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, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-11576.
The Honorable **Edmond E. Chang**, Judge Presiding.

ANSWER TO PETITION FOR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2142

Short Caption: SANDOR DEMKOVICH V. ST. ANDREW THE APOSTLE PARISH, ET AL.

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Attorney's Signature: s/ Kristina B. Alkass Date: 8/26/2019

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Attorney's Printed Name: Thomas D. Fox

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

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Sandor Demkovich

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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

Attorney's Signature: /s/ David L. Franklin Date: November 18, 2020

Attorney's Printed Name: David L. Franklin

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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INTRODUCTION

The panel held that where no tangible employment action is challenged, the ministerial exception does not *categorically* bar hostile-environment claims brought by ministers. This modest holding will allow courts to develop the ministerial exception appropriately in the context of concrete facts, and to account in the future for evolving rules governing religious liberty defenses. Defendants nevertheless seek immediate *en banc* review, asking this Court to bar all such claims from here on out, regardless how horrific the workplace abuse in some future case might be.

This Court should decline this request for three reasons. First, it would be premature to cut off all further development in this changing area of the law, where the Supreme Court has expressed a clear preference for incremental, common-law adjudication—and where further proceedings await on remand in this very case.

Second, Defendants' claims of conflict are vastly overstated. The panel opinion does not contradict *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003). Nor does it create any circuit split; indeed, it is the first federal circuit opinion to apply the Supreme Court's recent teachings involving the underpinnings of the ministerial exception to this distinct situation.

Third, the panel's holding is entirely consistent with the Supreme Court's ministerial-exception jurisprudence. The sweeping, bright-line immunity Defendants seek is not necessary to protect religious organizations' First Amendment right to select and control their ministers.

ARGUMENT

I. The certified question that the panel addressed is unsuitable for rehearing *en banc*.

Cases positioned at the intersection between employers' religious freedom and employees' anti-discrimination protections are often fraught. But *en banc* rehearing, even for cases in controversial areas, "is not favored." FRAP 35(a). Rather, "such proceedings are reserved for the truly exceptional cases." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (*per curiam*). This one does not qualify.

1. To start, the panel addressed only the "abstract" question certified at this stage of litigation by the district court: whether "the ministerial exception ban[s] *all* claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action[.]" Op. 5 (emphasis added). Because there has not yet been factual development in the District Court, the panel did not decide whether Mr. Demkovich's claims would be barred after "further inquiry or discovery" as this case proceeds. Op. 8-9, 32. In other words, the "question as framed" on appeal was only "whether ministerial employee plaintiffs may *ever* bring hostile environment claims against religious employers"—that is, "whether [the court] can imagine *any set of facts* under which ministerial employees could bring hostile environment claims without running afoul of the Constitution." Op. 9.

The panel's modest answer to that certified question does not warrant *en banc* rehearing. Because "[t]he federal courts have little experience with" these claims, the panel ruled it is inappropriate at this juncture to "clos[e] the courthouse doors to an

entire category of cases." Op. 30, 35. But while declining to bar *all* hostile-environment claims brought by ministerial employees, the panel recognized some—perhaps many—claims of this sort may "pose insoluble problems of entanglement" once concrete facts and arguments are introduced. Op. 9, 32, 34-35. The panel thus expressly reserved the possibility of a different outcome once federal courts gain more "experience with [hostile environment] cases against religious employers." Op. 27.

En banc review is always questionable where, as here, the panel decision will allow a nascent body of law to develop in ordinary common-law fashion, while reversal would permanently close the courthouse doors to an entire class of claimants. *See Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1416 (7th Cir. 1994) (Ripple, J., dissenting) ("[F]ew would maintain that 'legitimate jurisprudential goals'" sufficient to justify the court's decision "to devote its time to hearing a case *en banc*" "include forsaking the normal course of common law adjudication."); *cf. Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 917 F.3d 532, 538 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*) (*en banc* review warranted when "there will be no more litigation in this circuit, no opportunity for the full court to consider other lines of argument … down the road"). All the more so where further proceedings (and a possible second appeal) remain in the very case at issue. *See Rowe v. Gibson,* 2015 WL 10767326, at *1 (7th Cir. Dec. 7, 2015) (order respecting denial of rehearing *en banc*) ("[N]othing in this case warrants rehearing or rehearing en banc" where "[t]he panel did not order the entry

of judgment in favor of plaintiff, but rather vacated the district court's judgment" and remanded for further factual development).

