No. 19-2142

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

SANDOR DEMKOVICH,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

BRIEF *AMICI CURIAE* OF AGUDATH ISRAEL OF AMERICA, THE SERBIAN ORTHODOX DIOCESE OF NEW GRACANICA—MIDWESTERN AMERICA, THE ORTHODOX CHURCH IN AMERICA DIOCESE OF THE MIDWEST, THE GREEK ORTHODOX METROPOLIS OF CHICAGO, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

Thomas C. Berg
Religious Liberty Appellate Clinic
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

Kimberlee Wood Colby
Counsel of Record
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 894-1087
kcolby@clsnet.org

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Attorney's Signature: /s/Kimberlee Wood Colby Date: October 13, 2020

Attorney's Printed Name: Kimberlee Wood Colby

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

Address: 8001 Braddock Road, Suite 302

Springfield, VA 22151

Phone Number: 703-919-8556 Fax Number: 703-642-1075

E-Mail Address: kcolby@clsnet.org

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of Midwest; Greek Orthodox Metropolis-Chicago; Russian Orthodox Church Outside Russia; Christian Legal Society

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Attorney's Signature: /s/ Thomas C. Berg Date: October 13, 2020

Attorney's Printed Name: Thomas C. Berg

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

Address: MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015

Phone Number: 651-962-4918 Fax Number:

E-Mail Address: tcberg@stthomas.edu

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Attorney's Signature: /s/ Reed N. Smith   Date: October 13, 2020

Attorney's Printed Name: Reed N. Smith

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

Address: 8001 Braddock Road, Suite 302

Springfield, VA 22151

Phone Number: 703-894-1081   Fax Number: 703-642-1075

E-Mail Address: rsmith@clsnet.org

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Amici joining this brief include a religious body of Orthodox Judaism, Agudath Israel of America, and four bodies of Orthodox Christianity: the Serbian Orthodox Diocese of New Gracanica-Midwestern America, the Orthodox Church in America Diocese of the Midwest, the Greek Orthodox Metropolis of Chicago, and the Synod of Bishops of the Russian Orthodox Church Outside of Russia ("ROCOR"). *Amici* also include the Christian Legal Society, a nonprofit entity that assists religious organizations on religious freedom matters. All *amici* are concerned that the First Amendment's ministerial exception be interpreted broadly to secure churches' autonomy over their internal governance. Detailed descriptions of *amici* appear in the Appendix.

[1] Pursuant to FRAP 29(a)(4)(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person (other than the *amici curiae,* their members, or their counsel) contributed money that was intended to fund preparing or submitting the brief. Pursuant to FRAP 29(a)(2), Petitioners' counsel consented to the filing of this brief, but Respondent's counsel denied consent. A motion for leave to file accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel opinion in this case seriously erred when it allowed the plaintiff to evade the First Amendment's ministerial exception by pleading that another minister's comments created a "hostile work environment." *Amici* agree that this case requires en banc review for the reasons set forth in the rehearing petition. *Amici* file this brief to emphasize the general principles of church autonomy that undergird the ministerial exception, and to show how claims of hostile work environment undercut two such principles: (A) judicial non-intervention in deciding questions of religious law and polity, and (B) churches' right to supervise and control, as well as select, their ministers.

General principles of church autonomy have been particularly important for Orthodox churches; many such principles were articulated in cases involving Orthodox bodies, most notably in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). And prohibitions on judicial second-guessing of organizations' internal affairs are particularly important for groups that are relatively unfamiliar because of their limited size or their distinct ethnic culture—as is the case with several of the Jewish and Orthodox *amici* here.

ARGUMENT

I. The Ministerial Exception Rests on, and Should Be Informed by, General Autonomy Principles Protecting Religious Organizations' Internal Governance and Prohibiting Government Intervention in Religious Questions.

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 of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Government interference in decisions concerning those who "will minister to the faithful" violates both the Free Exercise and Establishment Clauses. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

In interpreting the ministerial exception's scope, it is important to recognize that the exception does not stand in isolation. "The constitutional foundation for [the ministerial exception is] the general principle of church autonomy …: independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2060. The Court in *Hosanna-Tabor* and *Our Lady* relied on "three prior decisions"; all of them "drew on this broad

principle, and none was exclusively concerned with the selection or supervision of clergy." *Our Lady*, 140 S. Ct. at 2061.

Two of the cases on which *Hosanna-Tabor* relied (see 565 U.S. at 186–87) involved *amici* here or other Orthodox Christian churches. In *Milivojevich*, 426 U.S. 696, the Court held that a state court had impermissibly overturned the Serbian Orthodox Church's removal of a bishop and its reorganization of its American/Canadian dioceses. The Court held that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," and that civil courts may not resolve "quintessentially religious controversies whose resolution the First Amendment commits exclusively to [those] tribunals." *Id.* at 724, 720. Both *Hosanna-Tabor* and *Milivojevich* relied on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), which barred a state from interfering with the Russian Orthodox Church's authority over both property and church administration and affirmed the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 106.

