

No. 16-1271

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

JOANNE FRATELLO

Plaintiff-Appellant,

v.

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK,
ST. ANTHONY'S SHRINE CHURCH and ST. ANTHONY'S SCHOOL

Defendants-Appellees.

On Appeal From a Judgment of the United States District
Court for the Southern District of New York

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, none of Defendants-Appellees has a parent corporation and no publicly held corporation owns 10% or more of Defendants-Appellees' stock.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
A. The Parties	2
B. The role and functions of principals at Archdiocesan schools	6
C. Fratello’s work at St. Anthony’s	10
D. The proceedings below	18
STANDARD OF REVIEW	20
INTRODUCTION AND SUMMARY OF THE ARGUMENT	21
ARGUMENT	24
I. Fratello was a minister	26
A. The ministerial exception applies when an employee has a substantial religious role or performs significant religious functions	27
B. As the leader of a religious school, Fratello was presumptively a minister	33
C. Even without the presumption, the record demonstrates that Fratello had a substantial	

religious role and exercised significant religious functions at St. Anthony’s.....	37
1. Fratello had a substantial religious role	38
2. Fratello performed significant religious functions.....	43
D. The remaining <i>Hosanna-Tabor</i> considerations also confirm that Fratello was a minister	46
1. Fratello’s title indicated that she held a position of religious leadership	46
2. Fratello used the title of principal to hold herself out as a religious leader	47
II. The alternative ministerial exception tests proposed by Fratello and her amici have no foundation in law	49
A. Fratello’s focus on her title contradicts both <i>Hosanna-Tabor</i> and over forty years of settled caselaw.	49
B. Fratello’s “two-prong” test is an invention that contradicts both the law and the facts of <i>Hosanna-Tabor</i>	54
C. The horrors posited by Fratello and her amici have never come to pass.....	61
CONCLUSION.....	64
CERTIFICATE OF COMPLIANCE	66
CERTIFICATE OF SERVICE	67

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alcazar v. Corp. of Catholic Archbishop of Seattle</i> , 627 F.3d 1288 (9th Cir. 2010)	51
<i>Alicea-Hernandez v. Catholic Bishop of Chicago</i> , 320 F.3d 698 (7th Cir. 2003)	52
<i>Archdiocese of Miami v. Minagorri</i> , 954 So.2d 640 (Fla. Ct. App. 2007)	35
<i>Askew v. Trustees of Gen. Assembly</i> , 684 F.3d 413 (3d Cir. 2012)	58
<i>Black v. St. Bernadette Congregation of Appleton</i> , 360 N.W.2d 550 (Wis. Ct. App. 1984)	35
<i>Braun v. St. Pius X Par.</i> , 827 F. Supp. 2d 1312 (N.D. Okla. 2011)	34
<i>Cannata v. Catholic Diocese of Austin</i> , 700 F.3d 169 (5th Cir. 2012)	<i>passim</i>
<i>Ciurleo v. St. Regis Par.</i> , --- F. Supp. 3d ---, 2016 WL 5870049 (E.D. Mich. Oct. 7, 2016)	32
<i>Conlon v. InterVarsity Christian Fellowship</i> , 777 F.3d 829 (6th Cir. 2015)	32
<i>Dayner v. Archdiocese of Hartford</i> , 23 A.3d 1192 (Conn. 2011)	34
<i>EEOC v. Roman Catholic Diocese of Raleigh</i> , 213 F.3d 795 (4th Cir. 2000)	24, 36, 43, 51

Guippone v. BH S & B Holdings LLC,
737 F.3d 221 (2d Cir. 2013) 20

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,
132 S. Ct. 694 (2012)..... *passim*

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996) 63

McClure v. Salvation Army,
460 F.2d 553 (5th Cir.1972)..... 27

Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash.,
875 A.2d 669 (D.C. 2005) 35

Penn v. New York Methodist Hosp.,
No. 11-cv-9137, 2013 WL 5477600
(S.D.N.Y. Sept. 30, 2013) 33

Petruska v. Gannon Univ.,
462 F.3d 294 (3d Cir. 2006) 34, 42

Rayburn v. Gen. Conference of Seveth-Day Adventists,
772 F.2d 1164 (4th Cir. 1985)..... 36,50

Rweyemamu v. Cote,
520 F.3d 198 (2d Cir. 2008) *passim*

Sabatino v. St. Aloysius Par.,
672 A.2d 217 (N.J. Super. Ct. App. Div. 1996)..... 35, 37

Shaliehsabou v. Hebrew Home of Greater Washington, Inc.,
363 F.3d 299 (4th Cir. 2004)..... 37, 38

Sterlinski v. Catholic Bishop of Chicago,
--- F. Supp. 3d ---, 2016 WL 4439949
(N.D. Ill. Aug. 23, 2016)..... 32

<i>Temple Emanuel of Newton v. Massachusetts Comm’n Against Discrim., 975 N.E.2d 433 (Mass. 2012)</i>	32
Statutes	
28 U.S.C. § 455	19
42 U.S.C. § 12101	28
Other Authorities	
Brief of <i>Amici Curiae</i> Law and Religion Professors, <i>Hosanna-Tabor v. EEOC</i> , 132 S. Ct. 694 (2012) (No. 10-553).....	59, 60
Catechism of the Catholic Church (1994).....	15, 52
Future Church, <i>Women in Church Leadership: Lay Ecclesial Ministers in the Catholic Church</i> , https://www.futurechurch.org/women-in-church-leadership/women-in-church-leadership/lay-ecclesial-ministers-in-catholic-church (last vsited Nov. 7, 2016)	52
<i>The Gospel of St. Matthew</i>	15
<i>The Gospel of St. Luke</i>	15
Gov’t Brief, <i>Hosanna-Tabor v. EEOC</i> , 132 S. Ct. 694 (2012) (No. 10-553).....	56
Perich Brief, <i>Hosanna-Tabor v. EEOC</i> , 132 S. Ct. 694 (2012) (No. 10-553).....	56

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as the action arose under Title VII, 42 U.S.C. § 2000e *et seq.* On March 30, 2016, the district court entered final judgment in favor of Defendants-Appellees. Plaintiff-Appellant timely appealed on April 26, 2016. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal concerns the application of the “ministerial exception,” a doctrine recognized by the United States Supreme Court as required by the First Amendment’s Free Exercise and Establishment Clauses. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 702 (2012); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). The issues arising in this appeal are:

1. Was Fratello presumptively a minister under *Hosanna-Tabor* and *Rweyemamu* because she was the principal of a religious school?
2. Aside from that presumption, was Fratello a minister under *Hosanna-Tabor* and *Rweyemamu*, particularly because of her role as head of a religious school and the religious functions she carried out in that role?

STATEMENT OF THE CASE

A. The Parties.

The Archdiocese. The Archdiocese of New York is a New York non-profit corporation incorporated pursuant to the Religious Corporations Law of the State of New York. App. 16. It is a constituent entity of the Roman Catholic Church and is headed by an Archbishop, currently Cardinal Timothy Dolan. App. 17. The Archdiocese covers ten counties in southern New York and is headquartered in New York City. *Id.*

For over 200 years, the Archdiocese has provided elementary schools for “ethnically and economically diverse student population[s]” in “urban and suburban settings.” App. 121, 182. From the beginning, the “foundation and mission” of these schools have been “formation in the faith,” “lived experience in Gospel values,” and “preservation of Catholic culture”—all of which is accomplished by training students “to be disciples of Jesus Christ who will live by their faith.” App. 122; *see also* App. 102.

While individual Catholic schools are a “ministry of the Parish with which [they] are affiliated,” App. 102, “ultimate responsibility” for accomplishing the Archdiocesan “educational apostolate” belongs to the

Cardinal Archbishop. App. 125. The Cardinal Archbishop delegates this responsibility to the Superintendent of Schools, who in turn entrusts specific local schools to the Parish pastor who is responsible for “the total parish educational program.” App. 127-28. The pastor delegates the school-specific part of the parish program to the school principal, who controls the “immediate direction of the school and its instructional program.” App. 128. Accordingly, the Archdiocesan Catholic schools fit squarely within Church hierarchy and have an “ecclesial identity” as a “genuine instrument of the Church, a place of real and specific pastoral ministry” that “participates in the evangelizing mission of the Church.” App. 124.

The parish. St. Anthony’s Shrine Church is a New York non-profit corporation incorporated pursuant to the Religious Corporations Law of the State of New York and is located in Nanuet, New York. St. Anthony’s is a parish of the Archdiocese.

The school. Until July 2012, St. Anthony’s School was a ministry of St. Anthony’s Shrine Church and had no separate corporate existence. In July 2012, it was separately incorporated as a New York non-profit corporation incorporated pursuant to the Religious Corporations Law of

the State of New York. The School is one of over 150 Catholic elementary schools operating within the Archdiocese. App. 184. As publicly stated on the Archdiocese's website, the schools' modern mission remains unchanged from their 200-year-old foundation: creating "Christ-centered, academically excellent, and welcoming communities" that "teach students to be life-long learners and leaders energized by fidelity to Christ, the Church, and one another." App. 181-182; App. 303, 307. The "Catholic faith" remains "central" to the schools, and the schools "proudly teach" that faith on a daily basis. App. 183.

