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

PROPOSED BRIEF OF AMICUS CURIAE LAMBDA LEGAL IN SUPPORT OF THE EN BANC COURT'S ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE

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Lambda Legal Defense & Education Fund, Inc.

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i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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Attorney's Signature: Gregory R Nevins Date: January 5, 2021

Attorney's Printed Name: Gregory R Nevins

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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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A (no stock)

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

N/A

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

N/A

Attorney's Signature: _____ Date: January 5, 2021

Attorney's Printed Name: Diana Flynn

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

As explained in more detail in the accompanying motion for leave of court, and in the attached appendix detailing the individual interests, proposed amici curiae are organizations dedicated to fighting for the civil rights and reproductive freedom of communities with a strong interest in the vigorous enforcement of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Amici urge this Court not to give an unnecessary and legally unsupported affirmative answer to the certified question in this case.[1]

As relevant here, Sandor Demkovich brought suit based on an allegedly hostile work environment he endured while working at St. Andrew the Apostle Parish. Defendants allegedly violated Title VII and the ADA based largely on epithets and slurs Reverend Dada directed at Demkovich regarding his being gay, getting married to a man, and being overweight as a result of his diabetes. Demkovich alleges that Dada referred to his "fag wedding" and to him and his fiancé as "bitches." Dada repeatedly suggested that Demkovich walk Dada's dog to lose weight. Demkovich also alleges various slurs and epithets against women, Mexican-Americans and African-Americans by Dada and by coworkers in Dada's presence. The District Court ruled that not all hostile work environment claims are

[1] No party's counsel authored the brief in whole or in part, nor did any party or a party's counsel contribute money that was intended to fund preparing or submitting the brief.

precluded by the ministerial exception, and dismissed the Title VII sex/sexual orientation claims and permitted the ADA disability claims to proceed.

The District Court posed this certified question: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as minister, even if the claim does not challenge a tangible employment action?" Its answer is plainly "no."

I. THE ANSWER TO THE CERTIFIED QUESTION IS "NO."

A panel of this Court barred a minister's suit over the "poor office conditions . . . exclusion from management meetings and communications, [and] denial of resources" in *Alicea–Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003). While this en banc Court could overrule *Alicea–Hernandez*, amicus submits that the Court can simply answer the certified question in the negative by focusing on the distinctions between the claims precluded there and the sweeping universe of abusive conduct that would be allowed if the question were answered in the affirmative.

Three very important facets of *Alicea-Hernandez* compel the conclusion that it would be wrong to preclude all hostile work environment claims by ministerial employees: (1) the actions there were conscious decisions by the church regarding the type of work environment; (2) the harassment did not plausibly rise to the level

of being tortious or criminal; and (3) the harassment did not consist of epithets, slurs, and intentionally demeaning taunts.

First, unlike *Alicea-Hernandez*, a very large percentage of hostile work environment claims involve conduct by coworkers, students, customers, and other third parties that can in no way be deemed an "act of decision" by an employer. See *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994).[2] The conscious choices of religious employers regarding their ministers is legally different than whether hostile work environments created by coworkers and third parties should be permitted without some legal consequence.[3] "[T]he free exercise clause of the First Amendment protects the **act of a decision**" regarding the minister's employment. *Id*. (emphasis added); *see also id.* (emphasizing its agreement with the "'act of decision' language" from *Scharon v. St. Lukes Episcopal Presbyterian Hosp*., 929 F.2d 360, 363 (8th Cir.1991). Similarly, Ms. Alicea-Hernandez challenged decisions by the Church itself regarding how she should do her job. But the certified question is not so limited and must therefore be answered in the negative.

---

[2] The *Young* court stressed that the case was about the "decisions" of religious entities with over twenty references in a five-page opinion. 21 F.3d at 184-88.

[3] This Court should be gravely concerned about Defendants' demand that all church "oversight" be immunized, because answering the certified question in the affirmative would mean immunizing both definitions of the word: active supervision **and** an unintentional failure to notice or do something.

