

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

MICHELLE FITZGERALD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:19-cv-04291-RLY-DLP
	)	
RONCALLI HIGH SCHOOL, INC.,	)	
and the ROMAN CATHOLIC	)	
ARCHDIOCESE OF	)	
INDIANAPOLIS, INC.,	)	
	)	
Defendants.	)	

**BRIEF IN SUPPORT OF DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,  
MOTION FOR JUDGMENT ON THE PLEADINGS**

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF UNDISPUTED MATERIAL FACTS .....	2
A. The Archdiocese and Roncalli.....	2
B. Faculty and Staff at Roncalli.....	3
C. Fitzgerald’s Role in Guidance.....	4
D. Fitzgerald’s Role in Roncalli’s Senior Leadership .....	13
E. Fitzgerald’s Non-Renewal.....	15
STANDARD OF REVIEW .....	17
ARGUMENT .....	17
I. Fitzgerald’s claims are barred by the ministerial exception. ....	17
A. The ministerial exception bars claims by ministers suing over their employment. ....	18
B. Fitzgerald was a minister. ....	20
1. Fitzgerald performed the functions of a minister. ....	20
2. Other considerations confirm Fitzgerald was a minister. ....	27
C. All of Fitzgerald’s claims are barred. ....	29
II. Fitzgerald’s federal claims are barred by RFRA.....	30
III. Fitzgerald’s Title VII claims are barred by Title VII.....	31
IV. Fitzgerald’s claims are barred by the First Amendment.....	34
CONCLUSION.....	35
CERTIFICATE OF SERVICE.....	37

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Adams v. City of Indianapolis</i> , 742 F.3d 720 (7th Cir. 2014) .....	17
<i>Alicea-Hernandez v. Catholic Bishop of Chi.</i> , 320 F.3d 698 (7th Cir. 2003) .....	18, 27
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	17
<i>Archdiocese of Miami v. Miñagorri</i> , 954 So.2d 640 (Fla. Dist. Ct. App. 2007) .....	26
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	17
<i>Bear Creek Bible Church v. EEOC</i> , No. 4:18-cv-00824, 2021 WL 5052661 (N.D. Tex. Oct. 31, 2021) .....	31, 32, 35
<i>Black v. St. Bernadette Congregation of Appleton</i> , 360 N.W.2d 550 (Wis. Ct. App. 1984) .....	27
<i>Bostock v. Clayton County</i> , 140 S. Ct. 1731 (2020) .....	30, 32-33
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000) .....	35
<i>Bryce v. Episcopal Church in the Diocese of Colo.</i> , 289 F.3d 648 (10th Cir. 2002) .....	34
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014) .....	30
<i>Christian Legal Soc’y v. Walker</i> , 453 F.3d 853 (7th Cir. 2006) .....	30, 31, 33
<i>Conlon v. InterVarsity Christian Fellowship</i> , 777 F.3d 829 (6th Cir. 2015) .....	27
<i>Dayner v. Archdiocese of Hartford</i> , 23 A.3d 1192 (Conn. 2011) .....	26

<i>Demkovich v. St. Andrew the Apostle Parish</i> , 3 F.4th 968 (7th Cir. 2021) (en banc).....	21, 34
<i>EEOC v. Catholic Univ. of Am.</i> , 3 F.3d 455 (D.C. Cir. 1996) .....	31
<i>Fratello v. Archdiocese of N.Y.</i> , 863 F.3d 190 (2d Cir. 2017).....	18-19, 26, 28
<i>Grussgott v. Milwaukee Jewish Day Sch., Inc.</i> , 882 F.3d 655 (7th Cir. 2018) .....	<i>passim</i>
<i>Hoffman-Dombrowski v. Arlington Int’l Racecourse</i> , 254 F.3d 644 (7th Cir. 2001) .....	17
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. EEOC</i> , 565 U.S. 171 (2012) .....	<i>passim</i>
<i>Indep. Trust Corp. v. Stewart Info. Servs. Corp.</i> , 665 F.3d 930 (7th Cir. 2012) .....	17
<i>Korte v. Sebelius</i> , 735 F.3d 654 (7th Cir. 2013) .....	18, 30, 34
<i>Leitgen v. Franciscan Skemp Healthcare, Inc.</i> , 630 F.3d 668 (7th Cir. 2011) .....	33
<i>Listecki v. Off. Comm. of Unsecured Creditors</i> , 780 F.3d 731 (7th Cir. 2015) .....	30
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979) .....	35
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020) .....	<i>passim</i>
<i>Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash., Inc.</i> , 875 A.2d 669 (D.C. 2005).....	26
<i>Paul v. Watchtower Bible &amp; Tract Soc’y of N.Y., Inc.</i> , 819 F.2d 875 (9th Cir. 1987) .....	30
<i>Petruska v. Gannon Univ.</i> , 462 F.3d 294 (3d Cir. 2006).....	26
<i>Religious Sisters of Mercy v. Azar</i> , 513 F. Supp. 3d 1113 (D.N.D. 2021) .....	31

<i>Sabatino v. St. Aloysius Par.</i> , 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) .....	27
<i>Schleicher v. Salvation Army</i> , 518 F.3d 472 (7th Cir. 2008) .....	18
<i>Scott v. Harris</i> , 550 U.S. 372 (2007) .....	17
<i>Shaliehsabou v. Hebrew Home of Greater Wash., Inc.</i> , 363 F.3d 299 (4th Cir. 2004) .....	18
<i>Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.</i> , No. 1:19-cv-03153-RLY-TAB, ___ F. Supp. 3d ___, 2021 WL 3669050 (S.D. Ind. Aug. 11, 2021) .....	<i>passim</i>
<i>Sterlinski v. Catholic Bishop of Chi.</i> , 934 F.3d 568 (7th Cir. 2019) .....	18, 24
<i>Vore v. Ind. Bell Tel. Co.</i> , 32 F.3d 1161 (7th Cir. 1994) .....	33
<i>Yin v. Columbia Int’l Univ.</i> , 335 F. Supp. 3d 803 (D.S.C. 2018) .....	19, 22

## **Statutes**

42 U.S.C. § 2000bb-1 .....	31
42 U.S.C. § 2000e .....	32
42 U.S.C. § 2000e-1 .....	32

## **Other Authorities**

1983 Code of Canon Law .....	3, 6, 16
Catechism of the Catholic Church .....	11, 16
Fed. R. Civ. P. 56(a) .....	17
L.R. 56-1 .....	16
Second Vatican Council’s <i>Gravissimum Educationis</i> (Oct. 28, 1965) .....	3

## INTRODUCTION

This case strikes at the heart of the First Amendment’s protections for religious autonomy. The Plaintiff, Shelly Fitzgerald, was a leader and Co-Director of Guidance at Roncalli Catholic High School. She lost her job after entering a same-sex union in knowing violation of her contract and Church teaching. She now sues, seeking to penalize the Archdiocese of Indianapolis for a religious decision about who can lead and transmit the faith in its Catholic schools.