This daily teaching occurs in two specific ways. First, through the "explicit study of the Catholic faith," where "Gospel teaching . . . is *the* fundamental element." App. 121, 123 (emphasis added). This study includes requiring schools to teach religion as a distinct class at every grade level, and recommending that it receive as much study as any other single subject. App. 160, 163. Such religion classes cover "the study of Catholic teachings and tradition, as well as sacramental preparation." App. 183. The schools also engage students in Catholic devotional activities, such as conducting daily prayer and "regular celebration of Mass as a school community." App. 183; *accord* Supp.App. 34

(“Traditional Roman Catholic prayers . . . should be prayed daily”). And the schools set “Holy days of obligation” as mandatory school holidays. App. 158.

A second way that Archdiocesan schools teach their faith is through infusing the standard New York State academic curriculum with Catholic beliefs and values. App. 121, 331. This includes ensuring that “Gospel ideals permeate the substance and structure” of “*all* subject areas and in *all* of the various activities going on in the school.” App. 183, 123 (emphasis added); *see also* App. 161 (“For all students in grades Pre-kindergarten through 8, instruction in all subjects should be infused with Catholic values.”). To this end, the Archdiocese created the Catholic Values Integration Program, which serves to “inspire, infuse, and integrate Catholic values” into the Archdiocese’s “established curriculum.” Supp.App. 43, 46. Thus, for instance, when 7th and 8th graders learn about Women in History via their Humanities class, the program explains that a discussion of Sacajawea, Madame Curie, Maya Angelou, and St. Therese of Lisieux should include the values of equality, courage, spirituality, and a focus on Christ. Supp.App. 71.

At a local level, St. Anthony's School embraces the Archdiocesan mission by making religion "a central part of the School curriculum" and providing an "educational experience" that both "enhances each child's spiritual . . . growth" and prepares students "to become . . . responsible stewards of God's creation." App. 345, 378.

Appellant Joanne Fratello served within these schools for several years, first as a teacher, then as an assistant principal, then as a principal at another school (St. Joseph's) that closed, and finally as the principal at St. Anthony's. App. 19, 209.

B. The role and functions of principals at Archdiocesan schools.

The "elementary school principalship" in Archdiocesan schools is an explicit "ministerial position" that must be performed "in a manner suited to any Catholic educational ministry." App. 175. The Archdiocese issues the principals of its schools an Administrative Manual to instruct them on the role they "must fulfill" to "carry out the vital work of Catholic education." App. 110. The Manual specifies that principals must provide "CATHOLIC LEADERSHIP," which requires principals to:

- commit to the mission of evangelization;
- direct the religious education program's implementation;

- formulate plans to meet the school’s religious goals;
- recruit a staff “committed to the goals of a Catholic school”;
- assist the school pastor’s “ministry to the students”;
- ensure adherence to Archdiocesan catechesis guidelines;
- ensure religion teachers obtain catechetical certification;
- provide opportunities for students, faculty, and parents to participate in “liturgical and paraliturgical services”;
- motivate students to actively participate in the parish;
- promote the school as a “community of faith” to students, parents, and faculty; and
- cooperate with the parish council by attending council meetings and keeping it informed about the school.

App. 133. Among other things, fulfilling these roles requires principals to provide “essential” instruction to new teachers on the “Catholic identity of the school.” App. 154. Principals must ensure that all teachers understand that “the Church puts its trust in them” to provide “faith education” and help students integrate the Gospel into daily living. App. 122-23. Principals have wide-ranging authority to implement their Catholic leadership responsibilities in their oversight of school personnel, instructional materials, finances, and facility use, as well as by serving

as the public face of the school in public and community relations. App. 133-34, 305.

Principals are also responsible for the implementation of the Catholic Values Infusion Program. The program helps “the principal to fulfill the mission of transmitting Catholic values, culture, and traditions to each succeeding generation,” thereby “fulfill[ing] the essential purpose of a Catholic school.” App. 136. The program identifies Catholic school principals within the Archdiocese as serving in the “role of spiritual leader[s]” who “must bear the responsibility of integrating Gospel values into the vision, goals, policies and practices, life, and curriculum of the school.” Supp.App. 56. Principals are also called to be “tradition bearer[s]” who fill a “role” that is “embodied” by their commitment to “model the Catholic values so central to the spirit of the Catholic school.” Supp.App. 57. Finally, principals must serve as the “prime communicator of the message” which “promote[s] the values of the Catholic school.” Supp.App. 58; App. 313. The program comes with a 38-page guide that provides instructions on how principals should “teach as Jesus did,” and copies of the guide are kept in every principal’s office. App. 104; *see also* Supp.App. 41-79 (copy of guide).

To ensure that prospective principals fulfill this role of spiritual leadership, applicants for the principal position must meet several religious qualifications. First, applicants must be “a practicing Catholic,” “in union with Rome,” and “commit[ted] to the teachings of the Church and to the development of Christian spirit and a community of faith within a school.” App. 138; *see also* App. 245. Second, applicants should attain “completion of Levels I and II of the Catechist Certification Program,” a requirement that could be temporarily waived by the Office of the Superintendent if the applicant would obtain the certifications “by the completion of their fourth year of service.” App. 138; App. 245. Finally, schools prefer applicants who have a “minimum of five years teaching experience” in “Catholic elementary schools,” since that provides “an understanding of the PreK→8 culture in a Catholic school.” App. 139; App. 347.

Applicants for principal positions “must” also “demonstrate proficiency” in a number of areas, including that they “[e]mbody Christ-centered principles,” “[e]ncourage the spiritual growth . . . of every student,” “[e]xercise spiritual leadership to ensure a thriving Catholic

school community,” and show a “[w]illingness to promote Catholic education.” App. 243; *see also* App. 250, 349.

In sum, principals in the Archdiocese’s schools hold a “crucially important” “vocation” “to the Church in New York.” App. 110. As noted above, they exercise delegated authority from the Cardinal Archbishop, each serving as her respective school’s “Catholic leader” who must “concentrate [their] efforts on” fulfilling the role of “instructional and spiritual leader.” App. 132. Successful principals are the “magic” behind a “thriving school” that “advance[es] Catholic education”; they “set the tone for everything that happens in [the] Catholic schools.” App. 183.

C. Fratello’s work at St. Anthony’s.

Immediately before coming to St. Anthony’s School, Fratello served for the 2006-2007 school year as the principal of St. Joseph’s, another elementary school within the Archdiocese. In that position, she was evaluated as a “RELIGIOUS LEADER” by her faculty. *See, e.g.*, Supp.App. 168. Fratello also evaluated herself as a “RELIGIOUS LEADER,” giving herself the highest possible marks in 8 of the 10 religious categories, and the second-highest possible marks for the last two categories. Supp.App. 173; App. 316. For instance, she reported that

she gave priority to the school's "comprehensive religious education program" and "select[ed]" faculty who were "committed to a Christian atmosphere and support Catholic teachings." Supp.App. 173. She also reported that she was "good" at implementing the Catholic Values Integration Program. *Id.* Fratello concluded with a handwritten statement that her strengths helped her in "all duties and functions as a spiritual & instructional leader." Supp.App. 178.

After learning that St. Joseph's was going to be closing, Fratello applied for the principal position at St. Anthony's School in March 2007. App. 90, 191. In her cover letter to the School, Fratello immediately identified her service as "a Principal in the Archdiocese of New York at St. Joseph's School" and her "strong Catholic faith" as qualifications to serve the students at St. Anthony's. App. 191; App. 316.

As with all principal applicants, Fratello was interviewed by St. Anthony's pastor and by a committee the pastor appointed. App. 138. They were searching for someone with "strong Christian values" who would provide teachers and students with "instruction in religious truth," set "educational policies which are in conformity with the religious beliefs" of the the Catholic faith, and create an environment in which

students were taught “how to live in accordance with the teachings of Jesus.” Supp.App. 30. The committee asked applicants about their relationship with the church, what would constitute a good religion lesson, and how they would implement communal prayer at the School. Supp.App. 30; App. 317. Satisfied with Fratello’s answers, and having received Superintendent of Archdiocesan Schools’ approval, the pastor decided to hire her. App. 84, 138-39.

Fratello’s employment contract with St. Anthony’s School was entitled “Contract of Employment for Lay Principals” of the “Archdiocese of New York.” App. 84. In it, Fratello agreed to “fulfill all the duties and responsibilities of the position” as required by the “policies and procedures of the school” and the “Office of the Superintendent of Schools.” *Id.* She also “recognize[d]” the “religious nature of the Catholic school,” and accepted the School’s right to dismiss her as “principal” for “immorality, scandal, disregard or disobedience of the policies or rules of the [Archdiocese], or rejection of the official teaching, doctrine or laws of the Roman Catholic Church.” App. 85, 346. The contract was for an initial one year term, starting in August 2007, and set to be reevaluated at the end of the term. App. 84.

