Archdiocese and supports affirming the District Court's judgment.

While the scope of the expressive association does not apply to every organization or situation, its protections are robust when it applies, shielding expressive organizations in the selection or exclusion of members or employees whose presence would affect the organization's expressive purpose or message. For example, Christian law students, gay softball leagues, the Boy Scouts, the Democratic Party, and pro-life nonprofits (to name but a few) have all relied on the doctrine to exclude those whose presence would detract from their expressive purpose. But the strength of the doctrine's protection and the exception it creates to otherwise applicable employment and anti-discrimination laws do not negate such laws entirely. The doctrine does not exempt organizations from employment laws of general applicability if the organization lacks an expressive purpose or if the employment decision is unrelated to and does not affect the organization's expressive purpose or message. And even when government action burdens an expressive association's message, the government may still prevail if its action serves a compelling state interest, which is unrelated to the suppression of ideas and cannot be achieved through a less restrictive means.

In this appeal, the doctrine of expressive association and the ministerial exception are different paths that lead to the same result—dismissal of Ms. Starkey's claims. They reach that common destination, however, only after traversing different terrain. The associational right, rooted in the Assembly and Speech Clauses, differs from the ministerial exception, which derives from both the Free Exercise and Establishment Clauses, in origin, scope, and legal review standard. The ministerial

exception is available only to religious organizations and only to their selection, control, or removal of individuals qualifying as "ministers." In contrast, the doctrine of expressive association applies to all organizations with an expressive purpose (not just religious organizations) and to their decisions of inclusion or exclusion of anyone (not just ministers) who would detract from the association's message.

The doctrine of expressive association is sometimes easier for courts to apply than the ministerial exception. This is because the doctrine of expressive association focuses on whether an *organization* is expressive and, if so, what message it conveys. This analysis can, at times, be a simpler inquiry than the ministerial exception analysis, which focuses on what an *employee* does. Thus, in situations like this, where both the ministerial exception *and* the right to expressive association apply, the associational right may provide an alternative, straightforward means for this Court to affirm the District Court.

ARGUMENT

I. The Doctrine of Expressive Association Offers an Alternative Ground to Affirm the District Court's Holding.

The First Amendment's associational right permits expressive associations like Roncalli and the Archdiocese to exclude those whose inclusion would detract from their expressive purpose. Under *Dale* and this Circuit's precedent, Roncalli and the Archdiocese are not required to employ Ms. Starkey because her admitted divergence in belief and behavior from Roman Catholic faith and practice undermines their expressive message, and no compelling governmental interest outweighs Roncalli and the Archdiocese's associational right.

A. The First Amendment's associational right permits expressive associations to exclude those who do not share their purpose or support their message.

The Supreme Court has held that the First Amendment's Assembly and Speech Clauses protect an individual's right to join groups and associate with others holding similar beliefs. *See Dawson v. Del.*, 503 U.S. 159, 163 (1992). This right is essential because it buttresses other First Amendment activities, such as free speech, assembly, petition for redress of grievances, and the exercise of religion. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The right of association encompasses two distinct types of freedoms: (1) the right to enter and to maintain intimate human relationships,[3] and (2) the right to associate to engage in expressive activity. *See* 16B C.J.S. *Constitutional Law* § 1148 (2021).

The First Amendment guarantees the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). Expressive association is the right to associate for the purpose of speaking by protecting a group's membership decisions. *See U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 600 (6th Cir. 2013).

[3] The right of intimate association does not apply here. It concerns intimate human relationships, which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like, and receives protection as a fundamental element of personal liberty. *See Paul v. Davis*, 424 U.S. 693, 713 (1976).

Freedom of expressive association requires both a freedom to associate and *not* to associate. *See U.S. Jaycees*, 468 U.S. at 623. The Supreme Court has found that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," because "[s]uch a regulation may impair the ability of the original members to express only those views that brought them together." *Id.*

The freedom of expressive association protects any group's right *not* to associate, regardless of their viewpoint. As with "all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 124 (1981); *see also Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.").