Such an *en banc* request is especially ill-advised at the delicate intersection of religion and antidiscrimination protections. As the panel recognized, "[t]he problem here is particularly sensitive, involving tension between freedom of religion and employees' rights to be free from invidious discrimination, also a compelling governmental interest." Op. 2. The Supreme Court has emphasized the value of incrementalism in this area, consistently refusing to stray beyond the facts of each particular ministerial-exception case it confronted. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012) ("Today we hold only that the ministerial exception bars" "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her"; "[w]e express no view on whether the exception bars other types of suits."); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) ("Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us."). Indeed, the Supreme Court has *never* applied the ministerial exception absent a summary-judgment record, let alone in the context of an abstract question stripped of case-specific allegations.

Perhaps *en banc* review might be advisable in the future, after development of a factual record that allows for concrete analysis of a minister's hostile-environment claim and any risks of entanglement. But eliminating the possibility that *any* ministerial employee can *ever* bring a hostile-environment claim, before such suits can unfold consistent with our system of case-by-case constitutional adjudication,

would be premature. As the Supreme Court noted with respect to the question of *whom* the ministerial exception covers, "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Hosanna-Tabor*, 565 U.S. at 196.

2. *En banc* intervention is all the more unwarranted in light of several current uncertainties as the Supreme Court maps the relevant doctrinal landscape. For one thing, the question of *who* qualifies as a ministerial employee is largely unsettled. That critical threshold issue should be addressed before deciding once and for all whether the ministerial exception bars an entire category of *claims*. Notably, the Archdiocese's counsel has urged the Supreme Court to expand the ministerial exception to include not just clergy and teachers who teach religion, but many other lay employees who could have never anticipated a ministerial designation—including nurses, counselors, and communications staffers. *See* Tr. of Oral Arg. at 20-21, *Morrissey-Berru*, 140 S. Ct. 2049. Employers in other cases have made similar arguments. *See, e.g.*, *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277-78 (9th Cir. 1982) (editorial secretary); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (administrative staff); *Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (facilities manager). Indeed, religious employers are actively encouraged to frame job descriptions so that "most if not all of your organization employees"—including "counselor[s], manager[s], and receptionist[s]"—are considered ministers. *See, e.g.*, First Liberty, Religious Liberty Protection Kit for Ministries (2016), at 32-34, https://perma.cc/JB5B-ZSPN.

If these arguments ultimately prevail, the Archdiocese's categorical argument will take on a new cast. A rule that *all* such employees, from teenage camp counselors to receptionists, are precluded from asserting *all* hostile-environment claims in *all* circumstances would strip vast numbers of workers of recourse for potentially horrific conduct—including, as the panel pointed out, racial slurs, racist jokes and pornography, mimed sex acts, and other race- and sex-based abuse. Op. 23-26 (collecting cases). It makes little sense for the *en banc* court to resolve definitively whether the ministerial exception precludes all hostile-environment claims before even tentatively addressing just which people, in which roles, would be affected by that rule.

But the landscape is in flux not only with respect to who counts as a minister. The vitality and scope of a key precedent—*Employment Division v. Smith*, 494 U.S. 872 (1990)—is currently pending before the Supreme Court. In their *en banc* petition, Defendants argue the ministerial exception must apply here to protect religiously motivated workplace conduct, and that the panel improperly imported *Smith* into the ministerial-exception context. Pet. 1-2, 16-18. But the Archdiocese's counsel is at the Supreme Court this Term arguing, in *Fulton v. City of Philadelphia*, No. 19-123, that the Court should overrule *Smith* and subject neutral, generally applicable laws to a muscular form of strict scrutiny if they burden religiously motivated conduct. *See* No. 19-123, Pet. Br. 37-51. If the Supreme Court accepts that argument, the ministerial exception may not be necessary to vindicate the Archdiocese's interest here. Even if the Court resolves *Fulton* on other grounds, several Justices have

indicated they will continue actively looking for cases to revisit *Smith*. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636-37 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari).