This Court, likewise, has emphasized that the ministerial exception is part of a church's broader autonomy over its "internal affairs." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006).

The panel majority here cited *Milivojevich* only once, in a paragraph of string cites. Op. 31. Unsurprisingly then, the panel applied the ministerial exception in a way incompatible with the broader religious autonomy principles undergirding it. Two such principles are especially relevant here: that (a) autonomy precludes courts from inquiring into or resolving disputed questions of religious law or polity; and (b) the ministerial exception protects churches' right not just to select, but to supervise and control, ministers.

A. Church Autonomy Precludes Courts from Inquiring Into or Resolving Disputed Questions of Religious Law or Polity.

A key principle of church autonomy is that civil litigation cannot be "made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). That bar also applies to courts' inquiries and determinations concerning religious polity.

Milivojevich overturned the state court's ruling for probing too deeply "into the allocation of power within a [hierarchical] church." 426 U.S. at 709 (brackets in original; quotation omitted). The Court held that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity," civil courts may not overturn the decision of the highest authority "within a church of hierarchical polity." *Id.*

The same principle forbids courts from determining what is "reasonable care" when a church or its employees act concerning religiously sensitive matters. On this ground, for example, courts have refused to impose duties of care for pastoral counselors—even in the fraught situation where a counselee may be suicidal. *Nally v. Grace Cmty. Church*, 763 P.2d, 948, 960 (Calif. 1988) ("'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations'") (quotation omitted); *Baumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319, 1323 (Ill. App. Ct. 1986) ("[T]he first amendment bars the judiciary from considering whether certain religious conduct conforms to the standard of a particular religious group.").

Amici are particularly concerned to preserve the bar against judicial second-guessing of religious polity. "If civil courts undertake to resolve such controversies …, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church*, 393 U.S. at 449. *Amici* have experienced, in cases like *Milivojevich*, the hazards of civil courts failing to appreciate the allocation of authority within a religious organization. As Part II discusses, these hazards are particularly present when a minister alleges that comments made to him by a supervising minister created a hostile work environment.

B. The Ministerial Exception Protects the Supervision and Control of Ministers, Not Merely Their Selection.

The Supreme Court in *Our Lady* and *Hosanna-Tabor* applied the ministerial exception to lawsuits challenging the removal of ministers. But the broader principles of church autonomy above show why the ministerial exception protects an organization's right not just to "select" (hire and fire) ministers, but also to supervise and control them. *Our Lady*, 140 S. Ct. at 2060–61 ("[A] church's independence on matters 'of faith and doctrine' requires the authority to select, *supervise*, and *if*

necessary, remove a minister without interference by secular authorities.") (emphasis added); *Hosanna-Tabor*, 565 U.S. at 194–95 ("The exception … ensures that the authority to select and *control* who will minister to the faithful … is the church's alone.") (emphasis added); *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972). Likewise, this Court has held that minimum-wage claims fall within the ministerial exception, even though those involve the right to control ministers, not the right "to decide who will perform" that role. *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

II. Under the Above Principles, Claims for Hostile Work Environment Are Barred by the Ministerial Exception.

Under the above principles, the ministerial exception should bar claims by ministers not only when they allege a tangible employment action, but also when they allege a hostile work environment. The latter inevitably embroil courts in impermissibly second-guessing religious organizations and determining religious questions at every stage of adjudication.

A. Evaluating a Minister's Hostile-Work-Environment Claim Will Require Courts to Inquire Into and Resolve Questions of Church Polity and Doctrine.

Courts cannot adjudicate hostile work environment claims by ministers "without engaging in a searching and therefore impermissible inquiry into church polity." *Milivojevich*, 426 U.S. at 723. Those inquiries begin with plaintiff's prima-facie case, where courts must determine whether the alleged discriminatory conduct is "severe or pervasive enough to create … an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23). Circumstances also include whether the conduct "unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Whether the alleged conduct is "severe" or "unreasonably interferes with … work performance" depends upon "the social context in which [the conduct] occurs and is experienced by [the plaintiff]." *Oncale*, 523 U.S. at 81.

The first impermissible inquiry in a minister's lawsuit is that judging from the perspective of a "reasonable plaintiff," *Oncale*, 523

U.S. at 81, means judging from the perspective of a "reasonable minister." Determining what is a reasonable minister's perspective is impermissible, see *supra* p. 6; like the duty of reasonable care rejected in cases such as *Nally*, the standard "would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity." 763 P.2d at 960.