Not surprisingly, this suit is barred by multiple protections for religious freedom. First, it is barred by the ministerial exception, which applies to employment claims by “any ‘employee’ who leads a religious organization” or has a “role in conveying the Church’s message and carrying out its mission.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020). Just three months ago, in what this Court called a “virtually identical” lawsuit brought by Fitzgerald’s own Co-Director of Guidance, [Dkt. 98](#) at 1, this Court held “that the Co-Director of Guidance at Roncalli falls within the ministerial exception” and entered judgment for the Archdiocese on all claims. *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 1:19-cv-03153-RLY-TAB, \_\_\_ F. Supp. 3d \_\_\_, 2021 WL 3669050, at \*7 (S.D. Ind. Aug. 11, 2021). As this Court explained, the Co-Director is “designated” as a “minister of the faith” and “charged” with “‘fostering the spiritual growth’ of her students”—including “communicating the Catholic faith to students, praying with and for members of the Roncalli community, teaching and celebrating Catholic traditions, [and] modeling the example of Jesus.” *Id.* at \*5 (cleaned up). The Co-Director draws on “matters of faith and doctrine” while “help[ing] students with their ‘most sensitive’ and ‘personal issues.’” *Id.* And the Co-Director is “a senior leadership role” that “help[s] shape the religious and spiritual environment at the school and guide[s] the school on its religious mission.” *Id.* at \*7. Thus, “it is apparent that the ministerial exception covers [that] role.” *Id.* at \*4.

That decision in *Starkey* is fully controlling in this “virtually identical” case. [Dkt. 98](#) at 1. Fitzgerald fulfilled the *same role* with the *same duties* at the *same school* at the *same time* as the *Starkey* plaintiff. Thus, her claims are barred under the same analysis. If anything, Fitzgerald has generated even more evidence of her own religious duties. She highlighted in her performance reviews that she discussed “personal and social issues ... and faith formation” with students; that she “consistently use[s] spiritual life and resources in my counseling conversations as well as sharing my own spiritual experiences” with students; and that her willingness to share her belief and love of God “is a strength when working with young people who are seeking direction.” App.44, 47. She helped lead a senior retreat—an intimate multi-night gathering focused on faith formation—where she gave a deeply personal talk on her own spiritual journey and reflected on Scripture. App.298-314 at 157:2-4, 165:4-166:13, 167:16-169:6, 170:22-171:2, 172:21-173:11; App.483; App.601-03. And at least one family independently praised her for “always preach[ing] the message of the gospel” in her work as counselor to their children. App.606. All this evidence only underscores that the *Starkey* decision fully applies here.

In addition, this suit is also barred by the Religious Freedom Restoration Act (RFRA), Title VII’s religious-employer exemption, and several First Amendment doctrines that apply regardless of whether Fitzgerald was a minister. Because this Court in *Starkey* ruled in the Archdiocese’s favor on the ministerial exception, it declined to address or revisit these issues, 2021 WL 3669050, at \*3, and it may follow the same course here. Nevertheless, we address them briefly as they confirm why summary judgment for the Archdiocese is required.

## **STATEMENT OF UNDISPUTED MATERIAL FACTS**

### **A. The Archdiocese and Roncalli**

The Roman Catholic Archdiocese of Indianapolis is a religious community led by the Archbishop of Indianapolis, subject to the “Roman Catholic Pontiff,” and governed

under the Roman Catholic “Code of Canon Law.” See App.634-36. The Archdiocese’s mission is to “live the Gospel” by “[w]orshipping God in word and sacrament”; “[l]earning, teaching and sharing [the Catholic] faith”; and “[s]erving human needs.” App.677.

Founded in 1969, Roncalli High School is a Catholic school “under the auspices of the Roman Catholic Archdiocese of Indianapolis.” App.677-78. Its purpose is “supporting and otherwise furthering the mission and purposes of” the Archdiocese, including “faith formation.” App.628. Per its mission statement, Roncalli seeks “to form Christian leaders in body, mind, and spirit,” to challenge students to “respond to the call of discipleship,” and “to make God’s love complete among us.” App.677; *accord* App.19-20 ¶9. Its student handbook states that “the most important program at Roncalli is our spiritual formation program” and that “true education is aimed at the formation of the human person in the pursuit of his ultimate end.” App.137, App.762 (adapted from the Second Vatican Council’s *Gravissimum Educationis* (Oct. 28, 1965), App.640-48); *see* App.680 (similar language in faculty handbook).

### **B. Faculty and Staff at Roncalli**

Catholic canon law requires Catholic educators “to be outstanding in correct doctrine and integrity of life.” 1983 Code c.803, §2. Accordingly, Roncalli’s faculty handbook emphasizes that a “foundational element” of Catholic education is “[t]he evangelizing witness of faith in action that is so obvious in the life of our teachers.” App.680. The handbook charges Roncalli’s principal with “[h]ir[ing] faculty and staff whose values are compatible with the mission of Roncalli High School.” App.693. The principal prefers whenever possible to hire faithful Catholics in teaching, administrative, and guidance counseling roles, and expects all teachers and guidance counselors to be “actively seeking opportunities to be involved in the faith formation and overall development of our students even outside school hours.” App.24-25 ¶¶32-34; App.137, 762 (student handbook) (staff participation in “Liturgies, Retreat



Experiences, Adoration, Community Service, Service Learning, Days of Reflection and Penance Services”).

Teachers and guidance counselors at Roncalli are typically employed under one-year contracts, which incorporate job descriptions. *E.g.*, App.507-14. When this dispute arose, the job descriptions for both teachers and guidance counselors required them to “[c]ommunicate[] the Catholic faith to students,” “[p]ray[] with and for students,” “[p]articipate[] in religious instruction,” and “carr[y] out [the Church’s] mission by modeling a Christ-centered life.” App.509 (guidance); App.501 (teachers); *see also, e.g.*, App.505 (guidance counselors “are being held accountable for 97% of the same expectations as the teacher,” “with the exceptions being daily lesson plans and efficient classroom routines”). Likewise, these descriptions indicate that teachers’ and guidance counselors’ “personal conduct ... both at school and away from school, must convey and be supportive of the teachings of the Catholic Church.” App.503-04, 512.

### **C. Fitzgerald’s Role in Guidance**

Plaintiff Shelly Fitzgerald began working at Roncalli in 2004 as Guidance Counselor. App.517-18. She was raised Catholic, attended Catholic schools from first grade until graduating high school, and listed herself as Catholic on her job application. App.155 at 14:1-12; App.418. In applying for a position at Roncalli, she touted her experience helping high-schoolers “deal with issues of divorce, sexual identity and awareness, pregnancy, and academic difficulty,” App.425, on the belief that part of her job as a Roncalli counselor would be to help students with similar “personal and sensitive issues,” App.175-76 at 33:19-35:20.

