NO. 125656

IN THE
SUPREME COURT OF ILLINOIS

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| MARY REHFIELD, | ) | On Review of the Opinion of the |
| | ) | Appellate Court, Third Judicial |
| *Plaintiff-Appellant*, | ) | District, Case No. 3-18-0354 |
| | ) | |
| v. | ) | There on Appeal from the |
| | ) | Circuit Court, Will County, |
| DIOCESE OF JOLIET, | ) | Illinois, Twelfth Judicial Circuit, |
| | ) | Case No. 2017-L-1000 |
| *Defendant-Appellee*. | ) | |
| | ) | Honorable Raymond J. Rossi, |
| | ) | Trial Judge Presiding |

# REPLY BRIEF OF PLAINTIFF-APPELLANT

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**ORAL ARGUMENT REQUESTED**

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## POINTS AND AUTHORITIES

## ARGUMENT

Mary Rehfield's employer fired her for reporting criminal conduct to the police, a termination that violated the Illinois Whistleblower Act and constituted retaliatory discharge under the common law. The Appellate Court held that the employer is nevertheless shielded from liability because it is a religious institution and because the court concluded that Mrs. Rehfield held a ministerial role. Religious freedom is a fundamental right afforded stringent protection by the Constitution, but that freedom remains fully intact in this case, where no religious reason has ever been raised for Mrs. Rehfield's termination, and the allegations concern exclusively secular matters. On the other side of the scale lies an interest of massive magnitude—the interest in safeguarding the line of communication between whistleblowers and law enforcement, which is essential to public safety.

The Diocese concludes that the U.S. Supreme Court's decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), issued just last month, contains a holding of astonishing breadth. It reads the opinion to foreclose "all employment disputes" between a ministerial employee and her religious employer. Resp. Br. at 19. The Court did no such thing, deciding instead only the question before it concerning who qualifies as a minister for the purposes of the ministerial

exception. The *Guadalupe* Court did not shut the door left open in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), regarding "whether the exception bars other types of suits."

So the question remains on the table, and it cannot be resolved without reference to the differing interests at stake in discrimination claims—the only context in which the U.S. Supreme Court has thus far found the exception to apply—and whistleblower-retaliation claims like the one before this Court now. Recognition of these interests compels the conclusion that neither ecclesiastical abstention nor the ministerial exception reaches so far as to bar anti-retaliation actions.

Unobstructed by either religious-freedom doctrine, Mrs. Rehfield's claims must stand. Both are sufficiently pleaded, and her employment contract does not preclude her from seeking recourse through the tort of retaliatory discharge. The Appellate Court therefore erred in affirming the Circuit Court's dismissal of the complaint, and Mrs. Rehfield respectfully requests that its decision be reversed.

## I. The ecclesiastical-abstention doctrine and the ministerial exception do not apply to claims under the Illinois Whistleblower Act or common-law retaliatory discharge.

The ecclesiastical-abstention doctrine enforces the Constitution's provision of religious freedom by requiring civil courts to refrain from

deciding issues of religious law. *See Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 708–09 (1976). The corollary is that courts can consider issues that do not call for inquiry into church doctrine and can instead be resolved, like secular disputes, by reference to "neutral principles of law." *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Bd.*, 2016 IL App (1st) 143045, ¶ 50.

The Diocese combines its discussion of the ecclesiastical-abstention doctrine and the ministerial exception, but the two are separate concepts. *See*, *e.g.*, *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014) (explaining that the latter is "best understood as a narrow, more focused subsidiary of the ecclesiastical abstention doctrine"). With its origin in the federal courts after Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., the ministerial exception "foreclose[s] certain employment discrimination claims brought against religious organizations." *Guadalupe*, 140 S. Ct. at 2061; *see also Hosanna-Tabor*, 565 U.S. at 188.

### A. Neither the U.S. Supreme Court nor this Court has decided whether the doctrines apply to whistleblower-retaliation claims.