Moreover, because courts must view the circumstances of a hostile work environment in the social context where the conduct occurs, *Oncale*, 523 U.S. at 81, a minister's claim must be viewed in the context of the relevant church and its tenets. The objective "severity" of harassment necessarily depends upon church context. Some negative comments about an organizational leader's same-sex conduct might be expected when he leads a Catholic church as opposed to a Walmart store. But judging whether and how that difference affects the comments' "severity" requires inquiries into church doctrine and context that a civil court cannot make.

Impermissible inquiries also arise in determining whether the alleged conduct "unreasonably interferes with [the minister's] work performance." Determining what interference is "unreasonable"

requires courts, again, to discern a “reasonableness” standard with respect to ministers. And determining the effects on “work performance” requires courts to assess what the minister’s proper performance should be. This too is impermissibly entangling, as this Court held in *Tomic*, a discrimination suit by a music director. If the suit went forward, the Court said, “the diocese would argue that [plaintiff] was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services”—the plaintiff would question this as a pretext, “and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services.” *Tomic*, 442 F.3d at 1040. So too with a court evaluating a minister’s performance to determine whether it was unreasonably affected.

Impermissible inquiries also arise under a church’s affirmative defense to a hostile work environment claim. An employer can defeat liability by showing that (1) it “exercised reasonable care to prevent and correct promptly any … harassing behavior,” and (2) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Under the defense, the court must determine what is a "reasonable" church response to alleged discriminatory comments made by one minister to another. That may require judging both the capacity of higher church authorities to intervene and the adequacy of the church's "preventive or corrective opportunities." *Id.* Again, these factors require "searching and therefore impermissible inquiry into church polity." *Milivojevich*, 426 U.S. at 723.

It is no answer to say, as the panel did, that district courts should wait for these inevitable religious questions to arise before dismissing the suit. This approach would still create "procedural entanglement"; the burdens of litigation could induce churches to employ ministers who pose less risk "rather than those that best 'further its religious objectives.'" *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (quotation omitted); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (Religion Clause rights may be "impinge[d]" on "not only [by] the conclusions" government decisionmakers reach, "but also [by] the very process of inquiry leading to findings and conclusions").

B. The Hostile-Work-Environment Claim Here is Barred by the Ministerial Exception Because the Alleged Statements Were Attempts to Supervise a Minister.

The ministerial exception protects a church's right not just to select its ministers, but to supervise and control them. *Supra* Part I-B. Comments relating to a minister's fitness for ministry fall within the right of supervision and control. Here, Reverend Dada's comments to plaintiff, even as alleged in the complaint, were attempts to guide and supervise him. As the panel recognized, "[t]he parties treat Reverend Dada's alleged harassment of Demkovich as motivated by his and the Church's religious beliefs, if not actually required by those beliefs." Op. 9. And when the supervising minister commenting on another minister sincerely intends the comments as supervision or guidance concerning the church's beliefs, the court cannot reject that characterization based on its independent judgment. "[I]t is precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*." *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019).

Liability for such guidance would interfere with important aspects of church governance. For example, the Statute of the Orthodox Church

in America provides that the parish priest "serves as the spiritual father and teacher of that portion of the flock of Christ entrusted to him, the first among the Parish Clergy." Article XII, Section 3(a), https://www.oca.org/statute/article-xii.

The panel concluded that churches have sufficient power to supervise and control ministers by taking tangible employment actions against them. Op. *16 n.4, 20–21. But this approach still restricts how the church "'manage[s] and discipline[s]'" its ministers, *Skrzypczak*, 611 F.3d at 1245 (quotation omitted), and how it addresses a conflict between ministers growing out of the lead minister's supervision. And the approach "creates a perverse incentive," as Judge Flaum's dissent observed. Op. 38–39. Under the panel's rule, a church can take discriminatory action against a minister, but comments intended to guide the minister risk creating liability. The rule pushes churches to take the harsher step of tangible action without giving the minister comments of guidance first.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

Thomas C. Berg
University of St. Thomas School of Law
(Minnesota)
Religious Liberty Appellate Clinic
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

Kimberlee Wood Colby
Counsel of Record
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org

Counsel for Amici Curiae

October 13, 2020

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

1. This brief complies with the length limitation found at XXIV (E), *Practitioner's Handbook for Appeals* 181, ed. 2020, and Fed. R. App. P. 29(b)(4) because it contains 2597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Counsel of Record for
Amici Curiae

Dated: October 13, 2020

CERTIFICATE OF SERVICE

I certify that on October 13, 2020, the foregoing brief and attached appendix were attached to a Motion for Leave to File Brief *Amici Curiae* and were served on counsel for all parties by means of the Court's ECF system.