In 2007, Fitzgerald was promoted to Co-Director of Guidance. App.161 at 20:12-19. Principal Chuck Weisenbach states that Fitzgerald’s Catholic upbringing, Catholic education, and “track record of [her] commitment to and leadership in these areas of faith formation was a part of what made [him] comfortable elevating” her. App.26-27 ¶43.

As Co-Director of Guidance, Fitzgerald held a supervisory role, as all guidance counselors are “responsible to the Director of Guidance.” App.437. In that role, Fitzgerald “[s]upervise[d]” and “participate[d] in the performance appraisal of” the other guidance counselors. App.436; *see* App.162 at 21:2-7, App.272 at 131:14-132:3, App.289 at 148:1-8. She also attended department chair meetings as a department chair. App.19 ¶¶6-7; App.164 at 23:9-15. She answered directly to the Principal and was part of the school’s Administrative Council. App.435-36; App.18 ¶4; App.161 at 20:20-21:1. Fitzgerald held each of these positions—guidance counselor, Co-Director/Chair of Guidance, and Administrative Council member—for 11 years before this dispute arose. *See* App.161 at 20:12-19.

In May 2018, Fitzgerald signed a “School Guidance Counselor Ministry Contract.” App.507-08; *see* App.261 at 120:12-121:7. The contract states that she “acknowledges having been provided with a copy of the Faculty Handbook” and “agrees that conscientious observance of the Faculty Handbook ... is an expressed duty of [her] performance of this contract.” App.507; *see* App.513 (similar). The faculty handbook provides that the Director of Guidance and Guidance Counselor “assist[] the students in strengthening and developing their social, emotional, intellectual and Christian development,” with the non-Director Counselors being “responsible to the [Co-]Director,” Fitzgerald, in this task. App.435, 437.

The Guidance Counselor Ministry Contract signed by Fitzgerald also states that “School Guidance Counselor also acknowledges receipt of the ministry description that is attached to this contract and agree[s] to[] fulfill the duties and responsibilities listed in the ministry description.” App.507. Fitzgerald acknowledges having seen that description by “June 2018.” App.671; *see* App.937-38 at 125:19-126:11 (Co-Director Starkey confirming she saw description “in May 2018”).

The ministry description states that the guidance counselor is “a minister of the faith.” App.509. The first “Role” listed in the description is that a guidance counselor “Facilitates Faith Formation,” which includes the following responsibilities:

- “Communicates the Catholic faith to students and families through implementation of the school’s guidance curriculum ... [and] offer[s] direct support to individual students and families in efforts to foster the integration of faith, culture, and life.”
- “Prays with and for students, families, and colleagues and their intentions.<sup>1</sup> Participates in and celebrates liturgies and prayer services as appropriate.”
- “Teaches and celebrates Catholic traditions and all observances in the Liturgical Year.”
- “Models the example of Jesus, the Master Teacher, in what He taught, how He lived, and how He treated others.”
- “Conveys the Church’s message and carries out its mission by modeling a Christ-centered life.”
- “Participates in religious instruction and Catholic formation, including Christian services, offered at the school ...” *Id.*

The ministry description includes several other responsibilities relating to personal and spiritual counseling duties, such as: (1) “Uses techniques and methods that foster a Christ-centered atmosphere”; (2) “Participates in spiritual retreats, days of reflection, and spiritual formation programs”; (3) Coordinates “bullying awareness and prevention, suicide awareness and prevention, substance abuse awareness and prevention”; (4) “Proactively identifies and addresses physical, social, emotional, and spiritual needs”; and (5) “Display of Gospel values.” App.510-12.

The ministry description also states that “Catholic schools are ministries of the Catholic Church, and school guidance counselors are vital ministers sharing the mission of the Church. School guidance counselors are expected to be role models and are expressly charged with leading students toward Christian maturity and with teaching the Word of God.” App.512 (must be “credible witnesses of the Catholic faith”). The description says that “[a]s role models,” the “personal conduct” of guidance

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<sup>1</sup> An “intention” is a Catholic term for the object of a prayer. *See* 1983 Code c.945-51.

counselors “both at school and away from school, must convey and be supportive of the teachings of the Catholic Church,” including the “call[ing] to respect human sexuality and its expression in the Sacrament of Marriage.” *Id.*

Angela Maly, a Guidance Counselor at Roncalli since August 2018, confirms that the ministry description “is a fair description of the day-to-day expectations” of the job, including the “role in facilitating faith formation among students.” App.1, 7 ¶¶2, 39, 40; *accord* App.23 ¶¶25-27. Maly describes her “day-to-day work” in faith formation as a Guidance Counselor as “specifically geared toward modeling and teaching not just a generic ‘Christian’ faith but the Catholic faith specifically”: “I pray with and for them. I join with them in liturgies and prayer services. ... And I try to help them understand and be formed in the Catholic faith.” App.7 ¶40.

Consistent with the expectation that she participate in religious services offered at the school, Fitzgerald regularly attended monthly Masses at Roncalli, receiving Holy Communion along with the rest of the Roncalli community, including most of her students and counselors who reported to her. App.209-10 at 68:16-69:22; *see* App.22 ¶24.

Fitzgerald also attended “Days of Reflection.” App.356-57 at 215:22-216:11. These are gatherings at the beginning of the year for “faculty who are impacting kids in their spiritual life on a day-to-day basis.” App.21-22 ¶¶19-22. Counselors are included. App.22 ¶22; *see also* App.8 ¶44 (Maly declaration); App.982-83 at 170:18-171:19 (Co-Director Starkey “generally attended” these Days, including the “liturgy,” “to prepare for the year ahead”). Supported by campus ministry, the day features an outside Catholic speaker and a liturgy, or Mass, with Holy Communion, and has also featured church visits. App.8 ¶44; App.21-22 ¶¶19-21; *see also* App.982-83 at 170:24-171:19; App.660-61 ¶13 (Fitzgerald confirming attendance for recent speaker).

At the Day of Reflection, Roncalli’s Principal Weisenbach delivers a “call-and-response Commissioning Prayer” to the assembled faculty. App.22 ¶21. In a typical

prayer, the faculty state that they “embrace the responsibilities of my ministry,” “promise to willingly share my faith with others,” and “promise to form youth and support families in the faith by following the example of our Master Teacher, Jesus Christ.” App.36; App.22 ¶21. The leader then states: “I hereby commission you to faithfully and joyfully serve as ministers of the faith.” App.36; *see also* App.8 ¶45.

