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
THE HONORABLE CATHY SEIBEL, PRESIDING

AMICUS CURIAE BRIEF OF CATHOLIC LAY GROUPS IN SUPPORT OF PLAINTIFF-APPELLANT AND OF REVERSAL

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are Catholic organizations that represent the interests of Catholic laity and workers. *Amici* write in support of Plaintiff-Appellant to provide the Second Circuit with context about the devastating consequences for lay Catholic workers if the district court's decision is upheld. They respectfully urge this Court to reverse the district court's ruling that a lay Catholic school principal is a minister for purposes of the First Amendment's ministerial exception. The *Amicus Curiae* brief includes the following organizations:

Call To Action is one of the largest organizations working for equality and justice in the Catholic Church today. With over 25,000 members and supporters and 50 chapters nationally, Call To Action educates, inspires, and activates Catholics to act for justice and build inclusive communities. In doing so, Call To Action does not condone discrimination on the basis of sexual identity, conscience decisions, and/or personal decision-making that does not conform to institutional Catholic dictates.

DignityUSA is an organization of Catholics committed to justice, equality, and full inclusion of lesbian, gay, bisexual, and transgender people in our Church and society. We support clear and fair employment policies for all people, including those who work for Catholic institutions, that protect those employees from discrimination on the basis of age, gender, sexual orientation, marital status, disability, religion, decisions of conscience, or any other factor, and that provide for clear and fair appeal processes in the event of discipline or dismissal.

FutureChurch is a twenty-six year old organization with outreach to nearly 25,000 members, donors, activists, and participants, promoting the rights and responsibilities of all the baptized in the Roman Catholic Church. We work for just treatment for all church workers, educators, theologians,

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned states that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed to funding the preparation or the submission of this brief. Pursuant to Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this *amici curiae* brief.

ministers, and lay employees. Just treatment for Church workers is core to FutureChurch's "Justice in the Church" Initiative, which seeks to provide immediate resources and advice for ministers and employees who have been silenced, fired, or otherwise treated unjustly. As an organization we: provide resources documenting the rights and responsibilities of Catholics as identified in Church documents and referrals to those who can help; document and uncover unjust treatment of Church ministers and employees; and honor dioceses/parishes with good practices and structures for Church ministers and employees.

FutureChurch believes that as Catholics who love the Church and want to see it flourish for years to come, we must preserve the integrity of our faith tradition as we face the many challenges of our times. Church law clearly tells us it is our right and sometimes our duty to speak out about matters that concern the good of the Church. (Canon 212.3). The Vatican II document, *Gaudium et Spes*, reminds us that with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent (29). FutureChurch affirms the dignity and rights of all human beings, rejects discrimination of every sort, including discrimination based on sex, gender, race, and sexual orientation.

The National Coalition of American Nuns (NCAN) is a national Catholic organization of women religious dedicated to working, studying, and speaking out on justice issues in church and society since 1969. Its 300 members are individual women religious in Roman Catholic congregations of nuns in the United States. NCAN prioritizes such issues as poverty, workers' rights, environmental responsibility, women's equality, and respect and justice for all marginalized peoples.

New Ways Ministry is a national Catholic ministry of justice and reconciliation for lesbian, gay, bisexual, transgender people and the wider Catholic Church. In our 39-year history, we have worked with hundreds of parishes, schools, colleges, hospitals, religious communities of vowed men and women, promoting greater equality for LGBT people. Recently, we have been involved with numerous cases where LGBT people and their allies have been fired from Catholic institutions due to their support for marriage equality and other issues. Because we value the Catholic teaching on the inherent human dignity of all people, as well as the teaching that

promotes justice for workers, we strongly support the right of church employees to due process when disputes occur. Catholic church employees do not forgo their U.S. civil rights when employed by church institutions.

Voice of the Faithful is a movement of faithful Catholics that started in the basement of a church in response to the sexual abuse crisis in the Church and has grown to a worldwide movement of 30,000 members dedicated to their mission of providing a prayerful voice, attentive to the Spirit, through which the faithful can actively participate in the governance and guidance of the Catholic Church.

Drawing on our baptismal responsibility for the life and work of the Church, VOTF members commit themselves to supporting survivors; supporting priests who are helping to heal survivors and correct institutional flaws in the Church; and working to reform governing structures so that abuse of authority could never happen again.

Nourished by its members' deep love for the Body of Christ, VOTF seeks full transparency and accountability in Church governance and full incorporation of lay Catholics in the life and work of the Church at every level.

