16-1271cv

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 THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the Reply Brief of Plaintiff-Appellant Joanne Fratello ("Ms. Fratello"). The proposed two-prong analytical approach set forth in Ms. Fratello's opening brief honors *Hosanna-Tabor*, is principled, and is an approach which allows both fairness and predictability in adjudicating employment cases involving Church-related entities.

REPLY ARGUMENT

"Of all the animosities which have existed among mankind those which are caused by difference of sentiments in religion appear to be the most inveterate and distressing and ought most to be deprecated.
--George Washington

"…this evidently inborn predisposition leads with frightening ease to racism and religious bigotry. … good people do bad things."
--E.O. Wilson[1]

"Teach your children well…."
--Crosby, Stills & Nash

POINT I:
MS. FRATELLO WAS A LAY EDUCATOR, NOT A CLERGYMAN

A. Appellees' "Substantial Religious Function" test will swallow *Hosanna-Tabor*'s ministerial immunity rule, and expand it beyond the confines of Churches

1. Clergy and "affiliated entities"

The Archdiocese's argument that the "ministerial exception applies when an employee has a substantial religious role or performs significant religious functions" is not *Hosanna-Tabor's* test. What made *Hosanna-Tabor* a unanimous decision was addressing the Founding Father's historically-based concern that:

[1] *See*, EDWARD O. WILSON, THE MEANING OF HUMAN EXISTENCE (2014) at p. 31.

> "Government appointment of clergy was a hallmark of an oppressive state establishment….."[2]

There are two important aspects of quote. One is that it involves the organization of a Church itself [3] (not Church-affiliated entities operating in the secular world). Second is that it involves the Church's appointment of its clergy—its ecclesial ministers. Thus, any Church (Judeo-Christian, Islam, Scientologist,[4] or Secular Humanism[5]) can appoint whomever it desires as "ministers" of its religion's beliefs. The State has no say.

But as to a Church-affiliated hospital, law or medical school, military academy, bible (or handgun) manufacturing company,[6] or as here, elementary school, the State has the right to supervise and to ensure that secular law is respected. Religion is not a free pass to ignore the rules of the larger society (the free pass that the Archdiocese seeks for its Church- affiliated entities).

As to clergy, religious clergy are a known lot, historically and practically. The idea that an elementary school principal fits within this definition is,

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[2] *See, Ira C. Lupu & Robert W. Tuttle, The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, at p. 8. Forthcoming, 20 Lewis & Clark L. Rev, Issue #4 (retrieved at: http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2478&context=faculty_publications).

[3] The Court may find the IRS definition of "church" instructive. *See*, https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined.

[4] *See, e.g., Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1181 (9th Cir. 2012).

[5] *See, e.g.*, Justice Hugo Black's footnote 11 in *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)("Among religions in this country … are … , Secular Humanism….").

[6] Hobby Lobby-style. *See, Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

respectfully, simply absurd. The "functions and duties" of a lay elementary school principal are not determined by Roman Catholic Church religious doctrine. Not at all, in any respect. Ms. Fratello's employer (St. Anthony's School) and its Pastor could require her to be a good Catholic administering (and thus leading) the school as an academic entity. Yet St. Anthony's School and the Archdiocese expressly tasked the Parish Priest with the pastoral (spiritual) duties and leadership. The Pastor leads the spiritual. The Principal leads the academic.

At its core, ministerial immunity deals with avoiding State intrusion into ecclesial (spiritual) dogma of a Church. As stated in *The Mystery of Unanimity*:

> "the central thread of this body of law is steady and unbroken—on matters of religious doctrine, church governance, and control of leadership, the state is forbidden from substituting its judgment for that of duly constituted religious authority. The state must respect the decisions of religious authorities on ecclesiastical questions." (*citation omitted*)[7]

The State must not dictate clergy, nor dictate what the clergy or religious teacher preaches in the pulpit or during Sunday School.

It is religious faith—something not at issue in this case—that the First Amendment protects. *Cf., Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) ("Father Justinian is an ordained priest…; his duties are determined by Catholic doctrine and they are drawn into question in this case."[8]). This is so even if the

[7] *Id.*

[8] Father Justinian exhausted an ecclesial appeal to the Vatican, which Church authority found that there was "just cause" for his removal for several reasons, including "complaints regarding

religion is Secular Humanism, with faith is science, and with the Church selecting scientists as its "clergy."[9]

But the State has every right to ensure that Church-affiliated entities and people respect the law—for example, that a Church-affiliated hospital practice good medicine, that a Church-affiliated business act lawfully, and that a Church-affiliated elementary school (or law or medical school) provide a sound elementary school education (or sound law or medical training). This is so even if the hospital, business or school decides to have an environment "infused with Church values". Expanding absolute immunity beyond the Church itself,[10] to affiliated corporations, religious groups or individuals is dangerous. It is dangerous not only to employees' civil rights, but also to our Nation's children, our society and our democracy.