Second, the *Alicea-Hernandez* court never considered the notion that the challenged conduct there was tortious or criminal, and it almost certainly was not. This Court in both *Young* and *Alicea-Hernandez* relied heavily on *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985), wherein Judge J. Harvie Wilkinson set forth a basic principle regarding judicial scrutiny of church actions: "Of course churches are not—and should not be—above the law . . [and] may be held liable for their torts and upon their valid contracts." *Id*. at 1171; *accord, Skrzypczak v. Roman Catholic Diocese Of Tulsa*, 611 F.3d 1238, 1244–46 (10th Cir. 2010); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 658 (10th Cir. 2002); *see also Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008). The Supreme Court could not have more explicit that it was not precluding tort and contract claims in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012).

There is precious little analysis of tort law in the employment context in the briefs supporting Defendants. Thus, they fail to address the fact that some conduct that creates a hostile work environment can also result in tort or criminal liability. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568–69 (1987) ("most States now recognize a tort of intentional infliction of emotional distress[;] . . . some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace."); Richard E. Kaye, "Cause

of Action Against Employer for Intentional Infliction of Emotional Distress," 37 Causes of Action 2d 1 (Originally published in 2008; updated November 2020).

Indeed, the most extensive analysis of tort law in the briefing to date is flawed. A coterie of learned constitutional law professors purport to delineate "two important differences between ordinary tort claims and discriminatory hostile-work-environment claims." *Brief for Robert F. Cochran, et. al., in Support of the Petition for Rehearing en Banc at 4, Demkovich v. St. Andrew the Apostle Parish*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142), 2020 WL 6264922 at *4, rehearing en banc granted, 973 F.3d 718 (7th Cir. 2020). But the professors either overstate or misstate tort law. They argue that "tort law defines unlawful conduct in objective terms" and thus avoids what the authors view as a problematic judicial "probe [of] the subjective reasons behind the alleged mistreatment of ministerial employees." *Id*. This is not necessarily so. Tort claims often require specific intent to inflict emotional harm. *See Whelan v. Albertson's, Inc.*, 879 P.2d 888, 891 (Or. Ct. App. 1994) (for an IIED claim, "a plaintiff must plead that the defendant intended to inflict and caused severe emotional distress"); *Meade v. Arnold*, 643 F. Supp. 2d 913, 921 (E.D. Ky. 2009) (rejecting IIED claim where defendant's actions were not "meant only to harm the plaintiff"); *see also Buell*, 480 U.S. at 563 n.13 (referring to the level "of unconscionable abuse which is a prerequisite to recovery" for employees in many jurisdictions).

The professors' second purported distinction is that, "unlike tort claims, hostile-work-environment claims typically arise out of speech that is alleged to be hostile or offensive." This again is a misstatement or overstatement of tort law; many jurisdictions allow recovery for intentional infliction of emotional distress based on verbal abuse alone. *Whelan*, 879 P.2d at 891 (recognizing intentional infliction of emotional distress claim based solely on antigay epithets); *see generally Buell*, 480 U.S. at 570 n.18 ("The American Law Institute urges that as long as the distress is 'genuine and severe,' bodily harm should not be required. Restatement § 46(k). Many jurisdictions have adopted the Restatement's approach . . .").

Finally, although Title VII and the ADA are not limited to mistreatment that is abusive, malicious, or indefensible, those statutes certainly cover such conduct. Answering the question in the affirmative would immunize such horrid conduct. Every brief filed with this Court supporting defendants conveniently ignores the specific allegations in the complaints regarding slurs and epithets, including that Reverend Dada called Demkovich a "fag" and a "bitch." The panel majority surely was correct that, in answering the certified question, the Court "must consider the full range of facts that might prompt such employees to bring such claims." *Demkovich v. St. Andrew the Apostle Parish*, 973 F.3d 718, 730 (7th Cir. 2020). The panel majority went on to chronicle, from cases "within this circuit

alone" a disturbing array of racist, violent, and otherwise horrific workplace environments. *Id*. at 730-31. The amended complaint in this case alleges a similar use of slurs by coworkers, condoned by Reverend Dada, that could give rise to a hostile work environment claim. See Amended Complaint, at Para. 14 (calling woman "fucking bitches," calling Mexican-Americans "spics," and calling African-Americans "derogatory" terms, including specifically the n-word).