Among the things ecclesiastical abstention and the ministerial exception have in common is that neither has been interpreted by either this Court or the U.S. Supreme Court to bar non-discrimination

retaliation claims like those of Mrs. Rehfield. In *Hosanna-Tabor*, the Court left no room for doubt that its holding was limited to employment-discrimination actions by explicitly reserving for another day the question of other types of claims. *See* 565 U.S. at 196. It explained that "[t]he case before [it was] an employment discrimination suit" and clarified that the Court "express[ed] no view on whether the exception bars other types of suits." *Id*.

The Diocese hails the U.S. Supreme Court's recent decision in *Our Lady of Guadalupe* as a development that expands *Hosanna-Tabor* and shuts the book on the possibility that non-discrimination employment claims are beyond the reach of the ministerial exception. *See* Resp. Br. at 19 (characterizing *Guadalupe* as holding that the exception applies to "all employment disputes between a faith-based school and its ministerial employees"). *Guadalupe* did not widen the scope of claims covered by the exception but rather served to clarify who falls under it. *See* 140 S. Ct. at 2063–66. In other words, the ministerial exception is analyzed in two parts—(1) who qualifies as a "minister" covered by the exception, and (2) what claims does it apply to—and both *Hosanna-Tabor* and *Guadalupe* overwhelmingly focus on the former. In no way did *Guadalupe* purport to decide the question reserved in *Hosanna-Tabor* regarding the exception's full scope. Nor did the case present the

issue, because both *Guadalupe* plaintiffs brought employment-discrimination suits, not retaliation claims. *See id.* at 2058–59. The Court again acknowledged the limited nature of its holding, noting that "[h]ere, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us." *Id.* at 2069.

Indeed, at oral argument the government, serving as *amicus curiae*, expressly urged the Court to refrain from deciding the precise issue raised in this appeal—whether the exception covers retaliation claims. Justice Ginsburg posed a hypothetical about a faith leader discharged for reporting a priest who sexually assaulted a student. *See* Transcript of Oral Argument at 33:1–5, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (19-267). The government responded that it was "simply asking for the same thing that [the] Court decided in *Hosanna-Tabor*," where the Court "specifically didn't decide whether things like retaliation for sexual abuse reporting would be covered." *Id.* at 33:6–20. Justice Ginsburg pressed further, asking about a situation where a teacher reports that the principal has been stealing from the school to pay for gambling excursions. *See id.* at 34:25–35:6. Again, the government requested that the Court "continue" to do what it did in *Hosanna-Tabor* and decline to resolve the issue. *Id.* at 35:13–23. And so it did, dedicating not a word to retaliation claims in the opinion.

Outside of the Appellate Court's decision below, Illinois courts have never before decided whether ecclesiastical abstention or the ministerial exception applies to retaliation claims. In contradiction to the Diocese's brazen position that "all employment disputes" between ministers and their religious employers are beyond the reach of the courts, Resp. Br. at 19, courts have allowed judicial consideration of certain claims brought by former employees against their religious employer because they compelled no intrusion into ecclesiastical territory. *See Jackson*, 2016 IL App (1st) 143045, ¶ 54 (declining to abstain from a pastor's claim that his termination violated church by-laws); *Ervin v. Lilydale Progressive Missionary Baptist Church*, 351 Ill. App. 3d 41, 46 (1st Dist. 2004) (same).

The Diocese points to *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 266 Ill. App. 3d 456 (4th Dist. 1994), in which the Fourth District abstained from considering the plaintiff's breach-of-contract claim against her church for allegedly reneging on an agreement to employ her as a teacher at a parochial school. The court's reasoning, although rooted in ecclesiastical abstention, echoed that underpinning the ministerial exception. *See*, *e.g.*, *id.* at 459 ("The decision of who should be appointed to speak for the church is an ecclesiastical matter to which judicial deference is mandated by the [F]irst [A]mendment."). Not

only is *Gabriel* factually distinguishable—Mrs. Rehfield's original appointment is not at issue—but this case involves whistleblower-retaliation claims that raise significantly more compelling governmental interests than contractual matters do.