Courts have consistently held that forced inclusion of members who do not share a group's viewpoints significantly affects the group's ability to associate under the First Amendment. In *Our Lady's Inn v. City of St. Louis*, the court held that mandating inclusion of individuals who did not share the nonprofit's commitment against abortion would "significantly affect the ability of Our Lady's Inn to advocate for its services" and would hinder its ability to express its views if it were "required to employ dissenters from [its] pro-life message." 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). In *Apilado v. North American Gay Amateur Athletic Alliance*, the court allowed a gay softball league to exclude a heterosexual team because it "interfere[d]

with its chosen expressive purpose." 792 F. Supp. 2d 1151, 1161 (W.D. Wash. 2011). The court cited the Supreme Court's decision in *Dale*, noting that it must "give deference to an association's view of what would impair its expression." *Id.* (quoting *Dale*, 530 U.S. at 648). The court found that, because the league's efforts to promote a unique set of values are protected by the First Amendment, "[f]orced inclusion of straight athletes would distract from and diminish those efforts." *Id.* Courts' application of the freedom of association is thus even-handed, providing consistent protection to groups across political and social spectrums.

B. Roncalli and the Archdiocese have a right to prevail based on their expressive associational right under the *Dale* test and Seventh Circuit precedent.

Courts evaluate expressive association claims under a three-step analysis. *See Sebelius*, 705 F.3d at 600. First, courts ask whether a group is an expressive association entitled to First Amendment protection. *Id.* Second, courts determine whether the government action in question significantly burdens the group's expression, deferring to the group's view of what would impair its expression. *Id.* And third, courts weigh the government's interest in the restriction against the group's right of expressive association. *Id.* These elements favor the Archdiocese and Roncalli.

1. Roncalli and the Archdiocese are expressive associations.

Roncalli is a private Roman Catholic high school operated under the direction of the Archdiocese to further the mission and message of the Roman Catholic Church.

See ROA. D. # 93, 2; ROA. D. # 114, 2.[4] Churches and religious organizations "are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring). Religious activity is one of the core freedoms the associational right protects. *See Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (recognizing that courts have consistently upheld freedom of association claims when individuals are engaging in "protected speech" or "religious activities"); *see also U.S. Jaycees*, 468 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

Overtly ecclesiastical districts of a religious group, such as the Archdiocese, are not the only religious groups that qualify as expressive associations. Rather, courts have recognized a wide range of associations buttressed by a commitment to religious beliefs, including associations like Roncalli, as expressive associations entitled to First Amendment protection. For example, the associational right protects religious organizations like the Christian Legal Society ("CLS"), an association of lawyers and law students united by a common faith in Christianity. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857–58 (7th Cir. 2006).[5] Because members join

[4] References to the record on appeal are noted as "ROA," with the District Court Docket number ("D. #") and page number, if applicable.

[5] *Walker* remains good law following the Supreme Court's subsequent ruling in *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) in light of factual and analytical distinctions between the two cases. Both this Court and other Circuits

CLS to express their religious beliefs and convictions, *id.* at 860, 862, courts have routinely held that CLS and organizations like it are expressive associations. *See id.* at 862 ("It would be hard to argue—and no one does—that CLS is not an expressive association."); *see also Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 859, 862 (2d Cir. 1996) (holding that a high school Bible club formed and conducted for expressive purposes was entitled to protection as an expressive association).

Even organizations whose purpose is not religious may be expressive associations if the organization operates according to sincerely held religious beliefs. *See Bear Creek Bible Church & Braidwood Mgmt., Inc.* v. *E.E.O.C.*, No. 4:18-CV-00824-O, 2021 WL 5449038, at *28 (N.D. Tex. Nov. 22, 2021) (citing *Dale*, 530 U.S. at 648 (2000)). In *Bear Creek*, the court found that one of the plaintiffs, Braidwood Management, was an expressive association because the business was owned by Christians who repeatedly expressed that Braidwood was a Christian business and required its employees to conform with biblical notions of sexuality and gender. *Id.* at *3. Braidwood Management's lack of engagement in public religious advocacy did not undermine its claim as an expressive association because the business engaged in private expression of its religious beliefs. *Id.* at *27.