The Archdiocese and its *amici* advocate for organized religion from a single religion-oriented Ivory Tower, considering neither world history nor evolutionary

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his homilies…." *Id*. 199.

[9] *See*, note 5 *supra*.

[10] The Appellant's Brief in *Penn v. N.Y. Methodist Hospital et ano*, 16-0474-cv, pending in this Court, discusses "religious organizations" and their legal relationship with their related Churches and religions. Granting religious exemptions to groups or persons for purely religious reasons threatens values protected by the Establishment Clause. *See*, e.g., P. KURLAND, RELIGION AND THE LAW, *passim* (1969). The claim to an exemption (such as ministerial immunity) is ordinarily through assertion of the Free Exercise Clause. Is the objection a religious one? *See, Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations,* 79 Columbia Law Review 1514, 1515, n. 8 (Dec., 1979) (available at http://www.jstor.org/stable/1121813). There is no evidence in the record that St. Anthony's School had any "religious" objection to Ms. Fratello's continued employment, or that religion had any bearing on her termination (employment contract non-renewal).

biology, nor the current state of the Nation and the world. They fail to fathom the dangers their expansive view of ministerial immunity entails—their tribal view[11]—a view that endangers our democracy and would be anathema to the Founder's Father's Enlightenment-Age thinking.

An objective examination of the facts in this case leads to the inescapable conclusion that Ms. Fratello was not a minister of the Roman Catholic Church, and should not be deemed a minister for civil law immunity purposes.

2. Hosanna-Tabor factors

The Archdiocese's Brief acknowledges four considerations that the Supreme Court found relevant to determining ministerial immunity status in *Hosanna-Tabor*:

> (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."

132 S. Ct. at 708; *Archdiocese Brief* p. 29. As to these, the "Church" gave no formal religious title to Ms. Fratello—she was hired with the title "lay principal," an elementary school administrative title. The substance defined by that title was private elementary school administration. Ms. Fratello's use of her title of

[11] *See*, MEANING OF HUMAN EXISTENCE, at chapters 12- 13. The Founding Fathers knew the dangers of organized religion, notwithstanding that the underlying scientific knowledge was not yet available. An "originalist" view of the Constitution would be this one.

Principal was to administer the school, and her testimony fairly indicates that she spent perhaps 99% of her time performing secular, administrative work.

Significantly, Ms. Fratello performed no functions specifically "for the Church," and certainly no pastoral functions.[12] Rather, she performed elementary school administration for St. Anthony's School; was paid a salary for this; and as a practicing Catholic, she did what any good Catholic would do as an employee of a Church-affiliated school—led some prayers, respected religious holidays and festivities and try to be a role model amongst fellow Catholics.

She was hired to perform functions for the elementary school, in an *in loco parentis* position vis a vis the school children (many of whom are not Roman Catholic), ensuring the proper teaching of the State-required secular education. The Parish Priest and the head of religious instruction were responsible for the religious instruction,[13] and the Parish Priest pastoral care. If Ms. Fratello violated her contract, she could be fired for cause, as the Archdiocese acknowledges at page 12 of its Brief, namely, that Ms. Fratello:

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[12] As pointed out in Ms. Fratello's opening brief, the Roman Catholic Church has its "pastoral" (spiritual/religious) ministry. It also has other "ministries of service" that are essentially secular and humanitarian—education, literacy, social justice, health care and economic development. *Appx.* 356 (¶ 66). Appellee St. Anthony's School, or Fordham Law School, would be education; and a Hobby Lobby Inc. might fit into economic development.

[13] If a Roman Catholic bishop or a canon lawyer were asked, they would undoubtedly admit that Ms. Fratello could not under Church doctrine qualify as a pastoral minister. Justice Thomas would defer to the Church's "good faith understanding of who qualifies as its minister." *132 S. Ct. at* 710. The record contains no representation whatsoever that the Roman Catholic Church viewed Ms. Fratello, a female lay principal, as a spiritual or pastoral minister—someone who preaches the faith or is involved in Church governance.

> "… 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.'"

There is no indication in the record that Ms. Fratello violated these contractual terms in any manner. Moreover, she had and has a strong Catholic faith.[14]

Assuming *arguendo* that Ms. Fratello worked for "the Church" (the Roman Catholic Archdiocese and not St. Anthony's School), the Supreme Court in *Hosanna-Tabor* made clear that religious function given to an employee is only one factor to be considered. As argued throughout this brief and Ms. Fratello's opening brief, if religious duties alone create a minister, then any religious group need only impose religious duties upon every person employed by it, or employed by its Church-affiliated entities (even for profit companies, such as Hobby Lobby Stores, Inc.), in order to make everyone a minister, and thereby immunize the Church and all Church-affiliated employers (e.g., Appellee St. Anthony's School) from secular law. This is a path that will advance the power of religious organizations (or more accurately, people with power clothed in religion) at the

[14] Her undersigned lawyer, on the other hand, was raised Catholic, has a science and overseas military background, witnessed the burning WTC towers on 9/11/2001, and has no qualms about describing the risks to our democracy and Bill of Rights posed by the Courts granting organized religion increased power over Americans' lives, employment, and especially religious indoctrination of American children in elementary school or high school, whether in a Catholic school, a Hassidic school, some other "faith-based" or fundamentalist school.

expense of both individual American citizens and American democracy (a citizenry that depends upon an educated citizenry, not an indoctrinated citizenry).