Whatever immunity a church official may enjoy for statements that are "offensive" or "incorrect,"[4] should not be extended to every malicious, indefensible slur, epithet, and statement uttered solely to demean and humiliate. Thus, this Court should reject the invitations that Defendants and their supporting amici have made in this litigation to pronounce a broad, dangerous principle, unsupported by precedent and unnecessary to resolve this appeal.[5] Amicus appreciates the opportunity to present to the Court the voice of those who often

[4] *See Bryce*, 289 F.3d at 658.

[5] See *Defendants' Reply in Support of Supplemental Rule 12(b)(6) Motion to Dismiss Plaintiff's Amended Complaint at 2, Demkovich v. St. Andrew the Apostle Parish*, No. 16-cv-11576, 2018 WL 11233364, (N.D. Il. Jan. 19, 2018), aff'd in part, 973 F.3d 718 (7th Cir. 2020)*, vacated and rehearing en banc granted, 973 F.3d 718 (7th Cir. 2020)*. ("Simply, it is the Church's prerogative to determine the character of the working environment it provides for its ministers."); *Brief of Amici Curiae Catholic Conferences of IL, et al., in Support of Appellants' Petition for Rehearing en Banc at 8, Demkovich v. St. Andrew the Apostle Parish*, 973 F.3d 718 (7th Cir. 2020) (No. 19-2142), 2020 WL 6264921 at *8, rehearing en banc granted, 973 F.3d 718 (7th Cir. 2020). (asking the court to "Adopt[] a bright-line rule prohibiting hostile work environment suits under employment laws").

experience discrimination in the workplace—who experience a world of difference between a barrage of slurs and epithets on the one hand, and on the other, being told that church doctrine precludes women clergy or the marriage of same-sex couples.

II. AMICUS RESPECTFULLY SUBMITS THAT THE NEGATIVE ANSWER TO THE CERTIFIED QUESTION IS ALL THAT THIS COURT NEED SAY ON THE MATTER.

The panel majority went beyond answering the certified question in the negative on the premise that "an appeal under § 1292(b) brings up the whole certified order." *Demkovich*, 973 F.3d at 722. While that is a correct proposition of law emanating from *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the fact that an appellate court **may** go beyond the certified question in no way suggests that it **should**. *Yamaha* contains no such command, or even suggestion. To the contrary, both the Third Circuit and Supreme Court contented themselves with answering the foundational question that state tort law was not preempted by maritime law, leaving the District Court to decide the questions of which jurisdiction's law to apply and whether such law provided remedies to the plaintiffs. *See Yamaha*, 516 U.S. at n.14 (1996).

Such judicial restraint is particularly appropriate in interlocutory appeals like this where any number of events could obviate the need for this Court to weigh in on these issues. *See Buell*, 480 U.S. at 570-71 and n.22 (expressly declining to

adopt the circuit court's ruling that plaintiff could recover for emotional injury without physical harm, because "it appears that once the facts of this case are fleshed out through appropriate motions or through an eventual trial, it might not squarely present the question of pure emotional injury at all."); *Garcia v. Johanns*, 444 F.3d 625, 636–37 (D.C. Cir. 2006) (reaching beyond certified question to address "straightforward statutory construction issue" but not other issue that "will benefit from further development in the district court"). Forbearance is especially appropriate where, as here, defendants argue factually and legally that plaintiff will still fail on the merits even if he can survive a motion to dismiss. *See Demkovich v. St. Andrew the Apostle Parish*, No. 16-cv-11576, 2017 WL 11575425, at *14 n. 3 (7th Cir. Nov. 27, 2017).