The upshot is that the path is clear for this Court to hold that neither ecclesiastical abstention nor the ministerial exception shields religious institutions from retaliating against their employees (even those who qualify as ministers) for reporting crimes.

### B. The government's compelling interest in safeguarding employees who report criminal wrongdoing precludes application of either doctrine to retaliation claims.

Whether Mrs. Rehfield is considered a "minister" or not, ecclesiastical abstention and the ministerial exception do not bar her retaliation claims because of the vitally important interests they serve. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." (internal quotation marks omitted)); *Gabriel*, 266 Ill. App. 3d at 459 ("The Supreme Court has consistently concluded *certain* civil rights protected in secular settings are not sufficiently compelling to overcome

certain religious interests." (emphasis added)). There can be no doubt that anti-discrimination actions also involve a significant interest—the basic right of individuals to be free from discrimination on the basis of their protected traits and statuses. That the U.S. Supreme Court in adopting the ministerial exception has found that anti-discrimination interests are nevertheless overridden by a religious institution's freedom to choose its own ministers does not control the distinct question raised by this appeal concerning retaliation claims. The reason is that the Whistleblower Act and the retaliatory-discharge tort raise even more compelling interests that go beyond an individual's civil liberties.

Anti-retaliation actions give whistleblowers the protection they need to speak up and report wrongdoing, thereby providing a path for the government to identify violations of law and threats to public safety. *See Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 23 (stating that "a cause of action for retaliatory discharge" is necessary "to vindicate the public policy underlying the employee's activity and deter the employer's conduct that is inconsistent with that policy"); *Larsen v. Provena Hosp.*, 2015 IL App (4th) 140255, ¶ 47 ("[T]he purpose of the Whistleblower Act is to protect statutorily defined employees who report violations of state or federal laws, rules, or regulations because the reported wrongful conduct or unsafe condition affected the health, safety,

or welfare of Illinois residents as a whole." (alteration and internal quotation marks omitted)). Put another way, a violation of anti-retaliation law is not just between the religious employer and its employee—it is also between the religious employer and the public. The interest is particularly strong where, as here, the whistleblower reports a violation of criminal law. *See Palmateer v. Int'l Harvester Co.,* 85 Ill. 2d 124, 132 (1981) ("There is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a State's criminal code." (citation omitted)).

Accepting the Diocese's invitation to hold that a religious institution can fire its ministerial employees for reporting crimes would have far-reaching consequences not only for the employees themselves but also for other members of faith communities. This case provides ample illustration of that. Mrs. Rehfield identified a potential threat to her coworkers and students, and she contacted law enforcement to ensure their safety. Allowing the Diocese to be insulated from liability for terminating Mrs. Rehfield for that prudent action would deter school administrators from taking the same course in the future, knowing the law would stand by if they were fired for it. And disincentivizing education personnel's calls to the police would have ramifications not

just for the teachers and administrators but also for the students under their care.

It takes no crystal ball to foresee the other implications of allowing religious institutions to violate anti-retaliation laws with impunity. Crimes committed within the walls of a house of worship would even more seldomly come to light if church leaders—the people most likely to have the opportunity to observe wrongdoing and feel obligated to speak up—know that reporting a crime is legally permissible grounds for termination. Rescinding whistleblower protection gives would-be reporters yet another reason to keep quiet. It would even permit a "minister"-victim to be fired for reporting her own rape. Consider too that Illinois law designates "[e]ducation personnel" and "[a]ny member of the clergy" mandated reporters of child abuse and neglect. *See* 325 ILCS 5/4(a)(4), (9). The statute imposes criminal sanctions on mandated reporters who knowingly and willfully disregard their duty. *See* 325 ILCS 5/4(m). The Diocese's position would allow a ministerial employee to be terminated for her mandatory report, leaving her with a choice between potential termination or risking criminal charges. It would promote hesitation in a context requiring swift action.

These examples depict the unconscionable consequences that would result from insulating religious institutions from whistleblower

liability, even when limited to discharges of employees who qualify as ministers. They further demonstrate that enforcing anti-retaliation laws invokes weighty and compelling interests, and those interests of the highest order preclude expansion of ecclesiastical abstention and the ministerial exception to whistleblower-retaliation actions.