s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Counsel of Record for
Amici Curiae

Dated: October 13, 2020

APPENDIX
DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

The Serbian Orthodox Diocese of New Gracanica-Midwestern America is an integral part of the Serbian Orthodox Church, which is one of the fourteen autocephalous/self-governing, hierarchical/episcopal churches which comprise the Orthodox Christian Church, commonly referred to as the Eastern Orthodox Church. The Ruling Bishop of the Serbian Orthodox Diocese of New Gracanica-Midwestern America is the Right Reverend Bishop Longin Krco. His See is at New Gracanica Monastery in Third Lake, Illinois and he has

territorial jurisdiction over all Serbian Orthodox monasteries, parishes, church-school congregations, etc. in the States of Illinois, Indiana, Wisconsin, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Oklahoma, Arkansas, Louisiana, Texas, Alabama, Mississippi, Kentucky and Tennessee. This diocese comprises over 45 parishes, five monasteries and sketes, a School of Theology in Libertyville, Illinois, and other institutions which administer the Holy Mysteries/Sacraments, educate, and minister to the more than 250,000 persons of Serbian descent who live in these States and to the Orthodox Christians who have chosen to accept the omophorion/jurisdiction of the Serbian Orthodox Patriarchate.

The Orthodox Church in America Diocese of the Midwest is a diocese of the Orthodox Church in America--a hierarchical and "autocephalous" (self-governing) church arising from the Orthodox tradition. It encompasses eleven states in the Midwestern United States, including Illinois, Indiana, and Wisconsin.

The Greek Orthodox Metropolis of Chicago is one of eight Metropolises and the Archdiocesan District that comprise the Greek Orthodox Archdiocese of America, a hierarchical church within the

jurisdiction of the Ecumenical Patriarchate of Constantinople. The Greek Orthodox Church is a Christian Church, established from the time of the Apostles of Christ.

His Eminence Metropolitan Nathanael is the governing hierarch of the Metropolis of Chicago, a diocesan region encompassing Illinois, Northwest Indiana, Iowa, Minnesota, Northwestern Missouri, and Wisconsin. The Metropolis of Chicago is home to 58 parishes, two monasteries, and other institutions, offering the rites of the Holy Orthodox Church, education, and numerous religious and philanthropic ministries to Orthodox Christians and communities in those states.

The Synod of Bishops of the Russian Orthodox Church Outside of Russia is the executive body of the Russian Orthodox Church Outside of Russia, which was established by bishops, clergymen and laity who fled the Bolshevik Revolution and Civil War in 1920. It assembled its administration in Yugoslavia in the form of the Synod of Bishops of ROCOR, its executive body, which after World War II moved to New York City. The Synod of Bishops incorporated in the State of New York in 1952, and is a non-profit 501(c)(3) religious organization with its headquarters in New York City. The Synod of Bishops oversees

over 500 parishes, monasteries, missions and communities worldwide, including over 225 in the United States.

The Synod of Bishops of the Russian Orthodox Church Outside of Russia has for decades defended itself, its dioceses, parishes, monasteries and communities in the United States against individuals and groups seeking to induce civil courts to interfere in Canonical Church life. With full respect for Constitutional law, ROCOR consequently insists on the concepts of the right to free assembly and the separation of Church and State as we strive to live by the two-millennium-old tenets of traditional Christianity. We likewise strongly support other religious organizations in preserving and defending their own legal rights.

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1963. CLS operates the Center for Law and Religious Freedom ("the Center"), the nation's oldest organization committed exclusively to the protection of religious freedom. For four decades, CLS has sought to protect all citizens' free exercise and free speech rights in the federal and state courts and legislatures. CLS was instrumental in passage of landmark

federal legislation to protect persons of all faiths, including: 1) the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* which protects the religious freedom of persons of all faiths; and 2) the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.,* which protects religious freedom for congregations and institutionalized persons of all faiths. Through the Center, CLS has served as *amicus* or counsel to *amici* in numerous cases, including both Supreme Court decisions affirming and delineating the ministerial exception, *Hosanna-Tabor*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). CLS has filed *amicus* briefs in key cases defending the autonomy of religious organizations in making employment decisions. See, e.g., Brief for *Amici Curiae* Christian Legal Society, et al., *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No. 19-267), 2020 WL 703882; Brief for *Amici Curiae* Professor Eugene Volokh, Christian Legal Society, et al., *Hosanna-Tabor Evangelical Lutheran Church & School*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2470847; Brief for *Amici Curiae* Christian Legal Society, et al., *The Corporation of*

the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 483 U.S. 327 (1987) (No. 86-179 & 86-401), 1987 WL 864773.