Fratello immediately began meeting her significant religious obligations as principal. She:

- “manage[d],” “evaluate[d],” and “work[ed] closely with” teachers, including the religion teacher, “on a regular and consistent basis” to “carry out the School’s religious mission,” App. 96, 329;
- observed teachers fulfilling religious duties, such as leading students in “prayer” to “evaluate” their “ability to integrate Catholic values into the classroom,” App. 96, 331;
- would normally recite a mid-afternoon spiritual message over the loudspeaker to the entire School, the content of which would include a “prayer” and sometimes “a Biblical reading or quote to reflect upon,” App. 96, 322-23;
- would recite the Prayer of the Rosary for the entire School over the loudspeaker during October and May, App. 97, 323;
- attended the school’s annual “Feast of St. Anthony,” including the feast’s Mass, App. 97, 327;
- attended a monthly Mass at the School with faculty and students, App. 97; 328;
- encouraged students and faculty to embrace Catholic tradition, App. 97, 313-14, 329-31, Supp.App. 10;
- instructed teachers to attend Mass for School liturgical celebrations, such as First Holy Communion, App. 97, 337, Supp.App. 12, 14;
- advised teachers to display Advent wreaths in classrooms, App. 98, 325; and

- prominently displayed a crucifix in her office, App. 98, 326.

See also Supp.App. 125, 128, 139-40; App. 290-91 (Fratello conceding in her declaration that the School can require a “lay principal” to “lead[] morning and afternoon prayer; read[] religious stories to children; and attend[] all Mass services”).

When Fratello arrived at the school, she adopted a new format for prayer to ensure students were “more involved” in prayer. App. 322; Supp.App. 81-82. Under this format, every morning at 8:05 AM, Fratello would also host an eighth grade student to pray over the loudspeaker piped into all classrooms, at the end of which she would respond with “Praise to you Lord Jesus Christ.” App. 322-23; Supp.App. 82. The student would then read another prayer, and Fratello would conclude by reciting the Our Father prayer. App. 322-23; Supp.App. 82.¹ On Fridays

¹ The Our Father prayer reads as follows:

Our Father, Who art in Heaven, hallowed be Thy name. Thy kingdom come; Thy will be done on earth, as it is in Heaven. Give us this day our daily bread, and forgive us our trespasses as we forgive those who trespass against us, and lead us not into temptation, but deliver us from evil. Amen.

in October, Fratello would celebrate the Feast of Our Lady of the Rosary by reciting over the loudspeaker the Our Father prayer, ten Hail Mary prayers, and one Glory Be prayer. App. 323; Supp.App. 83.²

During the weeks-long Advent season preceding Christmas, Fratello gave near-daily religious readings over the School loudspeaker, connecting the annual tradition of Christmas tree decoration with “the people, prophe[c]ies, and events leading up to the birth of Jesus.” App.

Supp.App. 82. This is the prayer that Jesus Christ taught his disciples to pray. See Catechism of the Catholic Church at § 660 (from *The Gospel of St. Matthew* 6:9-13, *The Gospel of St. Luke* 11:2-4).

² The Hail Mary prayer reads as follows:

Hail Mary, full of grace, the Lord is with thee. Blessed art thou among women, and blessed is the fruit of thy womb, Jesus. Holy Mary, Mother of God, pray for us sinners, now and at the hour of our death. Amen.

Supp.App. 83.

The Glory Be prayer reads as follows:

Glory be to the Father, and to the Son, and to the Holy Spirit. As it was in the beginning, is now, and ever shall be, world without end. Amen.

Supp.App. 83.

98. She expressed how this tradition illustrated “the faithfulness of God.”
Id.

Fratello also oversaw a monthly school newspaper that invited School families to join her at Mass, expressed her enthusiasm at students’ receptiveness to the Gospel, and encourage students’ extra-curricular spiritual growth. Supp.App. 86; App. 337-38. And she supervised and approved the selection of hymns, decorations, and lay persons chosen to recite prayer at annual special Masses held in November and May. Supp.App. 108.

At the end of the school year, Fratello stood at the Church pulpit and gave a religious message to the graduating class, generally using both religious language and prayer, and asking God’s blessing on the students in “the name of the Father, the Son, and the Holy Spirit.” Supp.App. 83-85. She also conveyed a religious message to students in the yearbook, congratulating them on their spiritual growth and their adherence to Jesus’s teaching, and asking God to work in them. Supp.App. 22.

As the public face of the school, Fratello was featured in a local newspaper article as the “new St. Anthony’s principal” who was motivated by her “[s]trong faith.” App. 196; App. 317. The article stated

that she said that St. Anthony's helps students "prepare for life . . . as practitioners of their faith," and explained that families sent their children to St. Anthony's because they "are looking for a strong Catholic faith-based education." *Id.*

Near the end of her first year of service, Fratello was evaluated through the "Archdiocesan Principal Evaluation Process." App. 198; App. 106. The first area of evaluation was her service as a "Religious Leader," which asked, among other things, whether her service as the principal:

- "fosters a Christian atmosphere which enables staff and students to achieve their potential";
- "gives priority to a comprehensive religious education program by implementing Archdiocesan guidelines [and] encouraging communal worship";
- "ensures that religion classes are taught by knowledgeable and committed Catholics";
- "encourages teachers to obtain Archdiocesan catechetical certification";
- "provides for religious growth among staff members";
- "ensures the implementation of the Catholic Values Integration Program in curriculum and all other aspects of school life";
- "upholds and strengthens the Catholic identity of the school";

- “encourages and supports a strong program of evangelization”; and
- “provides a variety of opportunities for faculty to meet as a Christian community.”

App. 198-199; *accord* App. 106, 329-331.

Fratello’s evaluations included commendations for “renewing the Catholic Identity of St. Anthony’s School Office”; “setting a good example as a religious leader”; bringing “a renewed sense of Christian Spirituality” and “Catholic Community”; and making “religious values, attitude and behavior the focus of life at the School.” App. 107. The School’s pastor and faculty characterized Fratello as as a good “Religious Leader.” App. 99, 108; Supp.App. 113, 119, 133, 143, 157, 189. At the end of her first term as principal in Spring 2008, Fratello was renewed for a three-year term. App. 92.

At the end of the term in Spring 2011, the School declined to renew Fratello’s contract. App. 342. Fratello claims that the School’s decision was based on the new School pastor’s sexism against her. App. 47.³

³ For purposes of this appeal, the Court must take this claim to be true, although it is irrelevant to the question before the Court. The Appellees unequivocally deny the allegation. In Appellees’ view, Fratello engaged in insubordination towards the pastor of St. Anthony’s.

D. The proceedings below.

On October 12, 2011, Fratello filed a charge of discrimination on the basis of gender and retaliation with the Equal Employment Opportunity Commission. The EEOC was unable to determine that any law had been violated, so it closed its file and sent Fratello a right-to-sue notice on July 5, 2012. App. 60. Fratello filed suit within 90 days, and then filed an amended complaint in March 2013. Her complaint alleged violations of Title VII and state law, and sought reinstatement and damages. App. 50-59.

Appellees filed a motion to dismiss on April 26, 2013, asserting the ministerial exception as a defense. App. 4. On November 11, 2013, the district court denied that motion, holding that limited discovery on the question of the ministerial exception was necessary. App. 4, 436-37. Fratello moved Judge Seibel to recuse herself, stating, “I do not know Your Honor’s religion, but if perchance you are Roman Catholic, or sympathetic to the Roman Catholic Church (*e.g.*, by being a Fordham Law graduate), then I ask you to consider whether this could affect your judgment in this case. If so, you should recuse yourself under 28 U.S.C. § 455.” Dkt. 67 at 2. Judge Seibel denied the motion to recuse, stating that

she could be “be fair and impartial in a case involving the Roman Catholic Church.” App. 10.

On July 16, 2015, the parties filed cross-motions for summary judgment. App. 12-13. Appellees re-asserted their ministerial exception defense, while Fratello sought “summary judgment striking Defendants’ ministerial immunity defense” because she was merely a “lay principal” who performed purely secular administration of the school. App. 437. The district court granted Appellees’ motion on March 29, 2016, and entered final judgment the next day. App. 450-51. Fratello filed her notice of appeal on April 25, 2016. App. 453.

STANDARD OF REVIEW

The standard of review on “motions for summary judgment is de novo.” *Guippone v. BH S & B Holdings LLC*, 737 F.3d 221, 225 (2d Cir. 2013) (quotation omitted). “Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law.” *Guippone*, 737 F.3d at 225 (quotation omitted).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Some ministerial exception cases will be difficult. They may involve an underlying religious schism, conflicting contracts, or even questions about whether the defendant organization is truly a religious group.

But this is not one of those cases. There is no question that the Archdiocese, St. Anthony's parish, and St. Anthony's School are "religious groups" under the Supreme Court's unanimous ministerial exception decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. And this case involves the same sort of employment discrimination dispute at issue in both *Hosanna-Tabor* and this Court's leading case, *Rweyemamu v. Cote*.