Like religious groups, schools are entitled to First Amendment protection as expressive associations. In *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, the Court assumed that freedom of association applied to law schools. 547 U.S. 47, 49, 68, 69

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have continued to cite and rely on *Walker's* First Amendment analysis and holding. *See*, *e.g.*, *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 984 (8th Cir. 2021); *Surita v. Hyde*, 665 F.3d 860, 869–70 (7th Cir. 2011).

(2006). The Court repeatedly referenced "the law schools' freedom of expressive association." *Id.* at 49. Lower court holdings suggest that law schools are not unique in their expressive nature and that freedom of expressive association applies to all kinds of educational institutions. *See, e.g.*, *Circle Schools v. Pappert*, 381 F.3d 172 (3d Cir. 2004). Plaintiffs in *Circle Schools* included secular private schools who objected to a state statute requiring the schools to lead their students in the national anthem or pledge of allegiance each morning. *Id.* at 175. The schools argued that the statute constrained their educational and intellectual freedom through its mandatory participation requirement. *Id.* at 182. The court agreed, holding that the statute violated the schools' right of expressive association because "[b]y nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *Id.*

The holding in *Circle Schools* applies to religious schools as well. When parents choose to send their children to private schools—whether secular or religious—they are engaging in expressive association. *See Beahn* v. *Gayles*, No. GJH-20-2239, 2021 WL 3172272, at *12 (D. Md. July 26, 2021); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("[W]e have long recognized the rights of parents to direct the 'religious upbringing' of their children . . . many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution."). Religious schools, like their secular counterparts, have an expressive interest in inculcating their values into their students. *See Heartland Acad. Cmty. Church* v. *Waddle*, 427 F.3d 525, 535 (8th Cir. 2005); *see also Cent. UTA*

of Monsey v. *Vill. of Airmont*, No. 18 CV 11103 (VB), 2020 WL 377706, at *19 (S.D.N.Y. Jan. 23, 2020) (finding an expressive association right where a religious organization planned to operate a religious school). Religious schools, which educate children in their faith tradition, then, are associations that engage in religious activity and are expressive by nature. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (July 8, 2020) ("[I]mplicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."). Thus, they are entitled to all the rights of an expressive association under the First Amendment, including the freedom not to associate with those who would detract from their message.

Roncalli's mission statement reveals its expressive purpose to educate and mold students through Catholic teachings. *See* ROA. D. # 114-2, 68. Roncalli, "[a]s a Catholic high school, [ ] pledge[s] [ ] to provide, in concert with parents, parish, and community, an educational opportunity which seeks to form Christian leaders in body, mind, and spirit." *Id.* The Archdiocese's mission statement conveys a similarly expressive purpose: "We, the Church in Central and Southern Indiana, called to faith and salvation in Jesus Christ in the Roman Catholic tradition, strive to live the Gospel." *Id.* The Archdiocese strives to do so by (1) "[w]orshipping God in word and sacrament," (2) "[l]earning, teaching[,] and sharing our faith," and (3) "[s]erving human needs." *Id.* Thus, Roncalli and the Archdiocese are "the archetype of associations formed for expressive purposes" because they are committed to

communicating their religious beliefs. *Hosanna-Tabor*, 565 U.S. at 200–01 (Alito, J., concurring).

2. Requiring Roncalli and the Archdiocese to employ individuals who do not share and, in fact, oppose their expressive purpose and message would impair Defendants' ability to convey that message.

Courts apply a deferential standard when analyzing an organization's self-identified expressive purpose or message and the question of who or what would impair that purpose or message. The Supreme Court requires little proof of an organization's expressive purpose. *Dale*, 530 U.S. at 651 ("We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs."). The Court has further stated that, just as courts "give deference to an association's assertions regarding the nature of its expression, [courts] must also give deference to an association's view of what would impair its expression." *Id.* at 648. But little deference is needed to see that forcing the Archdiocese and Roncalli to retain Ms. Starkey would undermine their ability to express their message on human sexuality.