The guidance department is the only department at Roncalli whose members meet one on one with every student every school year. App.870-71 at 58:19-59:9; *accord* App.23 ¶28. Consistent with contract expectation, Roncalli Guidance Counselors under Fitzgerald’s leadership were closely engaged in tracking and managing students’ “‘most sensitive’ and ‘personal issues.’” *Starkey*, 2021 WL 3669050, at \*5; *see* App.44. One way they did so was through the Student Assistance Program, or SAP (recently renamed STAND UP). App.180-85 at 39:15-44:1; App.3-4 ¶¶14-18.

SAP helps identify and address students “experiencing physical, social, emotional or spiritual difficulties,” App.795, including, for example, “mental health issues” or substance abuse. App.183 at 42:2-10; *see also, e.g.*, App.860 at 48:12-16 (“dysfunction in their homes,” “death of a loved one”). All five counselors participate in SAP, along with the campus minister, the social worker, and several administrators and teachers. App.185 at 44:2-9. SAP usually identifies at-risk students “through a referral process,” and during her time at Roncalli Fitzgerald was the point of contact for anonymous referrals. App.181 at 40:10-16; App.443; App.191-92 at 50:9-51:15.

Roncalli Guidance Counselor Angela Maly has taken on a “leadership role” within SAP/STAND UP. App.3 ¶15; *compare* App.860-61 at 48:24-49:10 (similar leadership role for former Guidance Counselor Starkey). She describes her direct-guidance role as “assist[ing] students with their social, mental, academic, emotional, and spiritual needs” and “showing the face of Christ to the Roncalli family.” App.2 ¶¶4-5. That assistance has included discussions of “anxiety, stress, depression, romantic relationship issues, thoughts of suicide, sexual orientation, gender identity, and questions

and doubts about the Catholic faith and its moral teachings.” App.2 ¶6. Representative conversations included: (1) talking a student through “how to rely on God” during a breakup; (2) encouraging students facing academic challenges to pray, emphasizing “that God has a plan bigger than we can imagine”; and (3) assuring students “struggling to reconcile their sexual orientation with their faith” that they are loved by God “no matter what” and “not define[d]” by their orientation. App.2-3 ¶¶7-12. One student recently emailed Maly, thanking her for “play[ing] a huge role in shaping the person [she is] today,” and including a reflection that she shared with the entire school, where she thanked Maly for encouraging her to spend time in the chapel alone with God each day. App.4-5 ¶22.

Maly “regularly pray[s]” with students, reminding them to “offer the struggle up to Christ through prayer.” App.2 ¶9; App.3 ¶13. Those prayers “often incorporat[e] traditional Catholic prayer practices” like “prayer cards” or intercessory prayer using “‘tiny saints,’ small keychains with an image of a saint.” App.3 ¶13. She understands prayer with counselees to be an “essential component[.]” of her job. App.2 ¶10.

Prayer is also “a huge part of [Maly’s] daily life and work at Roncalli” even outside of counseling meetings, including leading students and faculty in morning rosaries and adoration of the Blessed Sacrament; daily all-school prayer; opening every Guidance meeting with prayer; praying at STAND UP meetings; and participating in monthly Mass. App.4-6 ¶¶18-32. Maly also states that she is “instructed and encouraged by Roncalli to” “put[] faith into action.” App.6 ¶33. To that end, she has engaged in charitable endeavors with students, including at a food pantry and a weeklong mission trip with students focused on service projects and prayer. App.6 ¶¶33-34.

As Co-Director of Guidance, Fitzgerald affirmed on multiple occasions the faith-formation component of Roncalli Guidance Counselors’ work discussed by Maly. *E.g.*, App.498; App.527. For example, in May 2016, Fitzgerald was part of an email conversation with Roncalli administrators on how to classify the school’s guidance

counselors under the Fair Labor Standards Act. App.499-500; *see* App.919-21 at 107:4-109:19. As part of that conversation, Fitzgerald’s Co-Director, Starkey, transmitted a letter to Principal Weisenbach over her and Fitzgerald’s signatures, explaining why “school counselors qualify for a salaried contract to the same degree as ... teachers do.” App.498; *see* App.920 at 108:8-12, App.926-27 at 114:4-115:12. This letter referenced “ArchIndy’s Ministry Description for ‘Teacher’ (2.22.2016),” and explained that “[i]f school counselors had a Ministry Description, it would be identical to that of teachers, except for III.B.2 (daily lesson plans) and III.C.5 (efficient classroom routines).” *Id.*; *see* App.922-23, 930 at 110:5-111:3, 118:7-15; App.501-04. The duties in the Teacher Ministry Description that Fitzgerald and Starkey identified as “identical” substantially match all of the counselor duties noted in bullet points above (*supra*, p.6), and also include “[p]articipates in spiritual retreats, days of reflection, and spiritual formation programs”; “[d]isplays” “Gospel values”; and “[l]ead[s] their students toward Christian maturity” and “teach[es] the Word of God.” App.501-04; *compare* App.509-12 (later-adopted Ministry Description for Guidance Counselors).

Weisenbach shared Fitzgerald and Starkey’s letter with Archdiocesan staff, saying it “sets out some very clear reasons why a guidance counselor qualifies for the same ministerial exemption as the teachers.” App.499; *accord* App.252-53 at 111:13-112:4. Weisenbach went on: “There are 67 items listed on the archdiocesan ministry description for a teacher. A guidance counselor fulfills 65 of the 67.... Given they are being held accountable for 97% of the same expectations as the teacher, being granted the same exemption as the teacher makes sense to me.” App.499. In response, Fitzgerald emailed Weisenbach thanking him for taking her and Starkey’s “side” on this matter. App.505. Weisenbach has since reaffirmed that Starkey and Fitzgerald’s letter “characterized their roles accurately,” including their roles in “forming the faith of students.” App.27 ¶46.



The Fitzgerald–Starkey letter also noted that “school counselors are evaluated using the ... school counselor version of the Catholic *Educator* Advancement Program,” or CEAP. App.498. CEAP “allows educators”—both teachers and guidance counselors—“to advance in their career levels and pay scale based on their performance[.]” App.25 ¶¶36-37. When the CEAP was extended to counselors, Fitzgerald participated in drafting and establishing the performance criteria. App.654; *see also* App.37 (performance review thanking Fitzgerald “for taking the initiative on this”). Those criteria included the following for a “Distinguished School Counselor”:

- “School counselor embraces, embodies and lives out the spirit of Saint John XXIII as evidenced by their living out of his traits in their ministry at Roncalli.”
- “School counselor connects with students’ spiritual life and resources in counseling (e.g. retreat, church, youth ministry, mission work).”
- “School counselor consistently attends Sunday mass or their denominational church service ... .”