This appeal turns entirely on whether Appellant Joanne Fratello was a "minister" for purposes of the ministerial exception. And under *Hosanna-Tabor* and *Rweyemamu*, Fratello was a minister: she served in an inherently religious role—principal of a religious school—and carried out documented (and undisputed) religious functions such as leading students in prayer and designing religious curriculum.

Indeed, this appeal can begin and end with the fact that Fratello was the leader of a religious school, and thus presumptively played an

important religious role and had important religious functions. In *Hosanna-Tabor*, a fourth grade teacher was held to be a minister; the head of a religious school, who supervises all of the teachers, is *a fortiori* a minister.

Judge Seibel undertook a thorough examination of the undisputed facts surrounding Fratello's role and applied the ministerial exception standard to them. She concluded that while Fratello's title and qualifications did not weigh in favor of finding her to be a minister, the overwhelming and undisputed evidence establishing Fratello's role as principal of the school and the religious functions she carried out made Fratello a minister under *Hosanna-Tabor* and *Rweyemamu*.

In her appeal from Judge Seibel's careful conclusions, much of Fratello's argument hinges on one proposition: that the word "lay" in her job title negates her religious role and functions at St. Anthony's. As an initial matter, this approach misapprehends the Catholic understanding of the word "lay." By restricting ministry to the clergy, it would exclude laypeople entirely from the set of ministers. Yet Catholic theology embraces the idea of "lay ecclesial ministers" and indeed broadly calls lay Catholics to take on ministerial roles in a number of different ways. The

mere fact that a layperson is not a priest or nun does not exclude that person from performing important religious functions.

More importantly for the Court's application of the First Amendment, Fratello's position would revive one of the very evils *Hosanna-Tabor* sought to eliminate—entangling the state in religious questions such as what it means to be “lay” in Catholic doctrine. Fratello's call for this Court to examine “canon law” and determine her “ecclesial status” is simply untenable. Worse still, this approach would penalize religious groups for involving laypeople fully in the life of their church as well as providing a perverse incentive for churches to either ban laypeople from ministerial roles or to slap ministerial titles onto employees in an effort to insulate themselves from liability. Surely government-driven hyperclericalization is not one of the goals of the First Amendment.

Fratello's amici fare no better. Indeed, they embrace seemingly contradictory positions—claiming that ministerial titles are indispensable while at the same time asking the Court not to take titles at face value. Their argument is ultimately circular and apparently motivated by an unspoken urge to relitigate *Hosanna-Tabor* itself.

* * *

As the first significant case to arise in this Circuit since *Hosanna-Tabor*, this appeal presents an opportunity for the Court to provide helpful guidance to the lower courts of this Circuit. By explicating how *Hosanna-Tabor* works in this case, and particularly how the leaders of religious schools are to be treated, the Court can save significant party and judicial resources by clearly communicating the contours of what separates weak claims from strong ones.

ARGUMENT

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These two clauses “give[] special solicitude to the rights of religious organizations,” working in tandem to protect the autonomy their internal decisions that “affect[] the faith and mission” of the organizations themselves. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 702, 706-07 (2012).

This right to religious autonomy “bar[s] the government from interfering with the decision of a religious group to fire one of its ministers” via enforcement of “Title VII . . . and other employment

discrimination laws.” *Id.* at 702, 705; *see also Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008) (recognizing the ministerial exception). The Establishment Clause protects anti-establishment interests by keeping the State from becoming excessively entangled in the Church’s internal affairs, including the hiring and firing of its ministers. *Hosanna-Tabor*, 132 S.Ct. at 706; *Rweyemamu*, 520 F.3d at 205, 208. And the Free Exercise Clause correspondingly prevents the State from restricting “the freedom of religious groups” to decide who will convey their “message and carry[] out [their] mission.” *Hosanna-Tabor*, 132 S. Ct. at 703, 708.

There is no dispute that the Archdiocese, St. Anthony’s, and its School are “religious group[s]” entitled to assert the ministerial exception. *Hosanna-Tabor*, 132 S. Ct. at 699. As in *Hosanna-Tabor*, this case concerns a church-owned school which “offer[s] a ‘Christ-centered education’ to students in kindergarten through eighth grade.” 132 S. Ct. at 699. Since Fratello’s “employer [wa]s a religious group,” the only question before this Court is whether Fratello was “one of the group’s ministers.” *Hosanna-Tabor*, 132 S. Ct. at 699.

She was. In fact, Fratello’s status as a minister is even clearer than the teacher’s in *Hosanna-Tabor* because of her broad supervision and

control over—not to mention daily, significant participation in—the School’s religious programs and mission.

I. Fratello was a minister.

Fratello was a minister for purposes of the ministerial exception. Each of the considerations identified as relevant in the leading ministerial exception cases of *Hosanna-Tabor* and *Rweyemamu* demonstrates that she had ministerial status.

First, Fratello held a significant religious role as the principal of a Catholic school. She held a religious office as the head of the School and was a lay ecclesial minister in the Catholic tradition. Indeed, her role as principal of a Catholic elementary school was so necessarily and inextricably intertwined with leading and executing the religious mission of the School that she was *presumptively* a minister.

Second, Fratello carried out significant religious functions on a daily basis. Among many other religious functions, she led the entire School in prayers; invited the School community to religious feasts, celebrations, and Masses; instructed the School community on religious beliefs; guided the content of religious curriculum; and hired teachers with a view to their ability to convey Catholic teachings to St. Anthony’s students.

Under this Court’s caselaw, either a significant religious role or the performance of significant religious functions would suffice to find Fratello to be a minister. But the other two considerations discussed in *Hosanna-Tabor* are also evidence that Fratello was a minister. Fratello’s title—principal—showed that she was a minister. And her use of that title also demonstrated that she was a minister.

A. The ministerial exception applies when an employee has a substantial religious role or performs significant religious functions.

For over forty years, the federal courts of appeals have uniformly recognized a ministerial exception to the employment discrimination laws. *See Hosanna-Tabor*, 132 S. Ct. at 705 n.2 (collecting cases). These courts have held that the ministerial exception precluded application of these laws to claims concerning the employment relationship between a religious institution and its ministers. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (first recognizing the exception).

This Court first recognized the ministerial exception in *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008), *cited in Hosanna-Tabor*, 565 U.S. at 188. In *Rweyemamu*, this Court found that a Catholic priest could not constitutionally bring a racial discrimination claim against the

diocese that had terminated his employment. *Rweyemamu*, 520 F.3d at 209. In reaching its decision, this Court held that “the ministerial exception protects more than just ‘ministers,’ and it is not confined to the Christian faith.” *Id.* at 206-207 (citing examples where the exception applied to an organist/music director, a press secretary, a director of music ministries, and to a Jewish nursing home) (citations omitted).

In 2012, the Supreme Court unanimously ratified the decisions of the courts of appeals when it also recognized the ministerial exception. *See Hosanna-Tabor*, 132 S. Ct. at 706. In *Hosanna-Tabor*, a teacher at a Lutheran school had sued her employer, a Lutheran church school, for wrongful termination under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* 132 S. Ct. at 701. The Sixth Circuit had ruled that she did not count as a minister because, among other things, she engaged in only 45 minutes of religious instruction per schoolday, with the remainder of her instruction being in secular subjects. *Id.* at 708. On appeal to the Supreme Court, the EEOC and the plaintiff teacher changed tack, arguing for the first time that all of the courts of appeals had been wrong and that there was no need for the Court to recognize a ministerial exception. *Id.* at 706, 708.

The Supreme Court firmly rejected this argument, holding that there was a ministerial exception, rooted in both the Free Exercise and the Establishment Clauses of the First Amendment: “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.” *Id.* at 703.

Having decided that the Constitution requires a ministerial exception, the Court turned to the question of whether the plaintiff schoolteacher was a minister. On the facts presented in *Hosanna-Tabor*, the Court declined to “adopt a rigid formula” for determining “when an employee qualifies as a minister.” *Id.* at 707. Instead, it identified four considerations that, on the facts of the case before it, were sufficient to determine ministerial status:

- (1) “the formal title given . . . by the Church”;
- (2) “the substance reflected in that title”;
- (3) “[the teacher’s] own use of the title”; and
- (4) “the important religious functions she performed for the church.”

Id. at 708. With respect to the second consideration, the Court held that the teacher’s title in *Hosanna-Tabor* reflected “a *role* distinct from that

of most of [the church’s] members.” *Id.* at 707 (emphasis added); *see also id.* at 708 (discussing minister’s “role in conveying the Church’s message and carrying out its mission”) (emphasis added); *id.* at 714, (noting the “substantial role” the teacher played in the school’s religious mission) (Alito, J., joined by Kagan, J., concurring).