The expressive purpose of Roncalli and the Archdiocese is to live and advance the doctrines of the Catholic Church. The Catholic Church instructs that marriage is a "covenant" between a "man and a woman." R.O.A. D. #93, 3 (quoting Code of Canon Law, Canon 1055). The Catholic Church believes that homosexual acts are "contrary to natural law" and "do not proceed from a genuine affective and sexual complementarity." *Id.* (quoting Catechism of the Catholic Church ¶ 2357). The

Catholic Church even states that "[u]nder no circumstances can [homosexual acts] be approved." *Id.* Roncalli requires its Co-Director of Guidance to "convey and be supporting of the teachings of the Catholic Church," including "the belief that all persons are called to respect human sexuality and its expression in the Sacrament of Marriage as a sign of God's love and fidelity to His Church." R.O.A. D. # 93, 2–3 (internal citations omitted).

Forcing Roncalli and the Archdiocese to include Ms. Starkey, a lesbian married to a woman, in a leadership capacity and as the Co-Director of Guidance, would impair their ability to achieve their expressive purpose which includes disapproval of same-sex activity. *See Walker*, 453 F.3d at 863; *see also Dale*, 530 U.S. at 654 ("[T]he Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members . . . [and] the presence of Dale [ ] would [ ] surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."). This Court's analysis in *Walker* applies with equal force to the facts here. *See* 453 F.3d 853. This Court considered "whether application of [a university's] antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity." *Id.* at 862. This Court stated, "To ask this question is very nearly to answer it," because "[t]here can be little doubt that requiring CLS to make this change would impair its ability to express disapproval of active homosexuality." *Id.* at 862–63.

The court in *Our Lady's Inn v. City of St. Louis* reached a similar conclusion about Catholic school employees who reject the Church's teachings on abortion. 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). The court held that freedom of association protected the Archdiocese of St. Louis's elementary schools from liability under a city ordinance prohibiting employment discrimination on the ground of "reproductive health decisions" because forcing the schools to hire "teachers or other staff who do not adhere to [their] values"—including the "the Catholic Church's longstanding and widely known opposition to abortion—would significantly affect [their] ability to advocate their viewpoints, through . . . teachers and staff, to their students." *Id.* at 813, 820–22. The court held, "[T]he forced inclusion of individuals who do not share Our Lady's Inn's commitment against abortion would significantly affect the ability of Our Lady's Inn to advocate for its services and encourage women to forgo abortion." *Id.* at 822. Likewise, "[its] ability to organize its staff and circulate expressive materials with their views on controversial reproductive rights issues would be hindered if they were required to employ dissenters from their pro-life message." *Id.*

So too here. It would be difficult, if not impossible, for Roncalli and the Archdiocese to convey their message of traditional marriage if, at the same time, they must employ Ms. Starkey, who openly rejects the Catholic Church's view of marriage.

3. Roncalli's and the Archdiocese's interests in expressive association outweigh the government's interests.

To justify interfering with freedom of expressive association, a law must pass strict scrutiny, meaning that it must serve a compelling state interest, which is unrelated to the suppression of ideas and cannot be achieved through a less

restrictive means. *See Dale*, 530 U.S. at 648. The government has an interest in eliminating discriminatory conduct and providing for equal access to opportunities. *See, e.g.*, *U.S. Jaycees*, 468 U.S. at 624. But the Supreme Court has explained that anti-discrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint. *See Dale*, 530 U.S. at 659–61; *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 578–79 (1995). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see also Dale*, 530 U.S. at 661.

In *Walker*, this Court found that the university did not have a compelling interest "in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed." 453 F.3d at 863. The Court stated, "The only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.* Thus, this Court concluded that this factor favored CLS and that "CLS's interest in exercising its First Amendment freedoms is unquestionably substantial." *Id*.

The same is true here. Roncalli and the Archdiocese have "unquestionably substantial" interests in exercising their First Amendment right to expressive association. Were the government to force Roncalli and the Archdiocese to employ

Ms. Starkey, it would both compel Roncalli and the Archdiocese to modify their expressive messages and would entangle itself in the governance decisions of religious organizations. The government's motivation for doing so, whatever it may be, is not a compelling interest because "[t]he First Amendment protects expression, be it of the popular variety or not." *Dale*, 530 U.S. at 660. "[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the [government's] effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id*. at 661.