This plea for judicial restraint comes from organizations that profoundly disagree with the District Court's dismissal of Demkovich's sexual orientation claim. That ruling should be reversed on direct appeal following a final judgment. Courts are perfectly capable of distinguishing between epithets and slurs on the one hand, and, on the other hand, harsh statements regarding an individual's shortcomings or ineligibility for certain jobs that would easily qualify as actionable harassment if it came from a secular employer. While LGBT litigants have indeed endured discrimination and emotional distress from clerics' pronouncements regarding their suitability for certain jobs, for marriage, for child-rearing, etc., *see*

Bryce, supra, there is a world of difference legally and emotionally between being subjected to those statements and being called a "fag" or a "bitch." And it is false judicial modesty to declare the courts incapable of making that obvious distinction.

But as this court certainly knows, a key reason for limiting appellate review to final judgments is that many of these issues disappear via settlement or because of a judgment on different grounds, obviating the need for premature judicial pronouncements. When it is procedurally appropriate and necessary, this court does not shrink from the weighty judicial issues at hand. *See, e.g., Hively v. Ivy Tech Comm. Coll*, 853 F.3d 339 (7th Cir. 2017) (en banc) (reversing district court's final judgment dismissing plaintiff's Title VII sexual orientation discrimination claim).

But at this interlocutory stage, there is no reason to go beyond answering the certified question in the negative. Factual development rather than a broad advisory opinion is appropriate. Lacking a persuasive reason why courts should immunize all mistreatment of ministerial employees, defendants seem to seek some version of religious qualified immunity, *i.e*., judicial abdication upon request of a religious employer at the pleading stage. But the very Supreme Court cases they cite refute this argument. Thus, defendants quote *Hosanna-Tabor* to make the puzzling concession that *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) allows judicial scrutiny of "outward physical acts"

(which abuse of employees very often is) while the ministerial exception protects "internal church decision[s]" and "internal management decisions that are essential to the institution's central mission" (which abuse of ministerial employees very often is not). *See* Petition for Reh'g at 17 (*quoting Hosanna-Tabor*, 565 U.S. at 190 and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. at 2060). But *Hosanna-Tabor* and *Morrissey Berru* did not afford "complete deference" to a religious employer's contention -- at the pleading stage -- that judicial scrutiny necessarily will result in excessive entanglement; rather they were summary judgment cases that eschewed "rigid formulas." *See Morrissey-Berru*, 140 S. Ct. at 2071-72 (Thomas, J., concurring) (arguing for "deference"); *id*. at 2076 (Sotomayor, dissenting (noting the majority's stated rejection of the concurrence's "complete deference" approach); *id*. at 2055, 2062, 2066-69 (ruling of the Court repeatedly rejecting "rigid" formulas). Indeed, the Supreme Court has counseled the restraint that is appropriate here. As in *Hosanna-Tabor* "(t)here will be time enough to address the applicability of the exception to other circumstances if and when they arise." 565 U.S. at 196.

CONCLUSION

To be sure, the analysis and holdings of *Young*, *Alicea-Hernandez*, and the panel majority are in tension,[6] in ways that support this court's en banc review. But these cases are not inconsistent regarding what hostile work environment claims should and should not be allowed to proceed. We submit that review at this stage should be limited simply to answering the certified question in the negative and remanding the case for further proceedings.

January 5, 2021

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[6] *Young* affirmed the District Court's problematic ruling that subject matter jurisdiction was lacking. *See* 21 F.3d at 185, 188. The later *Alicea-Hernandez* panel cited *Young* but *sub silentio* overruled its subject matter jurisdictional holding. *See* 320 F.3d at 702. And the panel majority's thoughtful contrast of the abusive slurs and epithets alleged here with the non-abusive church decisions in *Young* and *Alicea-Hernandez* compares favorably with its reaching beyond the certified question and its depiction of *Alicea-Hernandez* as solely an adverse employment action case. *See Demkovich*, 973 F.3d at 724-25.

CERTIFICATE OF COMPLIANCE

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 2817 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I electronically filed the foregoing 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 by the CM/ECF system.