It makes little sense for the *en banc* court to review the panel's interpretation of the ministerial exception in light of *Smith* when the Supreme Court may potentially overrule *Smith* entirely—or at least substantially modify its application. *See Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing *en banc*) (question presented was "substantial and potentially important" but rehearing unwarranted because of "antecedent issue as to whether [*Auer v. Robbins*, 519 U.S. 452 (1997)] is sound"; it would not "be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world").

3. Even setting all that aside, Defendants' concessions make this case a particularly poor vehicle for reconsideration. Defendants conceded that tort and contract claims, as well as criminal actions, are not barred by the ministerial exception. *See* Op. 2 ("[D]efendants acknowledge that the First Amendment does not bar those same ministerial employees from bringing contract and tort claims against their employers," nor does it bar "enforcement of criminal laws arising from mistreatment of those same employees."); Op. 10 (same); Appellant Br. 24.[1] Plaintiff

[1] Even in its petition for rehearing, the Archdiocese still does not attempt to identify *any* tenable distinction between hostile-environment claims and these other concededly viable claims.

believes those concessions were correct—but correct or not, they are likely dispositive here. Indeed, the panel's decision rested in no small part on the Archdiocese's concessions, emphasizing that hostile-environment claims cannot meaningfully be distinguished from these other, admittedly viable, claims. *See* Op. 18 ("Hostile environment claims are essentially tortious in nature."); Op. 19 ("The lack of constitutional necessity for barring ministerial employees' hostile environment claims becomes clear from the tort-law origins of the claims."); Op. 25 ("If criminal or tort cases do not [violate the First Amendment], then it is hard to see why a statutory case based on the same conduct would *necessarily* violate the First Amendment.").

Thus, even if the *en banc* court were interested in reconsidering the certified question, it should do so in a case unaffected by potentially outcome-determinative concessions. *See Planned Parenthood*, 917 F.3d at 534-36 (Wood, C.J., and Rovner and Hamilton, JJ., concurring in denial of rehearing *en banc*) ("Important as these issues are," where the "parties' concession" was "capable of dictating the outcome," "[i]t would be a waste of this court's resources to accept a case for *en banc* review"; "[i]t would not quite be a hypothetical case, but it would be too close for comfort.").

II. The panel decision does not create any conflict of authority.

A. The panel decision does not conflict with *Alicea-Hernandez*.

Defendants argue the panel decision "effectively overrules" *Alicea-Hernandez*. Pet. 6. Not so. The "only question" presented in *Alicea-Hernandez* was whether the plaintiff, who had been employed as the Hispanic Communications Manager for the Catholic Bishop of Chicago, held a ministerial position. 320 F.3d at 702-04. The Court concluded that she did, and went on to hold it was immaterial whether the

alleged discrimination arose out of Church doctrine or secular animus—the ministerial exception "is robust where it applies" and "precludes any inquiry whatsoever into the reasons behind" a protected employment decision. *Id.* at 703 (internal quotation marks omitted).

The question presented here—how to treat hostile-environment claims brought by a ministerial employee—simply never arose in *Alicea-Hernandez*. Alicea-Hernandez brought claims under Title VII for gender and national-origin discrimination and retaliation. *Id.* at 700. Here is the entirety of this Court's characterization of her claims:

> She bases these claims on allegations of poor office conditions, the Church's attempts to prevent her from rectifying those conditions, exclusion from management meetings and communications, denial of resources necessary for her to perform her job, and constructive discharge and subsequent replacement by a less qualified male who received a higher salary and a more significant title for the same position.

Id. As the panel here noted, Alicea-Hernandez's complaint did not identify her claims as seeking relief for a hostile work environment, and this Court's *Alicea-Hernandez* opinion never mentioned any such claim. Op. 11. On the contrary, as the above-quoted passage demonstrates, the Court treated her complaint as seeking relief for tangible employment decisions such as "denial of training and resources, exclusion from meetings, and discharge." *Id.*

Defendants' effort to itemize the appearances of the term "hostile environment" in Alicea-Hernandez's pleadings, Pet. 9, is beside the point. Viewed in context, those references were part and parcel of her claims of tangible disadvantage, not "an otherwise viable theory of hostile environment liability." Op. at 12 n.3. In any event,

it is this Court's reasoning and holdings, not the parties' arguments, that establish precedent within this circuit. And this Court treated Alicea-Hernandez's claims as challenging tangible employment actions, not a hostile work environment.