The much more important factors in deciding whether an employee is a minister are, first, whether the person has been chosen by his or her Church to be a pastoral minister of its religious faith, to teach the Word of its gospel (whatever that gospel is—Roman Catholicism, Jihadist Islam, Secular Humanism or anything else), and second, whether the employee serves in a position involving internal Church governance. It is the preaching of a religion's gospel and its internal governance and leadership that is sacrosanct and beyond the reach of secular authority. These are Church activities.

Choosing a pastor and internal Church governance are, by definition, not the activities of Church-affiliated entities, whether a Church-sponsored elementary school, or a Church-affiliated college, graduate school (law, medicine, business), hospital or clinic, or *Hobby Lobby*-style bible or gun manufacturing, news media or internet publishing company. If this Court blurs the distinction between a Church and all its possible "affiliated entities" and organizations, the risk is that increasing numbers of entities will seek religious affiliation, in order to avoid secular law.

3. Hosanna-Tabor unanimity

The Archdiocese portrays *Hosanna-Tabor's* grant of ministerial immunity as expansive in scope. It is not. On the contrary, the reason the decision was unanimous was because it was so narrow in scope—limited to purely internal Church ecclesial decision-making.[15]

One of Archdiocese's *amici* recognized this in a prior writing. *Amicus* Professor Richard Garnett co-authored a law review article for the CATO Institute that set forth the relevant *Hosanna-Tabor* factors, namely, whether the employee was:

1) An ordained/commissioned church leader (basically, a titled minister),
2) "lay" versus religiously "called";
3) In a job position where the "function of job" was religious; and
4) A leader of a religious organization.

See, Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011-2012 Cato Sup. Ct. Rev. 307, 320-21.[16] Each of these favors Ms. Fratello. Ms. Fratello was not ordained or commissioned, was not "called" to serve God, was hired into a position where the "function of the job" was not religious instruction but rather was elementary school

[15] *See, e.g., The Mystery of Unanimity, supra*, note 2.

[16] Prof. Garnett also acknowledged in his law review article that "[g]iven that the [Supreme Court] had never considered the constitutionality of the ministerial exception, the arguments centered more on the doctrine's existence than on its scope and application." *Id.*, at 319. And he acknowledged that Chief Justice Roberts "did not set out a single test or rule … perhaps … to secure unanimity…." *Id.* at 322.

administration, and was not the leader of a religious organization (as the school is an IRC § 501(c)(3) educational not-for-profit[17]), and in any case, both the school and the parish were led by the Parish Priest and the Parish governing body (which did not include Ms. Fratello).

In contrast, Rev. Perich was a religious leader in her religious Congregation, selected and then removed by the Congregation from her "called" religious status (Proposed Prong 2), and her employer expressly sought a Church-credentialed minister (Proposed Prong 1).

The Archdiocese and its *amici* focus on "job function"—arguing for ministerial immunity if a "job" is "religious" regardless of whether it is employment by a Church or merely an affiliated entity of some sort,[18] and regardless of whether the religious job is even part of the same religion as the employer.[19] Religion is thus advanced through Church-affiliated entities performing secular activities, and favored over secular competitors that need to comply with secular legal rules.

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[17] *Appx.* 351 (¶¶ 34-35).

[18] The Archdiocese cites *Temple Emanuel of Newton v. Mass. Comm'n Against Discrim.*, 975 N.E.2d 433 (2012), yet that case involved a truly "religious school" that was actually part of the Church itself, like a Sunday School or Catholic seminary, where only religion was taught.

[19] The Archdiocese cites *Penn v. New York Methodist Hosp.*, currently pending before this court, looking solely at an employee's (a chaplain's) pastoral functions, where his employer is not a Church, and apparently not even a religious organization. *See*, 2013 WL 5477600, at *6 (S.D.N.Y. 2013). Chaplain Penn was in a job akin to that of a U.S. Army military chaplain.

B. No reasonable Roman Catholic, and no Catholic Bishop, would view a lay principal as a minister.

The Parish Priest is a religious minister. A leader of a Catholic seminary may perhaps "presumptively" be viewed as a minister. A leader of a State-sanctioned private school, teaching a core secular curriculum that requires a sound secular education—one that includes science and civics so that the school children of different faiths can become productive and civilly-involved members of the larger society and participate in our Nation's democracy[20]—is presumptively an educator.[21]

To hold otherwise will reflect a bias in favor of religion, which is an instinctual bias explainable by evolutionary psychology, [22] but is not something the Founding Fathers would approve (nor endorsed by Chief Justice Roberts' unanimous majority opinion in *Hosanna-Tabor*[23]).