In one of the two concurring opinions, Justices Alito and Kagan emphasized that “it would be a mistake if the term ‘minister’ or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.” *Id.* at 711 (Alito, J., joined by Kagan, J., concurring). In their view, the exception should apply to employees who serve in “roles of religious leadership, worship, ritual, and expression” or who “conduct[] worship services or important religious ceremonies or rituals” or “serve as a teacher or messenger of [a religious group’s] faith.” *Id.* at 712. This reflected what these Justices saw as a “functional consensus” that prevailed among the courts of appeals. *Id.* at 714.

In the other concurrence, Justice Thomas stated that courts ought “to defer to a religious organization’s good-faith understanding of who

qualifies as its minister.” *Id.* at 710 (Thomas, J., concurring). “[T]he evidence demonstrates that Hosanna-Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich’s suit is properly barred by the ministerial exception.” *Id.* at 711.

Since *Hosanna-Tabor* was decided, the federal courts have tended to hew to the “functional consensus” identified by Justices Alito and Kagan, focusing primarily on the employee’s role and the functions that the employee performs. For instance, the Fifth Circuit’s ruling in *Cannata v. Catholic Diocese of Austin* focuses on religious role and religious functions. 700 F.3d 169 (5th Cir. 2012). Quoting Justice Alito and Justice Kagan’s exhortation to focus on the “perform[ance of] important functions,” the *Cannata* court found that it had “enough” basis to apply the exception simply upon finding that the employee in question “played an integral role” in worship services and thereby “furthered the mission of the church and helped convey its message.” *Id.* at 177 (quoting *Hosanna-Tabor*, 132 S. Ct. at 708, 712 (Alito, J., joined by Kagan, J., concurring)). The court was untroubled by the employee’s argument that he had no specialized religious “training, education, or experience” and that he did not have the title of “minister.” *Id.* Similarly, the Sixth Circuit

held that the ministerial exception “clearly applie[d]” where just two of the four *Hosanna-Tabor* considerations—“formal title and religious function”—were met. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015).

Other courts have taken a similar approach to applying *Hosanna-Tabor*. For instance, the Massachusetts Supreme Judicial Court ruled that a teacher at a Jewish school was covered by the ministerial exception even though “she was not a rabbi, was not called a rabbi, . . . did not hold herself out as a rabbi,” and had not been proven to have received “religious training.” *Temple Emanuel of Newton v. Mass. Comm’n Against Discrim.*, 975 N.E.2d 433, 443 (Mass. 2012). Instead, the Court found it dispositive that “she taught religious subjects at a school that functioned solely as a religious school” for children. *Id.* (“the ministerial exception applies . . . regardless whether a religious teacher is called a minister or holds any title of clergy”). *See also Ciurleo v. St. Regis Par.*, --- F. Supp. 3d ---, 2016 WL 5870049, at *4 (E.D. Mich. Oct. 7, 2016) (in case involving Catholic elementary school teacher, the court held that “religious function alone can trigger the [ministerial] exception in appropriate circumstances”); *Sterlinski v. Catholic Bishop of Chicago*, ---

F. Supp. 3d ---, 2016 WL 4439949, at *3 (N.D. Ill. Aug. 23, 2016) (in a case involving a Catholic church’s music director, the court held that “[i]n determining whether an employee qualifies as a minister, a court’s focus is on the *function* of the plaintiff’s position” (emphasis in original)); *Penn v. New York Methodist Hosp.*, No. 11-cv-9137, 2013 WL 5477600, at *6 (S.D.N.Y. Sept. 30, 2013) (determining ministerial status solely by reference to evidence that chaplain’s “employment functions were primarily religious in nature”).

B. As the leader of a religious school, Fratello was presumptively a minister.

It follows from the focus on role and functions that leaders of religious ministries like Fratello are presumptively ministers under *Hosanna-Tabor*. If the fourth grade teacher at the Lutheran school in *Hosanna-Tabor* was a minister, then the principal of that school—who supervised both the fourth grade teacher and all of the other teachers—must normally also be a minister. The role principals hold is such that, even if a principal never leads a prayer or catechizes a student, because they have discretionary authority over the prayer leaders and catechizers at an avowedly religious institution, they occupy a position that goes to the core of the ministry’s religious mission.

This presumption is a natural implication of both *Hosanna-Tabor* and existing caselaw. Well before *Hosanna-Tabor* authoritatively addressed the issue, courts recognized the “critical and unique role of the *teacher* in fulfilling the mission of a church-operated school.” *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 804 (4th Cir. 2000) (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979)) (emphasis added); *see also Rweyemamu*, 520 F.3d at 207 (noting the First Amendment limitations on state interference in employment of “a lay teacher at a parochial school”). It follows, *a fortiori*, that the primary individual charged with the “day-to-day” administration of accomplishing this religious mission, and who has direct authority over the teachers who help carry it out, would herself presumptively qualify as a religious minister. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006) (“To the extent that [an employee] supervises spiritual functionaries, at least some of the functions he performs are, by definition, spiritual ones.”).

Indeed, courts have long recognized that “a principal of a parochial school fits within the ministerial exemption.” *Braun v. St. Pius X Par.*, 827 F. Supp. 2d 1312, 1318 (N.D. Okla. 2011); *see also Dayner v.*

Archdiocese of Hartford, 23 A.3d 1192, 1205 (Conn. 2011) (“the plaintiff’s duties as a Catholic school principal render her a ministerial employee”); *Archdiocese of Miami v. Minagorri*, 954 So.2d 640 (Fla. Ct. App. 2007) (applying ministerial exception to Catholic school principal); *Black v. St. Bernadette Congregation of Appleton*, 360 N.W.2d 550, 553 (Wis. Ct. App. 1984) (applying exception to “church school principal”). The reason for this is simple: “more than anyone else at the school except the pastor,” the “principal of a Roman Catholic school” is responsible “for providing . . . spiritual leadership in and for the school community.” *Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash.*, 875 A.2d 669, 677 (D.C. 2005). A principal in a religious elementary school is “in charge of students’ religious education,” “supervises the teachers, plays a significant role in curriculum development, is liaison between the school and the religious community, and is the guiding force behind the school’s spiritual mission.” *Sabatino v. St. Aloysius Par.*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (applying the ministerial exception to school principal). Thus, principals are “inextricably intertwined” in their “school’s mission.” *Pardue*, 875 A.2d at 677.

Principals of religious schools are thus paradigmatic examples of what Justices Alito and Kagan meant when they said that the ministerial exception should apply to “any ‘employee’ who leads a religious organization.” *Hosanna-Tabor*, 132 S. Ct. at 711-12; *Cannata*, 700 F.3d at 175 (same). As noted above, for decades, the “general rule” among the courts of appeals has been that the exception covers employees who occupy “a position [that] is important to the spiritual and pastoral mission of the church” or whose duties “consist of . . . church governance, . . . or supervision or participation in religious ritual and worship.” *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). Where an employee serves as the “human vessel” through which a religious ministry expresses its message or accomplishes its mission, that person is presumptively a minister. *Id.* at 804.

The presumption is, of course, rebuttable. In an extreme case, one can imagine a school principal who did not serve in a role of leadership and acted as a purely administrative official devoid of authority over either the religious program or religious teachers, and who instead performs

“merely financial and logistic” functions. *Sabatino*, 672 A.2d at 219. But those cases are likely to be few and far between.

Here, Fratello was the principal of St. Anthony’s and thus presumptively a minister. And Fratello cannot rebut the presumption because the undisputed record before this Court is replete with evidence that Appellees required far more of Fratello than “merely financial and logistic” functions. The Court could therefore simply recognize the operation of the presumption and Fratello’s inability to rebut it, and affirm the decision below on that basis alone.

C. Even without the presumption, the record demonstrates that Fratello had a substantial religious role and exercised significant religious functions at St. Anthony’s.

Even if the Court does not apply the presumption, the facts here, as ably discussed by Judge Seibel, demonstrate that Fratello both (1) played a substantial religious role at St. Anthony’s and (2) exercised significant religious functions at St. Anthony’s.

Role and functions are closely related but not identical. Role concerns the employee’s office or position; functions concern the employee’s daily duties and activities. For instance, in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, the Fourth Circuit held that a staff member of

a Jewish nursing home was a “minister’ for purposes of the ministerial exception” after separately considering both his functions and his role. 363 F.3d 299, 309 (4th Cir. 2004). The court concluded that the staff member qualified as a minister because (1) “his primary duties included supervision and participation in religious ritual and worship,” and (2) “his position is important to the spiritual mission of Judaism.” *Id.* Similarly, in *Rweyemamu* this Court “easily” found ministerial status based upon role—that the employee was “an ordained priest of the Roman Catholic Church”—and functions—that his “duties [we]re determined by Catholic doctrine.” *Rweyemamu*, 520 F.3d at 209.

1. Fratello had a substantial religious role.

As set forth below, Fratello had a substantial religious role because she occupied a “position[] of leadership” and was required to demonstrate religiously appropriate “character and conduct.” *Hosanna-Tabor*, 132 S. Ct. at 712-13 (Alito, J., joined by Kagan, J., concurring); *see also Cannata*, 700 F.3d at 175 (same).