II. The Doctrine of Expressive Association Is Distinct from the Ministerial Exception.

A. Expressive association is doctrinally different from the ministerial exception.

The right of expressive association and the ministerial exception share some facial similarities but are distinct in several significant ways. *See Hosanna-Tabor*, 565 U.S. at 189 (rejecting the EEOC's argument that there was "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves" because "religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right 'implicit' in the First Amendment"); *see also id.* at 199 ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" (Alito, J., concurring) (quoting *U.S. Jaycees,* 468 U.S. at 619)). They differ in their origin, scope, and application.

Origin. While *Hosanna-Tabor* marked the first time that the Supreme Court recognized the ministerial exception, its origins predate the twenty-first century. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061 (noting that the First Amendment was adopted to prevent the repetition of 16th-century British statutes that had enabled the Crown to fill religious offices and to control the exercise of religion); *see Watson v. Jones*, 80 U.S. 679, 727 (1871) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."); *see also Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952) (holding that the selection of clergy, "where no improper methods of choice are proven" is "part of free exercise of religion"). Considering this history and plain meaning of the constitutional text, the Court in *Hosanna-Tabor* held that the ministerial exception was necessary to avoid violating both the Free Exercise and Establishment Clauses. 565 U.S. at 184 ("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."). The freedom of expressive association, in contrast, is rooted in the Assembly and Speech Clauses rather than the Free Exercise or Establishment Clauses. The "freedom of expressive association" is a term the Court coined to refer to the specific right to "associate for the purpose of speaking." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 68 (2006).

Scope. The doctrines also differ in their breadth and depth. The protection provided by the ministerial exception applies only to religious organizations and to a far more limited class of persons than does the right of expressive association. Specifically, the ministerial exception only applies to individuals within religious organizations found to be "ministers" by a court of law. Thus, courts have held that the ministerial exception "does not protect churches . . . and religious schools as to *non-ministerial* employees, nor does it protect Christian-owned businesses." *Bear Creek Bible Church*, 2021 WL 5449038, at *5. If the ministerial exception applies, the religious organization may terminate the minister for any reason. *See Hosanna-Tabor*, 565 U.S. at 184. Expressive association, by contrast, applies more broadly, encompassing both religious and secular organizations alike. And it applies to anyone within an organization who "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

Application. The right of expressive association may be "overridden" by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *U.S. Jaycees*, 468 U.S. at 623. Under this framework, the inclusion of an unwanted member into a religious organization might be permitted if no less restrictive means of furthering a compelling government interest exists. The standard under the ministerial exception, however, is absolute and more protective of an organization's rights if the individual meets the definition of a minister. *See Hosanna-Tabor*, 565 U.S. at 184. If the ministerial exception applies, that is the end

of the inquiry—the Court cannot interfere in an organization's choice of ministers without violating the Free Exercise and Establishment Clauses. *Id.* A court may not scrutinize why an organization terminated a minister but must "stay out of" such employment disputes altogether. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

* * *

While both the ministerial exception and the right to expressive association apply here to insulate the Archdiocese and Roncalli from suit, the doctrines are different. The ministerial exception arises under the Free Exercise and Establishment Clauses and provides absolute protection of an organization's employment or termination of ministers only. *See Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."). Whether an individual qualifies as a minister can require factual development. *Id.* at 184.[6] The right of expressive association is rooted in the Assembly and Speech Clauses, applies only

[6] Even so, since *Hosanna-Tabor*, the question of whether the ministerial exception applies has never been sent to a jury. *See Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 973, 985 (7th Cir. 2021) (motion to dismiss); *Sterlinski v. Cath. Bishop of Chicago*, 934 F.3d 568, 570–71 (7th Cir. 2019) (summary judgment); *Grussgott v. Milwaukee Jewish Day Sch., Inc.,* 882 F.3d 655, at 658–61 (7th Cir. 2018) (same); *Schleicher v. Salvation Army*, 518 F.3d 472, 475–77 (7th Cir. 2008) (motion to dismiss); *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1039-43 (7th Cir. 2006) (same); *Alicea-Hernandez v. Cath. Bishop of Chicago*, 320 F.3d 698, 703–04 (7th Cir. 2003) (same); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185–88 (7th Cir. 1994) (same); *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).

when individuals detract from an organization's ability to further its expressive purpose, and may be overridden if the state overcomes the strict scrutiny standard. *Rumsfeld*, 547 U.S. at 68; *Roberts*, 468 U.S. at 623.