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APPENDIX LIST OF AMICI CURIAE AND THEIR INTERESTS

Catholics for Choice ("CFC") represents the majority of Catholics on issues of sexual and reproductive rights and health, and is the leading voice in debates at the intersection of faith, reproductive health, rights and justice and religious liberty. Founded in 1973, CFC seeks to shape and advance sexual and reproductive ethics that are based on justice, reflect a commitment to human rights, and respect and affirm the capacity of all to make moral decisions about their lives. CFC's work promotes respect for the moral autonomy of every person, based on the foundational Catholic teaching that every individual must follow their own conscience and respect others' right to do the same.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders** (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

Jane Doe Inc., the Massachusetts Coalition to End Sexual and Domestic Violence, works to amplify the voices of all who are impacted by sexual and

domestic violence and to undo the social injustices that perpetuate an abuse of power. We seek to prevent gender-based violence by changing the lens through which people view the experiences of survivors and by promoting equity and justice for everyone. Survivors of sexual and domestic violence are directly impacted by the issues central to this matter, and we are interested in highlighting the danger to the most vulnerable in our community from overly expansive and unjustified claims of exemptions from generally applicable laws.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBTQ people and people living with HIV through impact litigation, education, and public policy work. As particularly appropriate here, Lambda Legal has been on the cutting edge of issues presented in this appeal as party counsel and/or amicus counsel: arguing for Title VII coverage of sexual orientation and gender identity discrimination,[7] arguing for proper, robust Title VII coverage of religious discrimination;[8] and highlighting the importance

[7] *Hively v. Ivy Tech Comm. Coll*, 853 F.3d 339 (7th Cir. 2017) (en banc) (sexual orientation, party counsel); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (gender identity, party counsel); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020) (same).

[8] *EEOC v. Abercrombie & Fitch*, 575 U.S. 768 (2015) (amicus supporting Muslim woman worker denied employment for wearing hijab).

and danger to the most vulnerable in our community from overly expansive and unjustified claims of exemptions from generally applicable laws.[9]

Founded in 1985, the **National Employment Lawyers Association** (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA has a particular interest in the current attempt to broaden the ministerial exception to hostile work environment claims, as any expansion would potentially strip thousands of people of the workplace protections guaranteed by our nation's laws. NELA and its members, who litigate these issues on behalf of employees, advocate for protecting religious freedom while shielding workers from invidious discrimination in the workplace and ensuring continuity in the application of anti-discrimination laws.

The National Organization for Women (NOW) Foundation is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every

[9] *Fulton v. City of Philadelphia*, 19-123, Brief of Amici Curiae Organizations Serving LGBTQ Youth in Support of Respondents, 2020 WL 5020356 *11 (August 20, 2020) (arguing against the shrinking, unsupported by social science, of "the pool of families willing to care for LGBTQ-identified youth and able to offer them supportive care").

state and the District of Columbia. NOW Foundation is committed to ending discrimination in the workplace against women as well as against LGBTQIA+ individuals and persons of color, among other objectives.

The Shriver Center on Poverty Law (Shriver Center) has a vision of a nation free from poverty with justice, equity and opportunity for all. The Shriver Center provides national leadership to promote justice and improve the lives and opportunities of people with low income, by advancing laws and policies, through litigation, and legislative and administrative advocacy. The Shriver Center is committed to economic security and advancement, including the achievement of equal opportunities for women, people of color, and LGBTQ individuals.

Founded in 2007, **SPARK Reproductive Justice NOW!** works to build and strengthen the power of our communities and a reproductive justice movement that centers Black Women, Women of Color, and Queer & Trans Youth of Color in Georgia and the South. Based in Atlanta, Georgia, we have fostered a dynamic, collaborative model of advocacy, leadership development, collective action, and discourse that creates change and impact for Black women and queer people's struggles for reproductive justice. We are committed to a complete vision of reproductive justice where our base has access to economic security and are protected from employment discrimination.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy. It has successfully handled thousands of civil rights cases on behalf of individuals and groups regarding discrimination on the basis of race, national origin, gender, and disability. Among other things, the Washington Lawyers' Committee represents clients challenging discrimination and harassment in employment. Title VII is an essential tool in the Committee's advocacy.