Religious leadership. The School could hardly have been more explicit that Fratello occupied an important, indeed crucial, religious leadership role. Its primary guidance document for principals, the

Administrative Manual, said she must provide “CATHOLIC LEADERSHIP” to the School’s faculty, students, and community. App. 133. If that was not clear enough, the Manual went on to explain that she was “the Catholic leader . . . of the school.” App. 132 (emphasis added). And if that was not clear enough, it further explained that she must “concentrate” on fulfilling the role of “instructional and spiritual leader.” App. 132. Even the recommendation form she sent to references explained that she was applying for “an important leadership role” with the Archdiocese. App. 190.

Nor would any of this come as a surprise to her at St. Anthony’s since she’d fully embraced it while serving as principal of St. Joseph’s. There, Fratello evaluated *herself* as a “RELIGIOUS LEADER,” giving herself high marks and reporting that she was “excellent” at things like prioritizing the school’s “comprehensive religious education program,” and “good” at implementing the Catholic Values Integration Program. Supp.App. 173. Fratello’s own handwriting identified herself “as a spiritual & instructional leader.” Supp.App. 178.

At a practical level, this well-established leadership role required Fratello to provide direction for the religious education program’s

implementation, the supervision of the teachers providing the program, recruitment of teachers who would implement the program, planning how to achieve the School's religious goals, training teachers about the School's "Catholic identity," execution of the Catholic Values Infusion Program, and personally promoting and encouraging faith in her students and faculty. App. 133, 136, 154. Indeed, Fratello directly admitted that the principal at the School "must of necessity be involved in . . . every aspect of the school operation," including "oversee[ing] . . . religious education, curricula instruction, [and] formulation and communication of school policy." App. 305 (Fratello's Response to Defendant's Rule 56.1 Statement). In this leadership role, Fratello admitted that "she had a responsibility to promote Catholic values" and to "maintain high academic standards enshrined in an atmosphere of Catholic faith." *Id.* at 313-14.

And by all accounts, including her own, Fratello personally performed these religious responsibilities. *See, e.g.,* App. 318. She managed, evaluated, and worked closely with teachers on a consistent basis to carry out the School's religious education mission. App. 96; *accord* 329-31 (admitting that she "worked closely with teachers and staff to carry [out]

the St. Anthony's School's mission," "expected teachers to relate Christian and Roman Catholic doctrine and teachings to . . . students," and "sought to ensure that Catholic values were found within the classroom"). She personally supervised teachers performing religious tasks such as prayer. App. 96, 331. She instructed teachers to attend religious ceremonies and to put religious decorations in classrooms. App. 97-98, 325, 337. She personally led individual students, and all of the students collectively, in daily prayer. App. 96, 322-23. She acted as the public religious leader of the School, providing religious blessings and exhortations at commencement ceremonies and explaining to the media that the School she led provided "strong Catholic faith-based education." App. 196, Supp.App. 83-84.

Fratello's status as the school's "Religious Leader" was reflected in the evaluations of her service as such. App. 99, 108, 198; Supp.App. 113, 119, 133, 143, 157, 189. Her supervisors and faculty said she set "a good example as a religious leader," and made "religious values" the "focus of life at the school." App. 107. She was praised for fostering a Christian atmosphere, prioritizing comprehensive religious education, encouraging communal worship, ensuring that religion classes were taught by

knowledgable Catholics, providing for the religious growth of her staff, and strengthening the Catholic identity of the School. *See, e.g.*, Supp.App. 113, 143.

Religious character and conduct. Religious leaders not only express religious teachings, but are the “embodiment of it[].” *Petruska*, 462 F.3d at 306. Both “the content and the credibility of a religion’s message depend vitally upon the character and conduct of its teachers.” *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., joined by Kagan, J., concurring). Thus, a religious body’s insistence that an employee “live up to the religious precepts that he or she espouses,” *id.*, is an indication that the employee occupies a ministerial role.

Here, Appellees required their principals to practice what they preached (and what they instructed others to preach). An applicant for the position had to be “a practicing Catholic” who was “in union with Rome” and confirmed “a commitment to the teachings of the Church and to the development of Christian spirit and a community of faith within a school.” App. 138, 245. And the contract Fratello signed accepted the School’s right to dismiss her for “immorality, scandal, disregard or disobedience of the policies or rules of the [Archdiocese], or rejection of

the official teaching, doctrine or laws of the Roman Catholic Church.” App. 85, 346. Moreover, the School’s instructional guidance for principals urged them to “model” the School’s “Catholic values.” Supp.App. 57

2. Fratello performed significant religious functions.

Fratello performed significant religious functions in “conveying the Church’s message and carrying out its mission,” *Hosanna-Tabor*, 132 S. Ct. at 708, because, among other things, she conducted “religious ceremonies and rituals” and taught “the tenets of the faith to the next generation.” *Hosanna-Tabor*, 132 S. Ct. at 712-13 (Alito, J., joined by Kagan, J., concurring); see also *Cannata*, 700 F.3d at 175 (same); *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 (same).

Religious services and ceremonies. One of the important religious functions Fratello performed was to lead the student body and teachers of St. Anthony’s in daily prayer. Every morning of the school year, Fratello would lead her students and faculty in praying the Our Father prayer. App. 322. In this, she would lead them in asking that God’s name be “hallowed,” for God’s “kingdom [to] come” and that God’s “will be done on earth,” as well as acknowledging their sin and asking for God’s forgiveness for it. App. 322-23; Supp.App. 82. Every Friday in October,

Fratello would lead all of her students in prayers that make theologically significant statements about God's identity as a Trinity, about the significance of and their personal relationship with Mary as the Mother of God, and about Mary's ability to intercede for them. App. 323, Supp.App. 83. Fratello also provided prayer at annual commencement ceremonies with faculty, students, and students' families. App. 332-33; Supp.App. 83-85.

Further, Fratello played an important role in religious ceremonies by personally attending, repeatedly encouraging students and parents to attend, and by regularly instructing her faculty to attend Mass and other religious ceremonies like First Holy Communion, the Sacrament of First Reconciliation, Confirmation, and an annual September 11 Memorial Prayer. App. 327, 337-38; Supp.App. 11-13, 86, 140, 152-53. Fratello also supervised and approved the selection of hymns and lay persons chosen to recite prayer at two annual special Masses. Supp.App. 108. Moreover, Fratello personally participated in some religious events, helped to organize them, and arranged for appropriate religious decorations for them. App. 337-38; Supp.App. 31-32, 90-91, 109-10, 129-30.

Teaching the faith. Fratello also performed the important religious functions of directly instructing students in the Catholic faith, supervising teachers in their instruction of Catholic faith, and directing the content of religious curriculum. App. 329-331 (admitting she “expected teachers to relate Christian and Roman Catholic doctrine” and that she “sought to ensure Catholic values were found within the classroom”); App. 331-32 (directing teachers to work specific religious content “into your Religion classes”). She was “responsible” for emphasizing “the importance of religious instruction,” ensuring “the quality of the catechetical experience in the school,” and setting “the amount of time spent on religious education.” Supp.App. 35. To that end, Fratello guided the selection of *all* instructional materials and text books. App. 305; Supp.App. 38. And she performed her responsibilities on—at least—a weekly, monthly, and annual basis. App. 329-330; Supp.App. 106-107 (noting that Fratello reviewed weekly lesson plans, including for religious content, held monthly faculty meetings that discussed religious events to be held at the school, and annually handed out curriculum on Catholic values and saints).

As Justices Alito and Kagan pointed out, teaching is a religious function that is central to religious groups, since their “very existence is dedicated to the collective expression and propagation of shared religious ideals.” *Hosanna-Tabor*, 132 S.Ct. at 712 (Alito, J., joined by Kagan, J., concurring). And since “[r]eligious groups are the archetype of associations formed for expressive purposes[,] . . . their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.” *Id.* at 713.

D. The remaining *Hosanna-Tabor* considerations also confirm that Fratello was a minister.

The remaining *Hosanna-Tabor* considerations—Fratello’s title and how Fratello used the title—also indicate that she was a minister. Although courts have not always focused on these considerations in the same way they have focused on religious role and religious functions, in this case these two considerations are at the very least strong additional evidence that Fratello was a minister.

1. Fratello’s title indicated that she held a position of religious leadership.

Fratello was the principal of St. Anthony’s School. The contract she agreed to was “for the position of elementary school principal” at “St.

Anthony's School," and she signed as the "PRINCIPAL." *See* App. 84-85; *see also* App. 92 (2008 performance review letter from Archdiocese identifying Fratello simply as "Principal, St. Anthony School"). A "principal" in the Archdiocesan system was the leader of her school. And parish schools within the Archdiocese were avowedly, openly, and wholly religious ministries. *See, e.g.*, App. 85 ("The principal recognizes the religious nature of the Catholic school"). As in *Hosanna-Tabor*, this title denotes a significant "role distinct from that of most of [the religious group's] members." *Hosanna-Tabor*, 132 S. Ct. at 707; *see* Sections I(B) and I(C)(1), *supra* (explaining the religious leadership role of the principal).⁴ Thus, Fratello's title as the Principal of St. Anthony's School established her as a religious leader for a religious ministry.