Attendant to full lay participation in the Church, VOTF promotes equality of all faithful in the life and work of the Church and abhors discrimination of any kind that thwarts the faithful in their pursuit of that work. As the faithful have secured rights and responsibilities resulting from their baptism, so VOTF holds church institutions accountable for addressing those rights and responsibilities in light of the church's most prized values.

SUMMARY OF ARGUMENT

Appellant Joanne Fratello is a lay Catholic by faith and a lay principal by contract. The district court recognized those two facts, finding "[t]here is no dispute that Plaintiff is not a member of the clergy and that she would not be considered a minister for purposes of Church governance." *Fratello v. Roman Catholic Archdiocese of New York*, No. 12-CV-7359 (CS), 2016 WL 1249609, *12 (S.D.N.Y. Mar. 29, 2016). Yet the court nonetheless transformed Fratello into a minister, ruling that "the issue here is one of U.S., not canon, law, and 'minister' for purposes of the ministerial exception has a far broader meaning than it does for internal Church purposes." *Id.* Relying on this misinterpretation of the ministerial exception, the court mistakenly dismissed Appellant's Title VII gender discrimination and retaliation claims and refused to exercise supplemental jurisdiction over a related New York State breach of contract claim. *Id*. at *13.

With those words the district court risked turning every employee of faith into a minister unprotected by the nation's race, national origin, gender, sexual orientation, age, disability, pregnancy, equal pay, and sexual harassment antidiscrimination laws. In doing so, the court misread the Supreme Court's ministerial exception precedent, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012),

in two ways. First, it misapplied the Court's four-part test of ministerial status to label Fratello a minister even though she had never taken any active steps toward ministry. Second, it ignored the Supreme Court's statements about breach of contract lawsuits and the relevance of Fratello's "lay principal" contract status to the ministerial-exception discussion.

By holding that U.S. law creates a minister out of a lay principal, the court also ran afoul of both Religion Clauses of the First Amendment. The district court offended the Establishment Clause by giving an absolute preference to employers' religious beliefs over their employees' beliefs and contractual expectations. The district court also violated Fratello's Free Exercise rights by ordaining her even though she had never chosen ministerial status, received ministerial training, or held herself out as a minister.

The district court's broad ruling threatens the employment status of 12,268 Catholic school principals and teachers in New York State alone, who could lose the protection of the state and federal race, national origin, gender, sexual orientation, age, disability, pregnancy, equal pay, and sexual harassment antidiscrimination laws. *See* THE OFFICIAL CATHOLIC DIRECTORY 1, 171-98, 866, 943, 1134-53, 1410, 1538-72 (P.J. Kenedy and

Sons, 2015). Joanne Fratello is entitled to her day in court. Therefore, the *Amici* respectfully ask this Court to reverse the ruling of the district court.

ARGUMENT

I. The district court misinterpreted *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), in two ways.

Joanne Fratello's facts and circumstances in this case were nothing like the situation of Cheryl Perich, the Lutheran schoolteacher whom the Supreme Court found to be a minister in *Hosanna-Tabor*. The district court misapplied the four *Hosanna* factors to Fratello, a non-ministerial school employee, and underestimated the importance of Appellant's contract title: lay principal.

A. The district court misapplied the four-factor test of *Hosanna-Tabor*, which emphasizes "the formal title given … by the Church, the substance reflected in that title, [the employee's] own use of that title, and the important religious functions she performed for the Church" to an employee who had never taken any steps toward ministry.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court for the first time recognized a ministerial exception, grounded in the Religion Clauses of the First Amendment, that requires the dismissal of some employment discrimination lawsuits by ministers against their religious employers. The case involved a "commissioned" teacher at a Lutheran elementary school,

Cheryl Perich, who was fired when she tried to return to work after a medical leave of absence for narcolepsy. *Id.* at 700. Perich alleged retaliation under the Americans With Disabilities Act. *Id.*

The Opinion of the Court did not adopt a bright-line test identifying who qualifies as a minister for ministerial exception purposes, and announced its reluctance "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 707. The Court's ruling in *Hosanna-Tabor* was heavily fact-dependent. Instead of a bright-line test, the Court summarized the four issues relevant to Perich's ministerial status: "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church." *Id.* at 708.