The Archdiocese' Brief, at p. 34, refers to limitations on State interference with the employment of "lay teacher[s]." Yet this Court permits the State to "order reinstatement of a lay teacher … if he or she would not have been fired otherwise

[20] A concept that the Supreme Court has recognized. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972).

[21] The Archdiocese's second sentence in its Point I(B) can be rephrased as follows: "If a priest working as a religious teacher is defrocked and fired, with the employer protected by ministerial immunity, then the lay principal of the same school must also is subject to ministerial immunity." The Archdiocese's logic is clearly flawed.

[22] *See*, MEANING OF HUMAN EXISTENCE, at chapters 4, 12 - 14.

[23] In *Hosanna-Tabor*, some of concurrences reflected an unduly deferential view of organized religion. Perhaps those justices were allowing the human instinct favoring religion to trump sound jurisprudence.

for asserted religious reasons." *See, Catholic High School Ass'n of the Archdiocese v. Culvert,* 753 F.2d 1161,1169 (2d Cir.1985), cited in *Rweyemamu.*

Moreover, if religion is genuinely at issue, then the § 703 Title VII exemption would protect the employer if, for example, the lay teacher or principal were to renounce the religion or violate the morals clause of the employment contract. The constitutional issue need not be reached.[24]

C. Ms. Fratello's job was not religious—it was to act in a nondiscriminatory fashion for the education and welfare of Catholics and non-Catholics alike

1. She did not have a substantial religious role

Whether or not Ms. Fratello had a "substantial religious role" is a question of fact for a jury (if this Court does not strike the Archdiocese's ministerial immunity defense, as Ms. Fratello requests). The record shows that Ms. Fratello's job was school administration, not Church evangelization. She spent only a tiny fraction of her time on things "religious" in nature (and only as a lay person).

Significantly, both the Archdiocese and Anthony's School have an express policy against discrimination, even discrimination on the basis of religion. *Appx.* 112 and 302 (¶ 1). Thus, Ms. Fratello's job, in part, was to prevent evangelizing and proselytizing of the non-Catholic students. Her role was to be religiously

[24] As acknowledged in *Rweyemamu*, this Court must exercise judicial restraint by avoiding constitutional questions in advance of the necessity of deciding them," 520 F.3d at 201, citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445(1988). The reason this Court reached the ministerial immunity question in *Rweyemamu* was because the Church expressly waived its Religious Freedom Restoration Act ("RFRA") defense.

neutral as to non-Catholic students—a very good reason for St. Anthony's School to hire her as a "lay" employee. Sound academics were first and foremost—a strong sales pitch and marketing tool to the general public for the Catholic Schools and their multi-denominational (and even non-religious) potential educational customers.

This comports with the educational (non-evangelizing) mission of the Catholic Schools. The Roman Catholic Church promotes secular education, just as it promotes sound health care, literacy, social justice and economic development. None of these "ministries of service" are part of its "pastoral" (religious) ministry. The pastoral ministry deals with religious faith, not the secular service ministries. Appellees are conflating the concepts (ignoring Church doctrine and canon law).

As Ms. Fratello's canon law expert explained, the pastoral (spiritual/faith) role is that of the pastoral ministry. For St. Anthony's School, the pastoral (spiritual/ministerial) role was performed by the Pastor—the Parish Priest. The school principal handled the academic—ensuring the sound secular education of the students, in a school with Christian values.

Ms. Fratello had virtually no religious training—just CCD taken when she was herself a child. The idea that the Church would give "substantial religious functions" to a layperson[25] with no pastoral or theological credentials whatsoever

[25] As explained in the opening brief, the Roman Catholic Church's bylaws (its canon law) make

is patently absurd. Ms. Fratello's professional credentials were her secular education, and her secular teaching and administrative experience. Education was and is her "learned profession."

2. She did not perform substantial religious functions

Appellees required Ms. Fratello only to be a "good Catholic." To live and demonstrate catholic values, which she always did. A parent or a janitor can lead a prayer and be a Christian role model. That does not transform them into ministers.

As stated above, Ms. Fratello's time was spent on secular education, with only a tiny fraction, perhaps 1%, of her time spent on "religious" things.

3. Employer manufacturing of pseudo-ministers

A Church-related entity should not be permitted to manufacture "ministers" to obtain ministerial immunity. The Archdiocese's functions test will invite such chicanery. For example, if St. Anthony's School hired a "staff attorney"[26] (advertised to hire an "admitted lawyer, to provide legal advice in a Christ-centered

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a huge distinction between the laity and the ministry. This Church is governed by its ordained ministers. The flock (the laity) follows. True, every religion is different, but we are dealing here with the Roman Catholic Church. Its rules govern who can govern the Church (its bishops) and who can preach the Word of the Lord (its ordained clergy).