## II. The claims otherwise survive dismissal on the merits.

Nor has the Diocese successfully identified any other grounds to dismiss Mrs. Rehfield's claims. It raises arguments about the sufficiency of the pleadings under 735 ILCS 5/2-615. This Court's review of a motion granted under that section is *de novo*, and consideration of the motion requires that well-pleaded facts be accepted as true and construed in Mrs. Rehfield's favor. *See Doe v. Coe*, 2019 IL 123521, ¶ 20.

### A. The Whistleblower Act claim is sufficiently pleaded.

This Court is the first to lay eyes on the Diocese's new argument that Mrs. Rehfield insufficiently pleaded her Whistleblower Act claim. The Diocese did not present the argument to either the Circuit Court or the Appellate Court, forfeiting it. *See Klaine v. S. Ill. Hosp. Servs.*, 2016 IL 118217, ¶ 41 (explaining that where a party does not raise an issue below "their argument may be deemed forfeited").

The Diocese's previous silence was for good reason. It argues that the Whistleblower Act's protections are limited to reports of an

employer's illegal activities. *See* Resp. Br. at 19–20. And so, it reasons, the statute does not cover Mrs. Rehfield because she alleges that she reported wrongdoing by a parent, not by the Diocese. But that interpretation of the Act is unmoored from any legal authority. The best source of information about the scope of the Whistleblower Act is its own text, which prohibits an employer from retaliating against an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation." 740 ILCS 174/15(b). The statute's protection is not cabined to only those reporting their employer's illegal activities. Indeed, the language set forth in 740 ILCS 174/15(b) is the language Mrs. Rehfield cites in her Whistleblower Act claim. *See* Am. Compl. ¶ 46.

Finding no support in the text, the Diocese plucks from its context this quote from *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 62 (1st Dist. 2011): "The Act protects employees who call attention in one of two specific ways to illegal activities *carried out by their employer*." (emphasis added). *Sardiga* concerned an employee who did complain about what he viewed as misconduct by his employer. *See id.* at 58. The court referred to "illegal activities carried out by [an] employer" because that was what it was confronted with in that case. *Id.* at 62. It did not

purport to read restrictive language into the Whistleblower Act that does not actually exist in the statute.

The Diocese also argues that Mrs. Rehfield was in fact not fired for her report to the police. *See* Resp. Br. at 20–21. Such an argument is inappropriate at the dismissal stage, where Mrs. Rehfield's allegations are assumed to be true. *See Coe*, 2019 IL 123521, ¶ 20. And the allegations are plain—"It was clear to Rehfield and others that the Diocese forced her out in retaliation for reporting the MacKinnon incident to police, as a way of shifting blame off of the Diocese and onto Rehfield." Am. Compl. ¶ 34. In urging its contrary view, the Diocese impermissibly flips the standard of review to draw inferences in its own favor. Mrs. Rehfield sufficiently pleaded her Whistleblower Act claim, and it withstands scrutiny when the proper standard is applied.[1]

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[1] In opposing the Whistleblower Act claim, the Diocese cites to *Darchak v. Chicago Board of Education*, 580 F.3d 622 (7th Cir. 2009), a case that did not include a claim under that statute. The Diocese appears to invoke the case to refute the notion that public-policy concerns preclude the expansion of ecclesiastical abstention or the ministerial exception to Whistleblower Act claims. But *Darchak* does not concern either of those doctrines.

To the extent the Diocese meant to challenge the retaliatory-discharge claim on the grounds that Mrs. Rehfield has not sufficiently alleged that her termination violated a clear public-policy mandate, *see Bell v. Don Prudhomme Racing, Inc.*, 405 Ill. App. 3d 223, 231 (4th Dist. 2010), it has forfeited the argument by not raising it below. *See Klaine*, 2016 IL 118217, ¶ 41. Nor is there any merit to it. *See Palmateer*, 85 Ill.