About those four issues, the Court was detailed in its inclusion of the facts of Perich's case. Perich held the official title, "Minister of Religion, Commissioned," spelled out on her "diploma of vocation," and was reviewed by her congregation for her "skills of ministry," "ministerial responsibilities," and "continuing education as a professional person in the ministry of the Gospel." *Id.* at 707. Perich also had significant religious training (eight college-level courses and oral examinations) as well as an official commissioning (requiring endorsement by the local synod, letters of

recommendation, a personal statement, written answers to ministry-related questions, and election by a congregation). *Id.*

The Court noted that "Perich held herself out as a minister of the Church," not only by accepting the church's call to service and describing herself as a minister at Hosanna-Tabor, but also by claiming a housing allowance on her tax return that was available only to members of the ministry. *Id.* at 707-708. Moreover, "Hosanna-Tabor held Perich out as a minister" by issuing her a "diploma of vocation" and titling her "Minister of Religion, Commissioned." *Id.* Finally, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. … As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Id.* at 708.

In stark contrast to Perich, Appellant Joanne Fratello is a lay Catholic, who was originally hired as a lay teacher. She had the formal title "lay principal," was held out by the school as a principal, possessed secular educational training in school administration, and never "held herself out as a minister" of the church or claimed tax benefits available only to ministers and clergy. She has no training or education in ministry, theology, or religious studies, and applied for a principal's job requiring a Master's or equivalent degree *in education*. *Fratello* Rule 56.1 Stmt, *see also Herx v*.

Diocese of Ft. Wayne-S. Bend Inc., 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014) *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014) ("The Diocese hasn't shown that Mrs. Herx's teaching qualifications or job responsibilities in any way compare to Ms. Perich's situation. Nothing in the summary judgment record suggests that Mrs. Herx was a member of the clergy of the Catholic Church. Mrs. Herx has never led planning for a Mass, hasn't been ordained by the Catholic Church, hasn't held a title with the Catholic Church, has never had (and wasn't required to have) any religious instruction or training to be a teacher at the school, has never held herself out as a priest or minister, and was considered by the principal to be a 'lay teacher.'"); *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1114 (N.D. Cal. 2015) (Catholic high school teacher was not a minister even though she spent one out of her five class periods on Campus Ministry duties because her degree was a Bachelor of Science in biology and not related in any way to theology or religion).

The district court described at length Fratello's work duties and erroneously concluded that her *leadership* role in the school made Fratello a minister. In fact, her leadership role made her a successful *lay principal* – just as the words of Appellees' job advertisement and Appellant's contract stated.

B. The district court underestimated the importance of the contract language identifying Appellant as a "lay principal."

In *Hosanna-Tabor*, the Court explicitly stated it "express[ed] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* at 710.

The Supreme Court's breach of contract language in *Hosanna-Tabor* is significant. Pre- and post-*Hosanna-Tabor*, state and federal courts have repeatedly held that a "church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." *Minker v. Baltimore Annual Conf.*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (citing *Watson v. Jones*, 80 U.S. 679, 714 (1871)). "Even cases that rejected ministers' discrimination claims have noted that churches nonetheless 'may be held liable upon their valid contracts.'" *Id.* (quoting *Rayburn v. General Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1171 (4th Cir. 1985)); *see also Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006) ("Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to . . . contract claim[s] would not violate the Free Exercise Clause"); *Crymes v. Grace Hope Presbyterian Church, Inc.*, No. 2011–CA–000746–MR, 2012 WL

3236290 (Ky. Ct. App. Aug. 10, 2012); *Second Episcopal District African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812 (D.C. 2012) (post-*Hosanna* cases allowing *ministerial* breach of contract claims to proceed).

Hosanna-Tabor did not change that fundamental principle. If *ministers* can sue *churches* for breach of contract then *a fortiori* can a lay principal sue a private school that includes teachers, staff, and students of diverse religious identities. The principle of holding employers to their contracts applies in this case. That principle carries over to Appellant's Title VII case because the contract determines Fratello's lay principal, non-ministerial status for Title VII purposes. St. Anthony's School sought, hired, and contracted with a lay principal with education and experience in school administration and held her out as such. Neither the school nor the court can transform her into a minister in defiance of the parties' contractual agreement. "Deeming Mrs. [Fratello] a 'minister' of the Catholic Church would expand the scope of the ministerial exception too far and, in fact, would moot the religious exemptions of Title VII." *Herx*, 48 F. Supp. 3d at 1177.