App.527. As discussed below, Fitzgerald herself was designated a Distinguished School Counselor after being evaluated by her own metric. App.272 at 131:11-13.

Counselors at Roncalli were in fact evaluated according to these religious criteria, under the CEAP and otherwise. App.583-99; App.573-81. For example, one former Guidance Counselor—in completing the CEAP-required self-assessment of her performance in “Spirit of Roncalli Formation”—explained that she fulfilled these criteria by “highly encourag[ing] students to attend retreat,” and “encouraging faith with my students.” App.597; *see* App.287 at 146:5-12. The counselor pointed out that she had become “more confident in” doing so by “[o]bserving retreat” herself, going through the Rite of Christian Initiation of Adults (the process for entering the Catholic Church as an adult), and Mass attendance. App.597 (also discussing the “charisms of St. John XXIII I live out most”).<sup>2</sup>

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<sup>2</sup> “[C]harisms” are “graces of the Holy Spirit which directly or indirectly benefit the Church,” by which the Holy Spirit “makes the faithful ‘fit and ready to undertake various tasks and offices for the renewal and building up of the Church.’” Catechism of the Catholic Church §§ 798-99.



Similarly, Angela Maly testified that “[o]ne of my goals is always spiritually based” in her annual review. App.8 ¶43; *see* App.583. And in one of Fitzgerald’s own performance reviews, the Principal commended her success in “find[ing] more ways to celebrate Christ, specifically through reading, journaling, praying, etc.,” and directed her to “[k]eep your focus strong here.” App.37. The review then shared the Principal’s own efforts “to include Christ in more of my daily life.” *Id.*

Fitzgerald also went through CEAP. App.40-48; *see* App.26 ¶42. In her self-assessment, Fitzgerald explained that she meets with students individually at least once a year “but often times, much more” and discusses “personal and social issues ... and faith formation.” App.43-44 (“personal and social counseling” can include “serious crisis situation[s]”). As for “Spirit of Roncalli Formation,” Fitzgerald stated that she “love[s] ... sharing [her] experience and faith with others,” and was “working the first retreat of the year, and plan[ning] to help more with St. Vincent de Paul.” App.47; *see* App.6 ¶33 (“St. Vincent DePaul Food Pantry”). She also emphasized:

I consistently attend Sunday church service, all masses at Roncalli, and morning communion services when I am able. I consistently use spiritual life and resources in my counseling conversations as well as sharing my own spiritual experiences. ... I am faithful, and have no problems sharing my beliefs and my love of God. In a faith-based school, I feel this definitely is a strength when working with young people who are seeking direction.

App.47. Fitzgerald’s narrative closes on her four “Goals” for the coming year, which included “[w]ork[ing] a senior retreat.” App.48.

The senior retreat is called the “Christian Awakening Retreat,” which Fitzgerald’s complaint describes as “a deeply personal and emotional experience” aimed at “spiritual growth.” [Dkt. 1](#) ¶¶98-99; *see* App.363-64 at 222:11-223:2. Principal Weisenbach agrees, stating the retreat is “the cornerstone of the senior experience.” App.26 ¶41. Its “ultimate goal ... is to help students understand how Christ is present in their daily life.” App.6 ¶35. The retreat lasts three-and-a-half days and is held at either the “Fatima Retreat House” or the “Benedict Inn Center.” App.303-04 at 162:15-163:3;

see App.600. During one of the evenings while their children are on retreat, parents gather in Roncalli's chapel for a "Prayer Vigil." App.600. Fitzgerald served as an "Adult Team Leader[]" on the retreat in 2016. *Id.* At the retreat, Fitzgerald gave "the very first talk of the opening night" entitled "Graph of Life," which discussed how her "relationship with God shifted throughout [her] life" and was designed to convey to retreatants that "[a] person's relationship with God has highs and lows ... , and those shape the sort of personal relationship that person has with God in the present." App.298 at 157:11-13; App.308-14 at 167:21-173:11; App.602-03. Fitzgerald chose a Scripture passage—"2 Corinthians 12:9-10"—to reference in the talk. App.601. Afterward, students went "off to a quiet place and work[ed] on their own Graph of Life," based on Fitzgerald's discussion. App.317-18 at 176:19-177:7.

#### **D. Fitzgerald's Role in Roncalli's Senior Leadership**

As Co-Director of Guidance, Fitzgerald was the Department Co-Chair. App.161-62 at 20:20-21:4. That meant she was responsible to oversee the Guidance Department, including conducting monthly department meetings, formulating the guidance curriculum, managing the budget, and working with the Principal in the hiring and supervision of all Guidance personnel. *Id.*; see App.727.

Fitzgerald also served on Roncalli's Administrative Council—"[t]he main leadership body within the school." App.18 ¶4. It includes the Principal, Campus Minister, Chaplain, two Assistant Principals, Dean of Students, Athletic Director, and Co-Directors of Guidance. *Id.* During Fitzgerald's tenure, the Council met weekly and always opened in prayer. App.198 at 57:7-14; App.204 at 63:13-15.

Principal Weisenbach states that "[m]ost faculty and staff recognize the Administrative Council as the lifeblood of decision-making at the school," and that "the Administrative Council and the Department Chairs are responsible for 95% of Roncalli's daily ministry, education, and operations." App.19 ¶¶5-7. Along with the Principal

and Assistant Principal for Academic Affairs, the Director of Guidance (Fitzgerald's role) "is the only staff member who serves on both those bodies." *Id.*

During Fitzgerald's tenure, as today, the Council informed key decisions relating to the life of the school, including issues core to Roncalli's religious mission. For example, the Council helped plan "all-school liturg[ies]," including by discussing who should serve "as Eucharistic ministers"; "[h]ow to get [students] more involved in the mass," especially with respect to "music"; and whether to include "Eucharistic adoration." App.208-09 at 67:16-68:15; App.220-21 at 79:16-80:19; App.224-25 at 83:22-84:20; App.447; App.487-88; App.137. Likewise, the Council discussed how to handle a student "morality survey" on important Catholic beliefs regarding sexual activity, dishonesty, and drug use. App.241-42 at 100:8-101:12. And the Council discussed other aspects of the school's religious identity and faith formation programming, such as whether "we [should] have information about the charisms [of St. John XXIII] on our web site" (App.495) and the "Senior Religion Capstone Project" for the Religion Department (App.496-97).

Council agendas show Fitzgerald's input on issues of faith, mission, and student challenges. *E.g.*, App.445. Indeed, in contemporaneous performance evaluations, Principal Weisenbach praised Fitzgerald's "input on the administrative council," App.613, and "the insights and ideas that [she] br[ought] to our weekly meetings." App.615. After the Parkland shooting, for example, Fitzgerald encouraged holding a "prayer service to honor kids who were killed." App.446-47; *see also* App.20 ¶13; App.205-06 at 64:8-65:12. In another meeting, Fitzgerald weighed in on a draft Archdiocesan policy dealing with transgender issues, expressing "concern" over a portion of the policy requiring school employees who learn of a student's identifying as transgender "to notify the youth's parents." App.229-31 at 88:18-90:14; App.491.