2. Fratello used the title of principal to hold herself out as a religious leader.

When Fratello applied for the position of principal at St. Anthony's, she held out her "RELIGIOUS LEADERSHIP" role at St. Joseph's as a

⁴ Judge Seibel held that "there is nothing inherently religious about the title 'Lay Principal.'" App. 445. But the issue is not whether the mere text of the title includes a religious word. "Press secretary" or "organist," *Rweyemamu*, 520 F.3d at 206, are not any more "inherently" religious than a "principal," but in their proper context these titles all denote religious activity.

basis for hiring her. Supp.App. 173; App. 191, 316. When she then accepted the position at St. Anthony's, Fratello accepted the "vocation" of Catholic leadership over an avowedly religious ministry, App. 110, and agreed to "fulfill all of the duties and responsibilities of the position." App. 84. And while holding that office, she held herself out to faculty, students, parents, and other members of the community as a "strong Catholic" and "religious leader" who could lead them in daily prayer, accompany them to religious worship, participate with them in religious rites, guide them in religious instruction, and encourage them to embrace religious tradition. And her faculty recognized her as their religious leader at the school. App. 99, 108, 198; Supp.App. 113, 119, 133, 143, 157, 189. In short, she "minister[ed] to the faithful," "communicat[ed] the faith" and "personifie[d] [the Church's] beliefs." *Hosanna-Tabor*, 132 S. Ct. at 706-07, 712. Judge Seibel correctly found that Fratello's acting like a minister in a role she knew to be "ministerial" meant she held herself out as a minister. App. 446.

II. The alternative ministerial exception tests proposed by Fratello and her amici have no foundation in law.

In response to Judge Seibel’s ruling below, Fratello and her amici make a number of claims about the *Hosanna-Tabor* standard that have no foundation in law. Indeed, several of the proposals appear to be attempts to relitigate *Hosanna-Tabor*—which was decided 9-0 by the Supreme Court—in this Court. The Court should reject their attempts to untether Second Circuit ministerial exception jurisprudence from *Hosanna-Tabor*, this Court’s existing jurisprudence, and the jurisprudence of other Circuits.

A. Fratello’s focus on her title contradicts both *Hosanna-Tabor* and over forty years of settled caselaw.

Fratello argues that although a “religious principal” for the School would qualify as a minister, because her title was “lay” principal, she was not a minister. Fratello Br. at 6 & n.5. Indeed, much of her argument hinges on the idea that the word “lay” in her title is a kind of trump card that dereligionizes her admittedly religious role and religious functions at St. Anthony’s. This argument is wrong for three reasons.

First, it is directly contrary to the reasoning and clear guidance in both *Hosanna-Tabor* and over forty years of settled precedent. *Hosanna-Tabor* held that “a title, by itself,” cannot be dispositive. *Id.* at 708.⁵

Justices Alito and Kagan explained why this must be so: the term “minister” is commonly used in some—mostly Protestant Christian—faiths to denote their leaders, but are not used, and sometimes outright rejected, by other faith traditions. 132 S. Ct. at 711 (Alito, J., joined by Kagan, J., concurring). In a country where “virtually every religion in the world is represented,” it would “be a mistake if the term ‘minister’” were “viewed as central.” *Id.* at 711 (Alito, J., joined by Kagan, J., concurring). Indeed, some religious groups, such as Sikhs or Quakers, believe that it is wrong to give any believer a ministerial title or to recognize any clergy, though as a practical matter there are many individuals who serve religious functions. *See also id.* at nn.3-4 (noting that Muslims typically

⁵ The same is true for the concept of ordination. *Rayburn*, 772 F.2d at 1168 (the ministerial exception’s applicability “does not depend upon ordination but upon the function of the position”). In *Hosanna-Tabor*, the plaintiff was not ordained, but she was still a “minister” for purposes of the ministerial exception.

do not use the term “minister” for their leaders but Jehovah’s Witnesses consider all baptized believers to be “ministers”).

Indeed, no circuit has ever made “formal title determinative” of the ministerial exception’s applicability. *Hosanna-Tabor*, 132 S. Ct. at 714 (Alito, J., joined by Kagan, J., concurring). The courts have instead have reached a consensus that the exception “encompasses more than a church’s ordained ministers.” *Id.* (quoting *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010)); *see also Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 (courts have “routinely applied the exception in cases involving persons other than ordained ministers”).⁶ As this Court has emphasized, “the term ‘ministerial exception’ is judicial shorthand” and the doctrine “protects more than just ‘ministers.’” *Rweyemamu*, 520 F.3d at 206-07 (noting the doctrine’s application to a press secretary, staff of a Jewish nursing home, and an organist/music director). In the end, it is “the realities of the position” and not considerations such as “title” that render [a] position

⁶ Contrary to Fratello’s argument here, *no* court has ever confined the exception to the “church house pulpit” or to solely “pastoral ministers.” Fratello Br. 27, 32.

ministerial.” *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 n.4 (7th Cir. 2003) (noting that, had the press secretary at issue “simply served in the capacity of translating the [Church’s] message from English to Spanish,” instead of “crafting the message,” she would not have been a minister).

Second, applying Fratello’s approach would contradict the meaning of the word “lay” within Catholic religious belief. In Catholic thought, laypeople can take on significant ministerial roles. *See, e.g.*, Catechism of the Catholic Church (1994), § 903 (describing lay ministry). Indeed, one of Fratello’s own amici is a strong proponent of lay ministry, as in their view it allows women substantial ministerial roles within the Church. *See* Future Church, *Women in Church Leadership: Lay Ecclesial Ministers in the Catholic Church*, <https://www.futurechurch.org/women-in-church-leadership/women-in-church-leadership/lay-ecclesial-ministers-in-catholic-church> (last visited Nov. 7, 2016). Yet in Fratello’s view, this entire category of ministerial roles should not count because they are filled by “lay” Catholics. The reality is that Fratello’s cramped understanding of “ministry” is considerably narrower than the Catholic Church’s.

Third, Fratello's argument that "lay" and "minister" must be forever opposites would, if adopted, wrongly penalize religious groups for involving laypeople fully in the ministries of their church. It would also provide a perverse incentive for churches either to bar laypeople from substantial "role[s] in conveying the Church's message and carrying out its mission," *Hosanna-Tabor*, 132 S. Ct. at 708, or to bestow ministerial titles upon as many employees as possible in an effort to insulate themselves from liability. But the strictures of the First Amendment cannot (and should not) turn on how many employees are given the express title of "minister."

Fourth, Fratello claims her "lay" position is nonministerial by contrasting it with "Religious" principals and "teachers of religion." Fratello Br. 45. But at St. Anthony's, the *functions* of a "lay" principal and a "religious" principal are the same. The only difference beyond nomenclature is the recruitment pool. A "Religious" principal is so titled because the applicant is a member of a religious order (such as a nun) who serves at the school by agreement of her order, and thus bears the technical title of "the Religious." App. 168 ("the Religious is an agent of the Congregation").

Likewise, the basic qualifications and expectations of a “lay principal” and a “teacher of religion” at the School are the same. Both must be members of a Catholic parish who practice and communicate their faith in accordance with Catholic teachings, both must either have or be in the process of obtaining catechist certification, and both must be committed to building a Catholic community in the School. *Compare* App. 148 (teacher of religion qualifications) *to* App. 85, 138, 245 (principal qualifications). In addition, both must teach Church beliefs, participate in prayer and worship, accompany students to religious ceremonies, engage the School and faculty in prayer on a regular basis, and participate in catechistic formation. *Compare* App. 148 (teacher of religion’s duties) *to* App. 85, 96-97, 136 (principal’s duties). If anything, because Fratello had responsibility for the hiring, firing, supervision, and teaching of her religion teachers, she had a much *more* significant role in accomplishing the School’s religious mission than individual religion teachers did.

B. Fratello’s “two-prong” test is an invention that contradicts both the law and the facts of *Hosanna-Tabor*.

Fratello also offers a novel “two-prong test” for deciding ministerial exception cases: “Appellant Fratello proposes that this Court adopt a two-

prong analytical approach to analyzing cases involving the ministerial immunity defense.” Fratello Br. 3. Under the first prong of Fratello’s test, the defendant invoking the ministerial exception would have to point to a specific “secular” term in the written contract with the employee as the basis for a bona fide occupational qualification (BFOQ). Fratello Br. 3. Under the second prong of Fratello’s test, the Court makes an “ecclesial inquiry,” deciding whether there was a non-employment decision of a church body that it would have to give effect to via the BFOQ exception. Fratello Br. 4.