The district court mistakenly held that the school's requirement that the principal be a practicing Catholic transformed Appellant into a minister. That ruling was incorrect on the facts of this case and is dangerous as a

precedent for future academic employment disputes. Ms. Fratello's ecclesial status as a lay practicing Catholic is nothing like that of ordained Catholic priest Father Justinian Rweyemamu, whom this Court decided "easily falls" within the ministerial exception. *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008). This Court has repeatedly recognized the distinction between ordained Catholic clergy and lay Catholic employees who sue for discrimination, recognizing that as a general rule "we will permit lay employees—but perhaps not religious employees—to bring discrimination suits against their religious employers." *Id*. at 207; *see also DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (allowing a lay Catholic high school math teacher to pursue an Age Discrimination in Employment Act (ADEA) case); *Catholic High Sch. Ass'n of the Archdiocese of New York v. Culvert*, 753 F.2d 1161, 1162 (2d Cir. 1985) (First Amendment does not "prohibit the New York State Labor Relations Board from exercising jurisdiction over the labor relations between parochial schools and their lay teachers").

Nonetheless, the district court *completely erased* the distinction between lay and ordained Catholics with its sweeping statement that although Appellant was unquestionably not a minister within her own church, "the issue here is one of U.S., not canon, law, and 'minister' for

purposes of the ministerial exception has a far broader meaning than it does for internal Church purposes." *Fratello* at *12. Such court-imposed ministry in defiance of ecclesial and contract status would have devastating consequences for the 12,268 Catholic schoolteachers and principals in New York State and the 14,831 Catholic educators who work within the Second Circuit. *See* KENEDY at 1-66, 171-98, 214, 553, 866, 943, 1134-53, 1410, 1538-72. Thus countless thousands of Americans could lose the protection of the nation's race, national origin, gender, sexual orientation, age, disability, pregnancy, equal pay, and sexual harassment antidiscrimination laws.

Recently Catholic high school teachers in San Francisco – with the vocal support of significant numbers of Catholic lay parents and lay Catholic politicians from the State Assembly and the Board of Supervisors – vigorously rejected their archbishop's request to sign new employment contracts labeling all teachers as ministers. Those California teachers understood that such contract language inaccurately characterized both their ecclesial status and their jobs. They knew they were lay teachers seeking academic excellence for students, not ordained priests offering pastoral ministry to parishioners. Those teachers also recognized that such contract wording "could exempt them from federal anti-discrimination law in the

event of dismissal." Lee Romney, *Faculty, Staff at S.F. Archdiocese Schools Sign Petition Rejecting Archbishop's Additions*, L.A. TIMES, Mar. 9, 2015, at B3. The San Francisco Board of Supervisors warned that contracts arbitrarily redefining teachers as ministers were "contrary to shared San Francisco values of non-discrimination, women's rights, inclusion, and equality for all humans." *Id.* at B6.

An Indiana district court similarly cautioned that labeling Catholic lay teacher Emily Herx a minister "based on her attendance and participation in prayer and religious services with her students, which was done in a supervisory capacity, would greatly expand the scope of the ministerial exception and *ultimately would qualify all of the Diocese's teachers as ministers*, a position rejected by the *Hosanna–Tabor* Court." *Herx*, 48 F. Supp. 3d at 1177 (emphasis added); *see also Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042, at *11 (Mass. Super. Dec. 16, 2015) ("[t]o apply the 'ministerial' exception here would allow all religious schools to exempt all of their employees from employment discrimination laws simply by calling their employees ministers. If that were the rule, most of the discussion in *Hosanna–Tabor* would have been unnecessary.").

Like the San Francisco and Indiana teachers, Fratello never thought of herself as a minister or held herself out as a minister. She signed her contract

to be a lay principal. Yet the district court saw the words "lay principal" in her employment contract and read them to mean "minister." By the district court's reasoning, every single one of the 60 million lay practicing Catholics in the United States is potentially a minister who is unprotected by the nation's most fundamental federal and state antidiscrimination laws. Indeed, even non-Catholics may be at risk; at least one Catholic Archdiocese has argued that a non-Catholic teacher qualified for the ministerial exception. *See Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013) (rejecting ministerial exception defense in case of non-Catholic computer technology coordinator fired for pregnancy).