As Administrative Council member, Fitzgerald was also invited to deliver all-school prayers. App.21 ¶18. Principal Weisenbach asked each member of the Council

to deliver a personal reflection and prayer to all students “about once every nine weeks.” *Id.* Although Fitzgerald states she declined the invitation, her Co-Director, Starkey, offered the reflection multiple times. *Starkey*, 2021 WL 3669050, at \*3.

Further, Fitzgerald participated in a Council discussion group on a book called *Living as Missionary Disciples: A Resource for Evangelization*. App.659-60. That book is a publication of the United States Conference of Catholic Bishops and is designed to assist “pastoral leaders” as they “develop, enhance, and review their own local strategies” to pursue evangelization. App.895-96 at 83:21-84:10 (Co-Director Starkey agreeing with description); see App.20-21 ¶¶14-17. Fitzgerald and Principal Weisenbach also exchanged books on religious and theological topics, including on outreach to “the LGBTQ community.” App.327-29 at 186:22-188:20; App.341-42 at 200:18-201:15. Roncalli “sen[t]” Fitzgerald and one other employee to a “workshop about bringing LGBTQ people into the church.” App.329 at 188:11-20; App.336-39 at 195:19-198:8; App.666. And in 2018, Fitzgerald was assigned to a newly-created “diversity council” aimed in part at addressing “LGBT issues,” as well as issues of “race,” “ethnicity,” and religious diversity at Roncalli. App.329 at 188:11-20; App.343-46 at 202:18-205:2.

#### **E. Fitzgerald’s Non-Renewal**

In May 2018, Roncalli renewed Fitzgerald’s employment for another year, and Fitzgerald signed the “School Guidance Counselor Ministry Contract.” App.507-08. The contract stated: “The School Guidance Counselor shall be deemed to be in default under this contract in the event of ... any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church.” App.508. A default provision like this was included in Fitzgerald’s annual employment contracts ever since she started at Roncalli. See, e.g., App.517-18 (2004-05 contract); App.261-69 at 120:20-128:19.

Fitzgerald's contract also provided that she would "be in default under this contract" if she engaged in "any breach of duty," including "[r]elationships that are contrary to a valid marriage as seen through the eyes of the Catholic Church." App.508 The Catholic Church defines marriage as a "covenant" "by which a man and a woman form with each other an intimate communion of life and love." Catechism of the Catholic Church § 1660; *accord* 1983 Code c.1055.

In August 2018, Roncalli leadership learned that Fitzgerald had entered a same-sex civil union. [Dkt. 1](#) ¶52; [Dkt. 29](#) ¶52.<sup>3</sup> Because this conduct violated Fitzgerald's contract and Church teaching, Fitzgerald was placed on "paid administrative leave" for the remainder of her one-year contract, which was not renewed. [Dkt. 1](#) ¶¶56, 66; [Dkt. 29](#) ¶¶56, 66.

Fitzgerald states that since she was placed on administrative leave in August 2018, she has "taken an active role in opposing" the Archdiocese's policy requiring its educators to uphold Catholic teaching on the nature of marriage. [Dkt. 1](#) ¶69. After Fitzgerald was placed on administrative leave, several Roncalli students "formed a non-profit advocacy group known as 'Shelly's Voice,'" [Dkt. 1](#) ¶73, for which Fitzgerald serves as "an active mentor." App.213 at 72:13-15. According to Fitzgerald, the group seeks "to advocate for" LGBTQ people "married ... to their partners." [Dkt. 1](#) ¶73; App.195 at 54:8-11. Likewise, Fitzgerald today works for a "philanthropic foundation" that funds LGBTQ causes. App.158-59 at 17:5-18:18. Her employer's website notes that her background "in youth education and counseling" "serves as a springboard for her current dedication to LGBTQ+ activism and advocacy." App.608; App.321 at 180:2-6; *see* App.320-21 at 179:17-180:1 (Fitzgerald affirming that she is "in fact dedicated to LGBTQ+ activism and advocacy").

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<sup>3</sup> The Archdiocese stipulates to the facts in this paragraph "only for the purpose of the motion for summary judgment"; the stipulations "are not intended to be otherwise binding." S.D. Ind. L.R. 56-1(g).

## STANDARD OF REVIEW

The Court must grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A factual dispute is “material” only if it “might affect the outcome of the suit under the governing law.” *Hoffman-Dombrowski v. Arlington Int’l Racecourse*, 254 F.3d 644, 650 (7th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). And a dispute is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. “Facts must be viewed in the light most favorable to the nonmoving party only if” they are genuinely disputed. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

A motion for judgment on the pleadings under Rule 12(c) is governed by the same standards as a motion to dismiss under Rule 12(b)(6). *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014). Thus, a claim must be dismissed if the complaint fails to “state a ‘plausible’ claim for relief” or “sets out all of the elements of an affirmative defense.” *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 934-35 (7th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

## ARGUMENT

### **I. Fitzgerald’s claims are barred by the ministerial exception.**

Three months ago, this Court granted summary judgment for the Archdiocese on identical claims brought by Fitzgerald’s Co-Director of Guidance, holding “that the Co-Director of Guidance at Roncalli falls within the ministerial exception.” *Starkey*, 2021 WL 3669050, at \*7. Because Fitzgerald had the same role with the same duties at the same school at the same time as the *Starkey* plaintiff, the *Starkey* decision is controlling here.

**A. The ministerial exception bars claims by ministers suing over their employment.**

The First Amendment protects religious organizations’ “autonomy with respect to internal management decisions that are essential to [their] central mission.” *Our Lady*, 140 S. Ct. at 2060. One “component” of this doctrine is the “ministerial exception.” *Id.* at 2060-61; *see also Korte v. Sebelius*, 735 F.3d 654, 677-78 (7th Cir. 2013).

Under this exception, “courts are bound to stay out of employment disputes involving” religious institutions and “those holding certain important positions” within them. *Our Lady*, 140 S. Ct. at 2060. Intervention in such disputes amounts to “[r]equiring a church to accept or retain an unwanted minister.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). And doing so violates both Religion Clauses: the Free Exercise Clause, “which protects a religious group’s right to shape its own faith and mission through its appointments”; and the Establishment Clause, “which prohibits government involvement in such ecclesiastical decisions.” *Id.*

The ministerial exception isn’t limited to “ordained ministers.” *Id.* at 203 (Alito, J., concurring); *see also id.* at 202 (“mere shorthand”). Rather, it covers any employee of a religious organization who “perform[s] religious functions.” *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 571 (7th Cir. 2019). Thus, the Seventh Circuit has applied the exception to a wide array of employees—from an organist (*Sterlinski*) to a rehabilitation-center administrator (*Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008)) to a press secretary (*Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003)); *see also Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 308-09 (4th Cir. 2004) (staff of Jewish nursing home; collecting cases).