B. Expressive association can sometimes be simpler than the ministerial exception for courts to apply.

The expressive association doctrine may be easier to apply in many cases than the ministerial exception because, unlike the latter, it can require little, if any, factual development. In *Hosanna-Tabor*, the Supreme Court's first case involving the ministerial exception, Chief Justice Roberts noted the Court's "reluctan[ce] [ ] to adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. Instead, the Court found that the ministerial exception applied after considering (1) the employee's formal title, (2) the substance reflected in that title, (3) the employee's use of that title, and (4) the religious functions the employee performed. *Id.* at 192.

In 2020, the Supreme Court again examined the scope of the ministerial exception. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049. The Court clarified that, in recognizing the four *Hosanna-Tabor* factors, it "did not mean that they must be met—or even that they are necessarily important—in all other cases." *Id.* at 2063. The Court noted that "attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal." *Id.* at 2064. And "insisting in every case on rigid academic requirements could have a distorting effect." *Id.* Instead, "[w]hat matters, at bottom, is what an employee does." *Id.* Thus, to determine whether the ministerial exception applies,

courts consider whether the employee's role includes "core responsibilities" that equate with those of a minister. *Id.* at 2066.

In contrast, rather than examine whether an employee performs a ministerial function, expressive association's three-part analysis focuses on the organization and its message. The court must determine whether (1) the organization is an expressive association, and (2) the forced inclusion of an individual "impairs" or "burdens" that expression. *Dale*, 530 U.S. at 652, 656. If both elements are met, the third step of the analysis states that the government may only force the organization to include the individual if there is no less restrictive means of furthering a compelling interest. *Id.* at 640–41.

In *Dale*, the Court spent little time determining whether the Boy Scouts qualified as an expressive association. The Court considered the Boy Scouts's mission statement, the Scout Oath, and the Scout Law, and then held that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive association." 530 U.S. at 649–50. This Court in *Walker*, relying on *Dale*, devoted only a paragraph to whether CLS was an expressive association, concluding, "[i]t would be hard to argue—and no one does—that CLS is not an expressive association." 453 F.3d at 862. On the other end of the spectrum, this Court also quickly determined that "the First Amendment does not protect coming together at a local bar to smoke." *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013); *see also Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) ("Political

advocacy groups like COAST are the paradigmatic expressive associations entitled to protection.").

The second step of the analysis is likewise undemanding because "[courts] give deference to an association's assertions regarding the nature of its expression [and] must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 648. Thus, federal courts have had little difficulty determining whether an organization has an expressive purpose and if the inclusion of a certain individual would impair or burden the group's message. The final step of the analysis asks courts to apply the strict scrutiny standard to governmental action—an inquiry which is required in many other contexts.

Here, Ms. Starkey does not dispute any of the expressive association factors—nor could she. There can be little doubt that forcing Roncalli and the Archdiocese to employ her in a senior leadership position would undermine the organizations' expressive purpose because Ms. Starkey's same-sex marriage contradicts their message on marriage and human sexuality. Thus, while amici agree that Ms. Starkey's "core responsibilities" are equivalent to those of a minister, this case shows the relative ease of applying the expressive association doctrine, which provides this Court with an alternative ground to affirm the District Court.

CONCLUSION

While the District Court correctly held that the ministerial exception exempts the Archdiocese and Roncalli from liability for Ms. Starkey's claims, this Court could also affirm that ruling based on the doctrine of expressive association, which permits the Archdiocese and Roncalli not to associate with Ms. Starkey, whose presence

threatens to undermine their expressive purpose. The Court should affirm the District Court, and should consider doing so based on the doctrine of expressive association.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1) and Circuit Rule 32, I certify that this brief complies with the type-volume limitation of 7th Cir. R. 29 because this brief contains 6,007 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and complies with the typeface requirements for Fed. R. App. P. 32(a)(5) and the type-style requirements of 7th Cir. R. 32(b) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 12 points or larger.

Dated: January 18, 2022

s/ *Miles Coleman*
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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed this Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

Dated: January 18, 2022

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