In practice, the district court deferred completely to Defendants' ministerial characterization of Ms. Fratello. Yet only one Justice in *Hosanna-Tabor* – Justice Thomas – ruled that courts must adopt the religious employer's characterization of the employee. *Hosanna–Tabor,* 132 S. Ct. at 711 (Thomas, J., concurring). In contrast, this Court has properly interpreted the controlling opinion of the Court in *Hosanna-Tabor* to require a court "to make *its own* determination whether the plaintiff was a minister subject to the ministerial exception." *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 204 (2d Cir. 2014), cert. denied, 135 S. Ct. 1730 (2015) (emphasis added). If a school said a janitor was a

minister, for example, "the court would have to determine whether under the actual law of the church in question (and not as a subterfuge) janitors really were ministers." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006), *abrogated on other grounds by Hosanna-Tabor*, 132 S. Ct. at 709, n. 4*; see also Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) ("we agree with the courts that have held that, if a church labels a person a religious official as a mere 'subterfuge' to avoid statutory obligations, the ministerial exception does not apply."). It is an open secret that many religious organizations are seeking new means to redescribe their employees as ministers so that they can fire LGBT and other suspect employees without legal repercussion. *See, e.g.,* ALLIANCE DEFENDING FREEDOM, PROTECTING YOUR MINISTRY FROM SEXUAL ORIENTATION GENDER IDENTITY LAWSUITS: A LEGAL GUIDE FOR SOUTHERN BAPTIST AND EVANGELICAL CHURCHES, SCHOOLS, AND MINISTRIES 12 (2015) ("When feasible, a religious organization should assign its employees duties that involve ministerial, teaching, or other spiritual qualifications – duties that directly further the religious mission. For example, if a church receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the church's faith, provide religious resources, or pray

with callers. Consider requiring all employees to participate in devotional or prayer time, or to even lead these on occasion."); Ian Millhiser, *Christian Denomination Plans to Avoid Civil Rights Laws By Pretending Receptionists Are "Ministers,"* THINKPROGRESS.ORG, Jun. 13, 2015, at http://thinkprogress.org/justice/2015/06/13/3668626/inside-southern-baptist-conventions-devious-plan-defeat-anti-discrimination-laws/ (The "*Protecting Your Ministry* manual instructs religious employers to layer religious duties on top of each of their employees' actual job descriptions in an effort to convince courts that every single one of these employees qualifies as a minister.").

This Court must not support the subterfuge that dismissed this case. Under the actual law of the church in question in this case, Joanne Fratello is not a minister. The ministerial exception of the First Amendment does not authorize the district court to ordain her to ministry. Indeed such ordination violates both Religion Clauses of the First Amendment.

II. The district court's reasoning violated both Religion Clauses of the First Amendment by creating an absolute preference for religious employers over employees without any regard for employees' rights.

The rule of the Free Exercise Clause is that *everyone* must comply with "valid and neutral law[s] of general applicability." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Neither

this Court nor the Supreme Court has ever held that any religious conduct, including the ministerial exception, is absolutely protected in all circumstances by the First Amendment. Although the freedom to believe "is absolute," the freedom to act "cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-04 (1940); *see also Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New Yor*k, 914 F.2d 348, 354 (2d Cir. 1990) (government "may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers.").

Nonetheless, the district court interpreted the ministerial exception to swallow *Smith*'s free exercise rule. The court created an unconstitutionally absolute right to harmful conduct when it concluded that Fratello's actual religious identity and beliefs were irrelevant to its ministerial exception analysis. That absolute preference for employers' over employees' religious freedom violates both the Establishment and Free Exercise Clauses of the First Amendment and contradicts *Hosanna-Tabor*'s reasoning. *See, e.g., Estate of Thornton v. Caldor,* 472 U.S. 703, 706 (1985) (Connecticut law giving employees an absolute and unqualified right not to work on their Sabbath violates the Establishment Clause); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786–87 (2014) (Kennedy, J., concurring) ("Among

the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."). The Religion Clauses require equal consideration of Appellant's and Appellees' religious freedom interests. Yet the district court's analysis ignored this balance of freedoms by completely tipping the scale toward Appellees.

When the *Hosanna-Tabor* Court recognized that the Religion Clauses of the First Amendment compel a ministerial exception, only Justice Thomas suggested that courts should defer to the employer's characterization of the employee as a minister. *Hosanna–Tabor,* 132 S.Ct. at 711 (Thomas, J., concurring). Eight Justices rejected the idea that religious employers deserve absolute immunity from employment discrimination claims. *See id.* at 694; *see also Bronx Household*, 750 F.3d at 204 (*Hosanna-Tabor* requires a court "to make its own determination whether the plaintiff was a minister subject to the ministerial exception.").