Hosanna-Tabor involved a Congregationalist church, where Church governance was by the members such as Rev. Perich, because she was "called" to become, a commissioned minister, after diligent theological study and other rigorous religious examination and scrutiny by this Congregationalist church.

As to types of religious organizations, an informative encyclopedia article, "*Religious Organization," International Encyclopedia of the Social Sciences*, can be found at: http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/religious-organization.

[26] Or school psychologist, or athletic director, or football coach.

way), would it be able to transform its lawyer into a minister by requiring the lawyer to lead some prayers, to provide "legal and spiritual mentoring" to the school's teachers and administrator, to teach some Roman Catholic canon law, and to ensure that the school operated "in accordance with both secular and canon law." Is the lawyer then a minister? If so, the School can say with impunity and immunity, "Afro-American, female and disabled lawyers need not apply!"?

Under Ms. Fratello's proposed two prong method of analysis, the job of "staff attorney" could not be so easily transformed into a "ministerial" job for the sake of immunity. Of course, if the School had a *bona fide* need for a practicing Catholic to fill the staff attorney (or psychologist or coaching) job, then it would be permissible if adherence to the religious faith was a BFOQ (as also discussed in the opening brief). An attorney (or psychologist or coach) who became a misfeasant Catholic could be fired under the Title VII § 703 exemption,[27] but not fired for racist or sexist or disability-biased reasons.

A Church, through its religious beliefs, can abhor what American society embraces. A Church can hate Blacks or women or gays. The Courts must respect this under the First Amendment. Yet the Court must not allow any Church the right to unlawfully discriminatory action in an affiliated school or other affiliated entity. *See*, e.g., *Brown v. Dade Christian Schools, Inc*., 556 F.2d 310 (5th Cir.

[27] 42 U.S.C. § 2000e-1(a).

1977)(en banc), *cert denied* 434 U.S. 1063)(1978). It extends the Free Exercise Clause too far to allow "evangelizing" in a racist or misogynic manner in an elementary school house (or requiring teachers and administrators to do so[28]), or in a non-profit hospital (perhaps by a supervisory chaplain of a completely different faith[29]). Judicial aid to an abhorrent religious belief and accompanying action (e.g., countenancing a pastor firing a lay school principal who opposes race discrimination by the pastor in a parochial school such as the Dade Christian Schools) impermissibly advances and favors religion, by giving "believers" the privilege to discriminate outside the church house, and into the school house (or hospital or business). The wrongdoer is then allowed to escape civil law and the rules of an ordered democratic society—a privilege not enjoyed by the competing nonsectarian private schools.

This Court must not permit ministerial immunity to extend so far, especially where there is no superseding constitutional need (as the Archdiocese has offered no religious basis for its underlying decision to terminate Ms. Fratello). *See, e.g.*,

[28] Or preventing parents of schoolchildren from supporting a lay principal against a racist parish priest. *See*, e.g., *Discrimination in the Name of the Lord, supra note 10, at notes 17-21 & accompanying text.* The parents should have standing, and the courts should not view unlawful discrimination in a private elementary school as an "internal Church matter," as the Church is separate from its affiliated school. The Constitution prohibits private schools that offer their services to the general public from excluding otherwise qualified children on account of race. *See, Runyon v. McCrary*, 427 U.S. 160 (1976)("the Constitution places no value on discrimination….", citing *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

[29] As alleged in *Penn, supra* note 10. Military chaplains are credentialed by their religion, yet professionally supervised by chaplains of different faiths and directly controlled by their military unit's commander (making the proposed two prong analysis particularly useful).

Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1154 (4th Cir. 1980) (upholding 42 U.S.C. § 1981 race discrimination claim by student against parish priest's "religious" decision to expel her from sectarian school for dating an Afro-American).

D. Ms. Fratello is clearly not a Minister under the most important considerations of *Hosanna-Tabor*, namely, Church governance and Preaching

The First Amendment protects the freedom of religious belief. This includes the right of individuals to organize into a religious group—a tribe of believers that we call a "Church." The justices of the Supreme Court in *Hosanna-Tabor* unanimously agreed that as to a Church, the secular courts cannot intrude into whom the religious group (there, a Congregation; here, the Roman Catholic Church's religious authority—its bishops[30]) selects as its religious leaders, as the spiritual leadership of a Church preaches its "faith" and tries to spread such faith and the Word of its God to non-believers. This the First Amendment protects, no matter how obnoxious or irrational the particular faith.

Thus, internal Church governance and allowing the selection of spiritual ministers who preach the particular religion's faith is what *Hosanna-Tabor*

[30] For example, Cardinal Dolan (the head bishop of the Roman Catholic Archdiocese of New York) could remove, or discipline, a Parish Priest. The Parish Priest could then have rights of appeal under ecclesial law. Rev. Perich had rights of appeal under her Church's rules, as the *Hosanna-Tabor* decision makes clear.