Against that backdrop, it is clear that when *Alicea-Hernandez* stated that "[t]he 'ministerial exception' applies without regard to the type of claims being brought," 320 F.3d at 703, it was answering only the question before it: whether the defense is available even when the plaintiff alleges that a tangible employment action was taken for non-religious reasons. That is why, two sentences earlier, the Court rejected Alicea-Hernandez's suggestion "that we also need to look to the nature of her claims and *whether the discrimination in question was exclusively secular*." *Id.* (emphasis added). And it is why, immediately after the passage in question, the Court explained that the ministerial exception does not require "endless inquiries as to whether each discriminatory act was *based in Church doctrine* or simply secular animus," or "whether the Church had *a secular or religious reason* for the alleged mistreatment." *Id.* (emphases added).

Alicea-Hernandez never answered whether the ministerial exception precludes a hostile-environment claim, because the Court was never asked to address that question. Thus, the panel majority correctly treated the question presented here—whether such claims are barred as a matter of law—as one of first impression.

B. The panel decision does not conflict with any decision from any other court of appeals.

Defendants' claim that the panel opinion conflicts with decisions from other circuits, Pet. 6, is likewise incorrect.

Defendants principally argue that the panel's holding conflicts with the Tenth Circuit's holding in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), that hostile-environment claims brought by ministerial employees may never proceed. Pet. 11. But *Skrzypczak* predates *Hosanna-Tabor*. In that case, the Supreme Court explained that the ministerial exception is designed to prevent "interfer[ence] with the internal governance of the church, depriving the church of *control* over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188 (emphasis added); *see also Morrissey-Berru*, 140 S. Ct. at 2060 (ministerial exception is "based on th[e] insight" that religious institutions require autonomy in "the *selection* of the individuals who play certain key roles") (emphasis added). Based on that reasoning, the panel here determined that subjecting ministerial employees to abusive or harassing behavior is not a "constitutionally protected means of 'control' within the meaning of *Hosanna-Tabor*." Op. 20-21. Such behavior, the panel continued, does not involve selecting or controlling an employee at all; instead, it "inhibits [the] job performance" of an existing employee. Op. 21.

The Tenth Circuit has had no opportunity to consider *Hosanna-Tabor*'s conception of "control" as it relates to the question presented here. If and when it does, it may agree with the panel's holding here. Certainly, the Tenth Circuit would have to acknowledge that it spoke too broadly in *Skrzypczak* when it opined that the ministerial exception gives religious employers an all-encompassing right not just to

"select" but also to "manage, . . . discipline," and "direct its ministers free from state interference." *Skrzypczak*, 611 F.3d at 1245-46 (citation omitted).[2]

Defendants' claim of a split with the Fifth and Eleventh Circuits is entirely unpersuasive: neither circuit has ever addressed the issue presented here, let alone reached a different conclusion. In *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), a minister brought claims for sex and pregnancy discrimination under Title VII, alleging that she had been deprived of maternity benefits and equal salary before being terminated. *Id.* at 344-45. Anticipating *Hosanna-Tabor*, the Fifth Circuit held that the Supreme Court's decision in *Smith* did not vitiate the ministerial exception, which the Fifth Circuit had recognized since *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). *See* 173 F.3d at 345-50. The *Combs* plaintiff did not raise a hostile-environment claim, and the Fifth Circuit did not address the viability of any such claim, holding only that the church has "*the right to select its ministers* free from Title VII's restrictions." *Id.* at 351 (emphasis added).

[2] As the panel noted, the Tenth Circuit's holding also rested on the same misreading of *Alicea-Hernandez* that Defendants urge here. *See* Op. 17 n.5. The panel's correction of that misconception could also cause the Tenth Circuit to rethink its prior position. Moreover, even if *Skrzypczak* could still be considered good law, the Ninth Circuit took the opposite position two decades ago, in *Bollard v. California Province of Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). Rehearing is unwarranted when the panel decision merely joins one side in an existing split that *en banc* proceedings would not resolve. FRAP 35, Advisory Committee Notes (1998 Amendments); *Chavira-Cervantes v. Holder*, 435 F. App'x 527, 530 (7th Cir. 2011) (Hamilton, J., concurring) (this Court is "rarely inclined" to rehear cases *en banc* for the purpose of switching sides in a circuit split).