Hosanna-Tabor is consistent with the Court's Establishment Clause precedents, which prohibit states from conferring absolute benefits on some religious actors at the expense of third parties' rights. In *Estate of Thornton*

v. Caldor, Inc., for example, the Court invalidated a Connecticut statute that gave Sabbatarians an absolute right not to work on their Sabbath because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. In *Caldor*, the Court approvingly identified "a fundamental principle of the Religion Clauses, so well-articulated by Judge Learned Hand" in this Court in 1953:

> "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

Id. at 710 (quoting *Otten v. Baltimore & Ohio R. Co.,* 205 F.2d 58, 61 (2d Cir. 1953)). Similarly, in *United States v. Lee*, the Court rejected Amish employers' requests for exemption from paying social security taxes because the exemption "operates to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982).

Since *Caldor*, the Court has repeatedly held that an "unyielding weighting in favor of [religious organizations] over all other interests" violates the Establishment Clause. 472 U.S. at 710; *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). The Court has consistently considered the effects of religious accommodations on the well-being of third parties whose interests

might be affected by the accommodation. *See Cutter*, 544 U.S. at 720 (citing *Caldor*) (in RLUIPA context, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.").

The Court always weighs the proposed actions of First Amendment rights holders against potential harm to third parties because "[a]t some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). This unlawful point was reached when the district court gave Appellees an absolute and unqualified immunity by dismissing Appellant's lawsuit even though "[t]here is no dispute that Plaintiff is not a member of the clergy and that she would not be considered a minister for purposes of Church governance." *Fratello* at *12. In defiance of the First Amendment, the district court gave Appellees an "absolute and unqualified" exemption where "religious concerns automatically control over all secular interests in the workplace," "no matter what burden or inconvenience this imposes on the . . . workers." *Caldor*, 472 U.S. at 708-09.

The burden on Joanne Fratello in this case, however, was no mere inconvenience. Instead, this lay principal's free exercise rights were completely eradicated. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div.,* 494 U.S. at 877; *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014). In Religion Clause jurisprudence, there is "widespread agreement that religious faith and practice should be *voluntary*. … Each person decides for himself or herself what to believe." Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 Nw. U. L. Rev. 1183, 1197 (2014) (emphasis added); *see also Roberts v. Madigan*, 702 F. Supp. 1505, 1511 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990) ("the goal of the Free Exercise Clause is to keep religious faith voluntary").

Joanne Fratello is voluntarily a lay Catholic by faith and a lay principal by contract. "There is no dispute that Plaintiff is not a member of the clergy and that she would not be considered a minister for purposes of Church governance." *Fratello* at *12. The Religion Clauses forbid the court to impose ministerial status on her without her consent. *See Lee,* 455 U.S. at 261.

The ministerial exception protects churches and their ministers who voluntarily agree to perform religious functions and promote religious goals together. Churches are not exempt, however, from adhering to their "completely voluntary" contractual obligations. *Petruska*, 462 F.3 at 310. Appellant has never taken any voluntary steps toward ministry. She has secular training and signed a contract as a lay principal. Thus, the court-imposed ministry that dismissed her case is beyond the pale of the First Amendment, which requires the Appellees to obey the valid, neutral, and general antidiscrimination laws prohibiting gender discrimination. "To permit [Appellees to have absolute immunity from antidiscrimination laws] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every [private school, hospital, university, or social service agency] to become a law unto [them]sel[ves]." *Smith,* 494 U.S. at 879. The First Amendment expressly prohibits that outcome.

CONCLUSION

The consequences of affirming the district court's decision in this case would be catastrophic for the 14,831 Catholic educators in New York State and the Second Circuit, who, like Ms. Fratello, could lose the protection of the nation's antidiscrimination laws by being ordained to a ministerial status

they never held. If the district court's reasoning is upheld, every practicing lay Catholic employee in the country could be transformed into a minister devoid of employment rights and outside the protection of the nation's race, national origin, gender, sexual orientation, age, disability, pregnancy, equal pay, and sexual harassment antidiscrimination laws. Therefore, *Amici* respectfully request this Court to reverse the ruling of the district court and allow Appellant her day in court.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

The undersigned, LESLIE C. GRIFFIN, ESQ., hereby certifies that on August 8, 2016, I caused the foregoing *Amicus Curiae* Brief to be served via the Court's CM/ECF system upon all counsel of record in accordance with the Electronic Case Files System of the Second Circuit Court of Appeals.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 Version 14.6.6 using 14-point Times New Roman font.

DATED: August 8, 2016

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