Many of the leading cases—including both decided by the Supreme Court—have applied the exception to the same type of employee as at issue here: educators at religious schools. *See, e.g., Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017)



(principal); *Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (program director); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (teacher). That is because “educating young people in their faith, inculcating its teachings, and training them to live their faith” are “vital” religious functions. *Our Lady*, 140 S. Ct. at 2064. Thus, religious organizations “must be free to choose those” who perform these functions. *Hosanna-Tabor*, 565 U.S. at 196.

*Our Lady* demonstrates the point. There, the Supreme Court considered whether the Religion Clauses barred discrimination claims by two teachers at Catholic elementary schools. The Ninth Circuit had held that it didn’t, noting the teachers lacked “clerical titles” and had limited “formal religious schooling.” 140 S. Ct. at 2067.

The Court reversed, explaining that for the ministerial exception, “[w]hat matters, at bottom, is what an employee does.” *Id.* at 2064. And on this understanding, the plaintiffs were ministers. “Educating and forming students in the Catholic faith lay at the core of the mission of the schools where [the plaintiffs] taught,” and the plaintiffs’ “employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission.” *Id.* at 2066. Moreover, the plaintiffs “prayed with their students, attended Mass with the students, and prepared [them] for their participation in other religious activities.” *Id.* In short, since the plaintiffs’ roles involved “educating young people in their faith” and “inculcating its teachings,” entertaining their claims would “threaten[] the [defendant] school[s]’ independence in a way that the First Amendment does not allow.” *Id.* at 2064, 2069.

This aspect of *Our Lady* is sufficient to resolve this case, also involving an educator at a Catholic school charged with helping to form students in the Catholic faith. But *Our Lady* also made clear that while an educator’s function alone can trigger the ministerial exception, certain “other ... circumstances” may also “shed light on” the inquiry. *Id.* at 2063 (citing *Hosanna-Tabor*, 565 U.S. at 191). These other “considerations” include the plaintiff’s “formal title,” “the substance reflected in that title,” and



“her own use of that title.” *Hosanna-Tabor*, 565 U.S. at 192; *but see Our Lady*, 140 S. Ct. at 2064 (these considerations may have “less significance in some cases”). All of these considerations confirm that Fitzgerald’s claims are barred by the ministerial exception.

**B. Fitzgerald was a minister.**

To determine whether Fitzgerald falls within the exception, “[w]hat matters, at bottom, is what [she] d[id].” *Our Lady*, 140 S. Ct. at 2064. And here, undisputed evidence shows that, in her role as Co-Director of Guidance and member of Roncalli’s Administrative Council, the Archdiocese “entrust[ed Fitzgerald] with the responsibility of educating and forming [Roncalli] students in the [Catholic] faith.” *Id.* at 2069.

**1. Fitzgerald performed the functions of a minister.**

First, as this Court noted in *Starkey*, “religious instruction and formation are central to Roncalli’s philosophy and mission, and [Fitzgerald’s] employment documents ‘specified in no uncertain terms’ that Roncalli expected her to perform a variety of religious duties and to help carry out the school’s mission.” *Starkey*, 2021 WL 3669050, at \*4 (quoting *Our Lady*, 140 S. Ct. at 2066). Her job description identified the “guidance counselor” as “a minister of the faith,” charged with “foster[ing] the spiritual ... growth of the children entrusted in his/her care.” App.509. And it listed as the top duties “[c]ommunicat[ing] the Catholic faith to students and families through implementation of the school’s guidance curriculum” and through “direct support”; “[p]ray[ing] with and for students”; and “[t]each[ing] and celebrat[ing] Catholic traditions and ... observances.” *Id.*; *see also* App.7 ¶¶38-40; App.23 ¶¶25-26. Thus, as this Court observed, Fitzgerald “was ‘expressly charged’ with ‘leading students toward Christian maturity and with teaching the Word of God.’” *Starkey*, 2021 WL 3669050, at \*5 (quoting *Hosanna-Tabor*, 565 U.S. at 192, and the guidance counselor ministry description (citation omitted)).

Moreover, like the teachers in *Our Lady*, Fitzgerald’s work was “evaluated to ensure that [she was] fulfilling” these religious responsibilities. 140 S. Ct. at 2066; *see, e.g.*, App.573-81. Indeed, Fitzgerald herself helped develop the relevant evaluations. According to performance criteria instituted by Fitzgerald, a counselor cannot advance to the highest pay level unless she “embraces, embodies and lives out the spirit of Saint John XXIII,” “consistently attends Sunday mass or their denominational church service,” and “connects with students’ spiritual life and resources in counseling.” App.527. These criteria “confirm[] that the school expected her to play an important role in ‘transmitting the [Catholic] faith to the next generation.’” *Grussgott*, 882 F.3d at 661 (quoting *Hosanna-Tabor*, 565 U.S. at 192); *see also* App.580 (Fitzgerald’s evaluation according to these criteria); App.597 (evaluation of another guidance counselor according to these criteria).

*Our Lady* also emphasized that the teachers there did not just “provide instruction about the Catholic faith” but “were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” 140 S. Ct. at 2066. So too here. Fitzgerald was expressly charged with “assist[ing] the students in ... Christian development.” App.435. An “essential component[]” of her job was thus to bring Catholic faith, prayer, and teaching to bear on students’ aspirations and struggles, including those touching directly on their formation in and adherence to the faith. App.2-7; *see also* App.23; *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 978 (7th Cir. 2021) (en banc) (“No other employer, besides a religious one, could impose this type of work requirement upon [the plaintiff].”).

And Fitzgerald did, in fact, do so, as this Court noted in its *Starkey* opinion:

Shelly Fitzgerald ... explained that she met with students individually “at least once a year, but often times, much more” and discussed “personal and social issues ... and faith formation.” Fitzgerald also “consistently use[d] spiritual life and resources in [her] counseling conversations as well as sharing [her] own spiritual experiences.” She explained that “in a faith-based school,” her

willingness to share her beliefs and love of God “is a strength when working with young people who are seeking direction.”

*Starkey*, 2021 WL 3669050 at \*5; App.43-44, 47.