Ms. Fratello was not the subject of ecclesial action, and had no right of appeal. Her position was secular, just as would be that of the Chief of Surgery at a Roman Catholic-affiliated medical center. Christ-centered? Perhaps. Ministerial? No.

protects. The St. Anthony's School is an educational non-profit, not a Church, and Ms. Fratello was a lay administrator, not a preacher.

1. The title "lay principal" gives no indication of religious leadership

Ms. Fratello's contract speaks for itself. She is a "lay" employee. If she is immoral or a bad Catholic, she can be removed for cause. It says absolutely nothing about her being a minister of any sort. She is an administrator, who "administers" the elementary school just like the CEO of a medical center administers the hospital, leaving medical duties to the physicians, and pastoral duties to the clergy.[31]

2. Ms. Fratello never held herself out as a religious leader

It would be blasphemy for Ms. Fratello to have held herself out as a religious minister of the Roman Catholic Church, as this would contradict Church doctrine and Roman Catholic canon law. As argued above, the Roman Catholic Church distinguishes between its laity and its ministry, and between its pastoral ministry and its ministries of service.

[31] *Cf..*, the *Penn* appeal currently pending before this Court. Respectfully, the duties of the priest involved in *Penn* are best analyzed under the proposed 2 prong analysis, and as a BFOQ.

POINT II:
MS. FRATELLO'S PROPOSED MINISTERIAL IMMUNITY ANALYSIS IS PRINCIPLED AND NECESSARY

A. The title a Church bestows indicates religiosity, and "lay" means non-religious

The title given Ms. Fratello may not be the sole factor here, but it is an important factor. "Lay" means lay. Non-ministerial. The Roman Catholic Church distinguishes its laity from its ministry. It is canon law—its Church bylaws.

No authorized representative from the Roman Catholic Church has stated to the contrary. The record contains no Archdiocese canon law expert; no priest; no bishop; no person with expertise in Catholic religious doctrine. The only canon law expert is Ms. Fratello's expert, Sister Kate (Kuenstler), who clearly states why Ms. Fratello is not a minister. *Appx.* 286 (¶ 22) and 288 (¶¶ 28-30).

Hosanna-Tabor did not suggest that lay teachers of a religious congregation's school could be ministerial. Rather, it held only the contrapositive, namely, that the commissioned (semi-ordained) teacher, because of her non-lay status (Rev. Perich devoted great effort to becoming commissioned, and her Church took effort in granting the commission), made Rev. Perich a minister. It was a title of spiritually that the "called" Rev. Perich sought and cherished.

Ms. Fratello is the opposite of Rev. Perich. Ms. Fratello had no religious credential (other than being a good Catholic); was not "called"; did not accept a religious title (none was offered); and was not viewed by anyone as a religious

figure (except by the Archdiocese's lawyers). Her only religious training was as an adolescent, and she was not even asked by her employer, St. Anthony's School, to take the basic, on-line, self-certifying "Catechist" training that would refresh her understanding of the basic tenets of Catholicism. Classifying Ms. Fratello as a minister is akin to calling someone with first aid training a physician.

Ms. Fratello was hired as a school administrator. She can be evaluated solely on that job, and if necessary, on the morals clause contained in her lay principal contract of employment. Unlike, say, the priest in *Rweyemamu, supra, 520 F.3d at 209,* Ms. Fratello did not preach Gospel or utter homilies, and did not engage in Church-directed religious functions (and certainly no "religious activities" that a secular court would find difficulty assessing).[32] A secular court can easily undertake an examination of Ms. Fratello's job without any "entanglement" with religion.

B. Ms. Fratello's "two prong" analysis is sensible and principled

The Archdiocese and its *amici* urge their amorphous "religious activities" test, where, ultimately, any employer could impose "religious duties" upon any

[32] If, for example, Ms. Fratello mis-read the Lord's Prayer –something every lay Catholic should know, or otherwise was incompetent as a lay Catholic—she could be fired for religious incompetence under Title VII's religious exemption.

The Courts should not obliterate an employee's civil rights with ministerial immunity (a Constitutional "nuclear option"), when a statutory exemption will suffice. If every employment action that would otherwise be covered by Title VII's religious exemptions is to be considered "a religious function," then the statutory exemptions will become meaningless because each such job action will be of Constitutional dimension.

employee and thereby obtain for itself absolute immunity from suit. Granting Church-affiliated entities such immunity will destroy the civil rights of countless Americans. Civil rights attorney will be reluctant to represent individuals with strong discrimination cases if faced with a "litigation before the litigation" (the ministerial immunity defense). It will simply be too arduous: two litigations for one lost job, and most often a job loss involving only very modest damages. This will certainly reduce the number of cases entering the District Court's dockets, but it amounts to a denial of justice for the aggrieved employee. This Court should honor its own tradition in upholding individual liberty and democracy under the Rule of Law.