The Court will search Fratello’s brief in vain for any precedent—Supreme Court, Court of Appeals, district court, or otherwise—that she can cite to as support for the existence of this test. The most she can claim is that her proposed new test is “not inconsistent” with *Hosanna-Tabor*. Fratello Br. 5. But that is not true, and even if it were, it would be far from enough to justify overturning cases like *Rweyemamu*.⁷

The reality is that Fratello is proposing an entirely new test because *Hosanna-Tabor* squarely forecloses her claim. The surest sign that

⁷ Fratello freely admits that she believes that “much of the pre-*Hosanna-Tabor* case law” invites “abuse.” Fratello Br. 56.

Fratello's proposed new test is really an attempt to relitigate *Hosanna-Tabor*—as opposed to an effort to apply it in good faith—is that her proposed new test both attempts to resurrect a number of arguments that the Supreme Court specifically rejected in *Hosanna-Tabor*, and rests on mistakes about the basic facts of *Hosanna-Tabor*.

Doctrinal errors. For example, Fratello argues that *Hosanna-Tabor* was wrongly decided because, she claims, the EEOC “fail[ed] to recognize and present” to the Court an argument that the existence of a bona fide occupational qualification (BFOQ) would mean “there was no need to resort to the First Amendment or ministerial immunity.” Fratello Br. 4. Yet both the Perich and government offered just this sort of BFOQ argument to the Court. *See* Perich Br. at 36 n.9, *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (discussing BFOQ); *accord* Gov't Br. at 31, *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (same). To be sure, since the Court relied on the First Amendment in making its decision, it passed over these BFOQ arguments in silence. *See Hosanna-Tabor*, 132 S. Ct. at 699. But there is no disputing that the arguments were presented to the Court and rejected without comment.

In another example of doctrinal error contradicting *Hosanna-Tabor*, both Fratello and her amici suggest that this Court should ignore her religious leadership role and religious functions and instead should analyze Catholic canon law to determine whether “ecclesial decision-making” supported the non-renewal of her contract, Fratello Br. 44; CLG Amicus Br. at 4, 12, or “whether the religious employer’s articulated reason for the plaintiff’s termination was a pretext[,]” NELA Amicus Br. at 12-13.

As an initial matter, these arguments are just an attempt to re-open the kind of “pretext” inquiry conclusively foreclosed by *Hosanna-Tabor* and *Rweyemamu*. Suggesting pretext “misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.” *Hosanna-Tabor*, 132 S. Ct. at 709. Indeed, determining whether a religious employment decision was pretextual necessarily leads to “impermissible entanglement with religious doctrine.” *Rweyemamu*, 520 F.3d at 209.

More importantly, civil courts simply have no authority or competence to accept Fratello and her amici's invitation to analyze and enforce Catholic canon law. CLG Amicus Br. at 12 (inviting Court to make "ecclesial status" decision). As *Hosanna-Tabor* explained, "the First Amendment commits" the analysis of "church laws and regulations" "exclusively" to the church itself. 132 S. Ct. at 705 (quotation omitted). The Fifth Circuit applied that rule to squarely reject precisely this kind of canon-law argument: courts simply cannot "second-guess whom the Catholic Church may consider a lay liturgical minister under canon law." *Cannata*, 700 F.3d at 179-80; accord *Askew v. Trustees of Gen. Assembly*, 684 F.3d 413, 420 (3d Cir. 2012) (courts cannot question churches' application of their own religious laws); *Rweyemamu*, 520 F.3d at 205 (courts cannot claim "competen[ce] in . . . ecclesiastical law").

A third glaring contradiction with *Hosanna-Tabor* is Fratello's claim that enforcing the ministerial exception would violate the Establishment Clause. Fratello Br. 48. She also claims that the district court "impermissibly picked sides in a religious dispute" by failing to enforce Fratello's understanding of Catholic canon law. Fratello Br. 49.

The *Hosanna-Tabor* Court gave no credit to similar arguments presented to it by some of the EEOC's amici, who claimed that recognizing the ministerial exception would be a violation of the Establishment Clause. See Brief of *Amici Curiae* Law and Religion Professors 32-35, *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (authored by counsel for CLG amici). Indeed, the Court recognized that the ministerial exception does not violate the Establishment Clause—it is *required* by the Establishment Clause. *Hosanna-Tabor*, 132 S. Ct. at 702 (it “violates the Establishment Clause” to give “the state power to determine which individuals will minister to the faithful”). The virtues of non-entanglement and state neutrality among faiths are furthered by a robust ministerial exception that ensures church-state separation.

Fratello's amici make a similar doctrinal mistake in arguing that ruling against Fratello creates an “absolute preference” in favor of Appellees, in violation of the Establishment and Free Exercise Clauses. CLG Amicus Br. 17-23. This argument was also presented to, and rejected by the Supreme Court. See Brief of *Amici Curiae* Law and

Religion Professors at 36, *Hosanna-Tabor*, *supra* (No. 10-553). Instead the Court held that:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor, 132 S. Ct. at 710. Thus to the extent there is any “absolute preference” for the religious freedom of a church, it is dictated by the First Amendment, which has “struck the balance for us.” *Id.* Fratello’s amici’s attempt to unsettle that balance is really just an attempt to relitigate *Hosanna-Tabor* itself.

Factual errors. Fratello’s proposed “two-prong test” is also based on ignorance of the basic facts in *Hosanna-Tabor*. For example, Fratello claims that “the Lutheran Congregation, acting as a religious body, revoked its member’s religious credential, Ms. Perich’s title of ‘Minister of Religion, Commissioned.’” Fratello Br. 38. Not so. Perich kept her title of “Minister of Religion, Commissioned” and remained on the Lutheran Church’s roster of commissioned ministers for several years after she had

her call revoked by the Hosanna-Tabor church. *Hosanna-Tabor*, Perich Br. 14. Fratello is confusing the ecclesiastical title “Minister of Religion, Commissioned” with the individual congregation’s “call.” One of Fratello’s “prongs” is thus predicated on a misunderstanding of *Hosanna-Tabor*.

Fratello also wrongly claims that the *Hosanna-Tabor* plaintiff Perich was required to be a commissioned minister in order to serve as a teacher at the Lutheran school. Fratello Br. 39. In fact, Perich had been a non-commissioned teacher for a year before she became a commissioned minister. *Hosanna-Tabor*, 132 S. Ct. at 700. Although the school had a preference for commissioned ministers, it was not an absolute requirement, as demonstrated by Perich’s experience.

Fratello’s proposed new “two-prong test” is thus wrong both because it has no support in caselaw and because it is predicated upon erroneous understandings of both the law and the facts in *Hosanna-Tabor*.

C. The horrors posited by Fratello and her amici have never come to pass.

Fratello and her amici also offer up a host of horrors they say will result if *Hosanna-Tabor* is followed. For example, Fratello states that if the ministerial exception applies in this case:

American [sic] will then be on its way to becoming a theocracy, as religious groups engage in secular (not exclusively religious) activities far from their church house pulpit.

Fratello Br. 27. Similarly, Fratello states that “Ministerial immunity allows a religious employer to put up a sign: ‘No Blacks, women, or disabled people need apply.’” Fratello Br. 53. Fratello’s counsel also poses an odd hypothetical about his own behavior:

I and other members of this new religion [invented by Fratello’s counsel] can racially and sexually harass and engage in what otherwise would be unlawful discrimination with impunity. My new ministers, unbeknownst to them, will have lost their civil law protections by joining my Church-affiliated law office.

Fratello Br. 55-56.

There are at least three responses to these horribles. As an initial matter, if these horribles were going to come to pass, they would have come to pass in the more than forty years since the ministerial exception was first applied in 1972. That the sky has not fallen during that time is *prima facie* evidence that these scenarios will remain hypotheticals.

Second, these hypotheticals owe much of their force, to the extent they have any, to insincerity. For example, Fratello’s counsel’s hypothesized harassing law office seems predicated on (one hopes) insincere action by

Fratello's counsel. Yet any claims or defenses under the First Amendment, including the ministerial exception, cannot be enforced if they are insincere. *See Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (free exercise protections are only available to those who “sincerely hold[] a particular belief”).

Third, this genre of hypothetical is exactly what was offered and rejected in *Hosanna-Tabor*, as “[t]he EEOC and Perich fores[aw] a parade of horrors” if the ministerial exception were to be recognized by the Supreme Court. *Hosanna-Tabor*, 132 S. Ct. at 710. The Supreme Court refused to be drawn into deciding fact scenarios that were not then before the Court. *Id.* This Court need not credit these claims any more than the Supreme Court credited them—which is to say, not at all.

For example, some of Fratello's amici claim that “every practicing lay Catholic employee in the country *could be* transformed into a minister devoid of employment rights[.]” CLG Amici Br. 24 (emphasis added). That concern is obviously not raised by this case, which involves the head of a Catholic school, not “every” kind of lay employee nationwide. Moreover, several decades of caselaw have proven that the courts are perfectly capable of adjudicating such claims on a case by case basis.

Those employees that serve a religious role or perform a religious function are rightfully deemed ministers; those who do not, are not. That some employees “could be” ministers is merely the common sense status quo.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 12,237 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on November 7, 2016.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system.

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