Similarly, in *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000), an ordained minister alleged that the church had retaliated and constructively discharged him for helping a colleague file a complaint against church elders. *Id.* at 1301. As in *Combs*, the issue was whether the ministerial exception announced in *McClure* survived *Smith*. *Id.* at 1301-04. Once again, the court did not address or resolve the validity of hostile-environment claims because the plaintiff had raised no such claim.

C. The panel decision does not depart from other circuits in referencing neutral principles of law.

Defendants next try to manufacture a conflict of authority over whether the so-called "neutral principles doctrine" can be applied to employment-discrimination cases. Pet. 14-16. No such conflict exists. The panel's common-sense observation that courts addressing hostile-environment claims in the ministerial context should "stick to applying neutral, secular principles of law," Op. 30, was not some improper use of a doctrine developed exclusively for church-property disputes. Rather, the panel was appropriately reminding courts to avoid substantive entanglement whenever they confront cases that could potentially touch on religious belief.

Rather than welcome the panel's warning to "avoid issues of faith," Op. 30, Defendants attempt to manufacture a false conflict with the Sixth and D.C. Circuits. Pet. 15-16. But both cited cases involved tangible employment actions plainly barred by the ministerial exception as framed by *Hosanna-Tabor*; neither featured a hostile-environment claim. In *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), the court considered whether it could adjudicate a minister's claim that his forced retirement

under church disciplinary rules was the result of fraud or collusion. *Id.* at 392-93. Observing that the claim "relates to appellant's status and employment as a minister of the church," *id.* at 396, the Sixth Circuit affirmed the dismissal below. And the question in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), was whether a nun denied tenure in the Department of Canon Law at Catholic University could maintain a Title VII action for sex discrimination and retaliation. Applying the ministerial exception, the D.C. Circuit affirmed the dismissal of the plaintiff's claims, holding that evaluating the tenure denial would require a court "to choose between . . . competing religious visions." *Id.* at 466 (internal quotation marks omitted). These cases hold that even "neutral principles" cannot be applied to disputes involving tangible employment actions for the simple reason that courts may not adjudicate such disputes at all. But that says nothing about how disputes that do *not* involve any tangible employment actions should be addressed.[3]

Finally, Defendants note that *Hosanna-Tabor* and *Morrissey-Berru* make "no mention of [the] neutral principles doctrine." Pet. 14-15. Again, that stands to reason. In both cases, the Supreme Court held that courts were barred altogether from adjudicating disputes involving the termination of ministers, so the standards governing such adjudication were irrelevant. The panel's admonition to courts to

[3] Defendants' state court citations are inapposite; neither case involved a hostile-environment claim. *See Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007) (parishioner cannot sue pastor for professional negligence in marital counseling); *El-Farra v. Sayyed*, 226 S.W.3d 792 (Ark. 2006) (terminated imam cannot sue Islamic Center for breach of contract).

avoid straying into questions of religious doctrine is relevant only for claims that are *not* categorically barred—here, hostile-environment claims.

III. The panel decision comports with Supreme Court precedent.

Defendants' assertion that the panel opinion "directly conflicts" with *Hosanna-Tabor* and *Morrissey-Berru*, Pet. 16, is even further afield. Both cases involved tangible employment actions—teachers terminated by religious schools—and the Supreme Court carefully limited its holdings to cases involving a church's authority over selection of its ministers. *See Hosanna-Tabor*, 565 U.S. at 196; *Morrissey-Berru*, 140 S. Ct. at 2069. Neither case discusses, or even mentions, hostile-environment claims.

Indeed, the Court explicitly declined to expand the ministerial exception further, "express[ing] no view on whether the exception bars other types of suits" because there would be "time enough" to address other circumstances as they arose. *Hosanna-Tabor*, 565 U.S. at 196. It is Defendants' position—which disregards the Court's admonition to tread cautiously in developing the ministerial exception—that runs counter to the Supreme Court's teachings.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' petition for rehearing *en banc*.

Dated: November 19, 2020

Respectfully submitted,

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Dated: November 19, 2020

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