Ms. Fratello's proposed two prong approach to ministerial immunity is a principled means of analyzing ministerial immunity, with transparency and fairness to all (the opposite of the self-serving functions test the Archdiocese seeks).

1. Prong One

Prong One of the proposed ministerial immunity analysis is "What did the parties bargain for in their contract?" In Ms. Fratello case, it was for a "lay principal."

In *Hosanna-Tabor, Rweyemamu, Hankins,*[33]*McClure,*[34] *Penn* [35] and most of the prior reported ministerial immunity cases, the employer specifically bargained for an employee with a Church-granted religious credential (Father Justinian and Father Penn were both ordained priests and Rev. Perich was religiously "called" and commissioned as a minister). These religious credentials can be viewed as permissible BFOQs (Prong One analysis) for the jobs in question, and thus permissible for the employment contracts under the § 702 and § 703 Title VII religious exemption.

When Father Justinian and Rev. Perich lost their religious credentials from their Church (Prong Two), they both were then fired from their employment. The Church's decision to grant, and then revoke or ecclesiastically restrict the religious credential—the Church's choice of a minister—is beyond judicial review, under the doctrine of ministerial immunity. [36]

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[33] *Hankins v. N.Y. Annual Conference of United Methodist Church*, 351 F. App'x 489 (2d Cir. 2009).

[34] *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert denied* 409 U.S. 896.

[35] *Supra* note 10.

[36] Similarly, a director of music occupies a religious function, found in Roman Catholic Church canon law. *See*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 & n. 5 (5th Cir. 2012)(expert testimony that "as a matter of both religious belief and canon law, the Church considers music in the liturgy to be sacred, … and a church musician to be a minister….").

If a Church actually bestows a religious credential, there is transparency. The individual knows he or she is hired because of the religious credential of "minister," and that the job depends upon the employee keeping that religious credential.

Ms. Fratello's contract required no religious ministry credential. (Prong One). The Roman Catholic Church granted none, and took none away from her (Prong Two) as discussed next.

2. Prong Two

Prong Two of the proposed analysis focuses on Church ecclesial decision-making. It is inapplicable here, as there was no Church decision-making regarding an ecclesial position. The Roman Catholic Church gave Ms. Fratello no ministerial credential, and took none away. If it had, she would have been entitled to a right of ecclesial appeal (such as Father Justinian pursued in *Rweyemamu).*

The Archdiocese *amici* argue that the proposed Prong Two means defrocking or excommunication, and that this is draconian. Prong Two does not. It merely requires ecclesial action—action by authorized Church officials or religious governing body, such as the bishop's decision to move Father Justinian or to retire Rev. Hankins.[37] In contrast, firing a lay employee or not renewing an employment contract is not ecclesial action. It is secular action. Prong Two is inapplicable.

[37] The Archdiocese quibbles that Rev. Perich's commission was not immediately revoked, but only her "call" (to Christ) was revoked. Brief. p. 60-61. Both are Church ecclesial actions regarding its preacher—a difference without a distinction. No such ecclesial decision-making was taken as to Ms. Fratello.

Also, as *Hosanna-Tabor* made clear, that school's preference was to hire "called" (minister) teachers, if available. The Archdiocese here has no such preference regarding principals here.

In sum, ministerial immunity is inapplicable to Ms. Fratello for want of Church ecclesial action (Prong Two) and for the Archdiocese's failure to require a religiously credentialed person in the principal's job in the first place (Prong One).

3. Pretextual termination, with no involvement of the Ecclesial

The Archdiocese argues that the Court cannot examine whether a religious defense is protected by the First Amendment, and should simply grant the employer immunity, because otherwise the Court is inquiring into religion. The argument is bogus. If the employer informs the employee that he or she is being hired because he or she holds a religious credential (priest, commissioned minister, nun), and then a formal, religious authority of the Church revoke the credential (revoked by recognized Church officials, with rights of ecclesial appeal), there will likely be no dispute that ministerial immunity applies. Such is not this case.

The fact that neither formal Church authority nor canon law allows a lay principal to be a religious minister, and that no authorized Church official (e.g., Cardinal Dolan or one of his bishops) has ever called Ms. Fratello as a minister (only the lawyers have, after Ms. Fratello's termination), shows that ministerial immunity is a sham defense in this case. What this case is about is one sexist man's (the Parish Priest's) gender-biased employment decision-making regarding a woman employed under a simple, and very clear, secular employment contract.

C. The "Parade of Horribles" is already occurring

The undersigned served in Iraq and Afghanistan; is a member of the New York Academy of Science; and was raised in the Roman Catholic faith. The undersigned's concern and advocacy is sincere and heartfelt. My hypothesized religious law office could be created,[38] and if so, is entitled to First Amendment protection (including ministerial immunity, allowing the sexist or racist or other obnoxious abuse hypothesized). So too can be any religion, even fundamentalist or radical, assert ministerial immunity. All that is needed is the invitation to do so from this Court, by upholding the court below.