### B. Mrs. Rehfield's employment contract does not preclude her retaliatory-discharge claim.

This Court has never held that only at-will employees may bring retaliatory discharge claims. In fact, this Court held to the contrary in *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143 (1984), rejecting the employer's argument that "retaliatory discharge was created to protect only 'at-will' employees" and instead allowing the plaintiffs to proceed under the tort despite the fact that they were "not 'at-will' employees but [were] union members." *Id*. at 149; *see also Boyles v. Greater Peoria Mass Transit Dist.*, 113 Ill. 2d 545, 555–56 (1986). The Court explained that "in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement." *Id*. at 149. That reasoning holds here too—"[T]he public policy against retaliatory discharges applies with equal force" where an employer unjustly terminates an at-will employee and where it terminates a contracted employee. *Id*. at 150.

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2d at 132 ("Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy."). That the *Palmateer* whistleblower was an at-will employee has no bearing on the public-policy analysis.

The Diocese points to the First District's finding that courts "confin[e] the tort to the discharge of an at-will employee." *Taylor v. Bd. of Educ.*, 2014 IL App (1st) 123744, ¶ 34 (citations omitted). But as explained in the opening brief, this is a misreading of the case law. The First District cited as support for the proposition, *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29 (1994); *Bajalo v. Northwestern Univ.*, 369 Ill. App. 3d 576 (1st Dist. 2006); and *Krum v. Chi. Nat'l League Ball Club*, 365 Ill. App. 3d 785 (1st Dist. 2006). All involve plaintiff-employees who alleged something short of discharge—a failure to renew a contract, a failure to rehire, or a demotion. *See Zimmerman*, 164 Ill. 2d at 31 (demotion); *Bajalo*, 369 Ill. App. 3d at 577 (failure to renew); and *Krum*, 365 Ill. App. 3d at 788 (failure to rehire); *see also Darchak*, 580 F.3d at 628 (failure to renew).

As quoted in the Diocese's brief, this Court has refused "to recognize a claim in any injury short of actual discharge." *Bajalo*, 369 Ill. App. 3d at 582. But *Bajalo* was distinguishing actual termination from constructive discharge, in which an employee's working conditions are modified, like by a demotion. *See id.* at 582–84 (citing a host of constructive discharge claims). Mrs. Rehfield was not demoted, transferred, or disciplined—she was actually discharged. Nor did her contract simply lapse without renewal. The Diocese does not engage with

the distinction between a failure to renew a contract or rehire an employee and the discharge that Mrs. Rehfield suffered. It is true that the *Bajalo* and *Krum* plaintiffs had employment contracts from which they were terminated early. *See Bajalo*, 369 Ill. App. 3d at 578; *Krum*, 365 Ill. App. 3d at 787. The difference is that Mrs. Rehfield had already accepted a new contract for the next year. She complains not of a failure to renew her contract or rehire her (she was already rehired through a renewal) but rather an actual termination.

The Diocese's retaliatory discharge of Mrs. Rehfield caused her significant harm, including not just financial injury but also emotional distress. That the Diocese fully paid the funds contractually owed to her does not compensate for the full range of damage inflicted by the unjustified termination. The Diocese has cited no legal authority for its suggestion that an employer can avoid tort liability, including the attendant possible punitive damages, for an illegal retaliatory discharge by paying out the wrongfully terminated employee's contract. This issue may go to the amount of damages, but it does not foreclose the claim entirely.

## CONCLUSION

For these reasons, Mrs. Rehfield respectfully requests that this Court reverse the Appellate Court's judgment.

August 25, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Julie B. Porter, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 17 pages, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service.

s/ Julie B. Porter

**CERTIFICATE OF SERVICE AND NOTICE OF FILING**

I certify under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on August 25, 2020, a copy of the foregoing Reply Brief of Plaintiff-Appellant was filed and served upon the Clerk of the Illinois Supreme Court via the efileIL system through an approved electronic filing service provider and was served on counsel of record below in the manner indicated:

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Based upon this Court's April 2, 2020 Order regarding COVID-19, Appellant will not send any paper copies of this filing to this Court unless so requested.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

s/ Julie B. Porter