The parade of horribles of religion-based dogma and "devotion to faith" is occurring all around us. Intolerance is becoming epidemic. We are becoming more and more tribal. One "creation story" versus another (religiously, politically, culturally, by class, by football team).

Undoubtedly helped by organized religions' propaganda and indoctrination, fifty percent of Americans reject the indisputably established science of biological evolution. *See*, THE MEANING OF HUMAN EXISTENCE, at 182-83. The Founders would be horrified, as our political leaders should be.[39]

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[38] Perhaps based upon Prof. Wilson's scientific teachings and philosophy, or perhaps based upon Secular Humanism.

[39] The Founding Fathers were Renaissance men of the Enlightenment. They certainly would have read E.O. Wilson, and other works explaining science. They would have appreciated both the science of human nature that is developing, and also the risk to American democracy if we encourage religious indoctrination and tribalism, because irrational "faith" is the antithesis of

Another "horrible" is religious fundamentalism-provoked terrorism. Dogma, taught to children at a young age, fosters radicalism, which of course has terrible consequences. Ministerial immunity granted to Church-affiliated private schools will facilitate the teaching of unquestioned dogma, and immunize the entities that seek indoctrination. The notion that radical or ultra-fundamentalist religious groups will not use ministerial immunity to insulate themselves from civil law scrutiny while brainwashing young minds is naïve. Tyrants do this. Absolute immunity is a very attractive thing, and granting it to a benevolent Roman Catholic Church will equally aid malevolent organizations and potential terrorists. The Court must recognize the 21st Century realities of the world.

The rejection of science, in favor of "faith," is dangerous to the future of our democracy and to the World. The First Amendment does not require it. The federal courts will be complicit in the destruction of our future, if judges do not recognize that mankind can only survive by applying rational science-based thought and open-mindedness, not religious dogma and indoctrination, to earthly problems. *See*, WILSON, *supra*, Chapter 15.

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reasoned evidence-based political decision-making.

Justice Douglas in *Lemon* explains the risks of teaching religious dogma in elementary schools. *See*, *Lemon v. Kurtzman*, 403 U.S. 602, 626-642 (1971)(Douglas, J., concurring).

Is the election of Mr. Trump as president a product of reliance on "faith" (the promise of "Make America Great Again)? Tribal emotion? Perhaps.[40] What democracy needs informed, educated citizenry, including sound American citizenry taught both in public schools and also parochial schools, yeshivas, madrasas' or any other Church-affiliated educational schools. If the Courts permit private (parochial) school teachers and principals to be dogmatists, not subject to secular law (even though required to teach a secular curriculum), both the students and the democratic society will falter.

Unchecked power (which is what the Archdiocese seeks here) always begets abuse. We must remember Lord Acton's adage: "power corrupts, absolute power corrupts absolutely."

POINT III:
WE ALL ENCOUNTER "FANATICS". DO WE WANT TO OUR SCHOOLCHILDREN TO BE TAUGHT FANATICISM?

The human mind is the most complex instrument ever created. It is also tribal. Religion is tribal. People are tribal. The Founding Fathers sought to keep religion apart from civil society and governance. They also recognized that a rational, informed citizenry is paramount to democratic governance.

[40] *See, e.g., Kristof, 5 Reasons to Vote Trump*, N.Y. Times, Nov. 3, 2016 (5th reason—"Donald Trump understands that our modern brains hold us back"), available at http://www.nytimes.com/2016/11/03/opinion/5-reasons-to-vote-trump.html?_r=0.

Thus, this Court must strike the correct balance between freedom of religion and the interpreting freedoms in a manner that allows democracy to work. Counsel recommends Professor Wilson's short book, THE MEANING OF HUMAN EXISTENCE,[41] so that the Court will have a better understanding of why organized religion must not be allowed to trump American democracy's need for an non-indoctrinated and educated citizenry.

CONCLUSION

The decision of the lower court must be reversed, and Ms. Fratello be allowed to pursue her employment discrimination lawsuit against her former employer, together with such other and further relief as is just.

Dated: Stony Point, New York
November 21, 2016

Respectfully submitted,

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[41] The book is small. The undersigned with provide a copy to the Clerk for the Court's law library.

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of FRAP 32(a)(7)(B) because it contains 6915 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

Anti-Virus Certification

I, Michael D. Diederich, Jr. certify that on today's date I have scanned for viruses the PDF version of the APPELLANT'S REPLY BRIEF that was submitted in this case as an e-mail attachment to civilcases@ca2.uscourts.gov and that no viruses were detected. The name and version of the anti-virus detector which I used is Avast Pro AntiVirus, program version 7.0.1474, virus definition version 130122-0.

_____/s/_____
MICHAEL D. DIEDERICH, JR.