Beyond that, Fitzgerald helped lead a senior retreat—an intimate multi-night gathering focused on faith formation—where she gave a deeply personal talk on her own spiritual journey and reflected on Scripture. App.298-314 at 157:2-4, 165:4-166:13, 167:16-169:6, 170:22-171:2, 172:21-173:11; App.483; App.601-03. At least one family independently praised her for “always preaching the gospel” in her work as counselor to their children. App.606; *see Our Lady*, 140 S. Ct. at 2066 (plaintiffs “prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities”). And Fitzgerald’s contract required her “personal conduct” itself to “convey and be supportive of the teachings of the Catholic Church,” App.508, 512—the provision whose breach gave rise to this suit. *See Yin*, 335 F. Supp. 3d at 816 (school employee a minister where she was expected “to live, teach, and promote a life of godly choices”); *see also Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring) (“A religion cannot depend on someone to be an effective advocate ... if that person’s conduct fails to live up to the religious precepts that he or she espouses.”).

As this Court noted in *Starkey*, Roncalli’s guidance counselors (including Fitzgerald) “worked with students ... through the Student Assistance Program,” which “helps guidance counselors identify and support ‘at risk’ students who may be struggling with issues such as dysfunction at home, the death of a loved one, or substance abuse.” *Starkey*, 2021 WL 3669050 at \*5; *see* App.183 at 42:2-10; App.860 at 48:12-16. Because guidance counselors are the only faculty who meet with every student one-on-one at least once a year, App.23 ¶28; App.43-44, they are “often the first to identify when students are grappling with difficult social, mental, academic, emotional, family, or spiritual issues.” App.23 ¶28. They are expected to “show[] the face

of Christ,” App.2 ¶¶4-9, while “help[ing] students with their ‘most sensitive’ and ‘personal issues.’” *Starkey*, 2021 WL 3669050 at \*5; App.44; see App.527 (Fitzgerald’s counselor evaluation metric encouraging “connecting with students’ spiritual life and resources”). Thus, as this Court held in *Starkey*, “Roncalli plainly anticipated that matters of faith and doctrine would inform a guidance counselor’s approach to working with students struggling with sensitive personal issues.” *Starkey*, 2021 WL 3669050 at \*5.

Further, like *Starkey*, Fitzgerald served as a Department Chair and member of the Administrative Council, which are senior leadership positions “responsible for 95% of Roncalli’s daily ministry, education, and operations.” App.18-19 ¶¶3-8. As Department Chair, Fitzgerald oversaw the entire Guidance Department, including formulating the guidance curriculum and working with the Principal in the hiring and supervision of all Guidance personnel. App.161-62 at 20:20-21:4; App.727. And as a member of the Administrative Council, Fitzgerald “was one of a select group of school leaders responsible for guiding Roncalli in its mission.” *Starkey*, 2021 WL 3669050, at \*5. As the Court noted in *Starkey*, this included participation in “book discussions to better understand [the Catholic] faith and develop ways to transmit the faith to others”; discussions on how to “serve[] the students’ spiritual, academic, and personal needs and [how] to form them in the Catholic faith”; helping plan “all-school liturgies” and determining “the qualifications for who could serve as Eucharistic ministers”; and determining how to respond “to students in crisis and distress” and “how to address the personal and spiritual struggles of faculty members.” *Id.* at \*6; App.444-48, 472-74, 487-97; see App.221, 226-27, 883-85. “Nearly every week,” these senior leadership roles required her to help address sensitive student crises—“mental, emotional, physical, spiritual, academic”—“in light of [the school’s] Catholic faith.” App.18-20 ¶¶3-12; see also, e.g., App.229-31 at 88:18-90:14; App.491 (Fitzgerald, in her Administrative Council capacity, airing concerns over the Archdiocese’s draft

transgender policy). As this Court held: “[Fitzgerald’s] role on the Council and her work in helping shape Roncalli’s educational and spiritual environment weigh heavily in favor of applying the ministerial exception.” *Starkey*, 2021 WL 3669050, at \*6.

In the face of all this, Fitzgerald’s complaint asserts that her “positions as Guidance Counselor and Co-Director of Guidance did not include any religious duties” or “any religious component,” [Dkt. 1](#) ¶¶32, 35, which suggests she intends to claim that communicating the Catholic faith to students, helping them through their most sensitive and personal issues, sharing her own spiritual experiences, leading a spiritual retreat, and helping lead a Catholic school are somehow not “religious.” But Fitzgerald’s Co-Director made the same argument in *Starkey*—trying to “downplay[] the religious nature of her role, and highlight[] her secular duties”—and this Court rightly rejected it as foreclosed by precedent. *Starkey*, 2021 WL 3669050, at \*6.

As the Seventh Circuit has repeatedly explained, it is the *employer’s* understanding of the religious importance of the plaintiff’s job duties that counts; to hold otherwise would be to impermissibly “second-guess[]” “a church’s characterization of its own theology and internal organization.” *Sterlinski*, 934 F.3d at 570; *see also Grussgott*, 882 F.3d at 661 (“[I]t is the school’s expectation—that Grussgott would convey religious teachings to her students—that matters.”). Likewise, this Court held in *Starkey* that “it would be inappropriate for this court” to second-guess “what qualifies as secular or religious guidance in the context of a Catholic high school.” *Starkey*, 2021 WL 3669050, at \*7. And the Supreme Court in *Our Lady* confirmed this point, noting that “both [plaintiffs’] schools expressly saw them as playing a vital part in carrying out the mission of the church, and *the schools’ definition and explanation of their roles is important.*” 140 S. Ct. at 2066 (emphasis added).

Indeed, this case is in many respects even easier than *Our Lady*. For one thing, the teachers in *Our Lady* were ministers even though they characterized their duties as primarily just teaching “religion from a book” in a classroom rather than exercising

“close guidance and involvement” in “students’ spiritual lives.” 140 S. Ct. at 2068 (internal quotation marks omitted). Here, however, Fitzgerald’s role was precisely to exercise “close guidance and involvement” in “students’ spiritual lives.” Guidance counselors don’t provide guidance *en masse*; they meet “one-on-one” with students—and in fact are the only part of the faculty who meets with every student one-on-one at least once a year. App.23 ¶28. And in counseling students, Roncalli guidance counselors were required (under Fitzgerald’s own performance criteria) to “connect[] with students’ spiritual life,” App.527—a task they often must undertake in the course of addressing students’ personal “struggles” on matters of profound moral and spiritual consequence in the Catholic faith, and even on “the Catholic faith and its moral teachings” themselves. App.2-4 (also listing, *e.g.*, “depression,” “thoughts of suicide,” and sexuality). Thus, even if individualized spiritual guidance were required to trigger the exception—and *Our Lady* makes clear it is not—Fitzgerald’s role would nonetheless fit the bill, as this Court recognized in *Starkey*. See *Starkey*, 2021 WL 3669050, at \*7 (“Employees in [Fitzgerald’s] position met with every student throughout the year and discussed some of the most sensitive issues in a young person’s life.”)

This case is also more straightforward than *Our Lady* because Fitzgerald was not an ordinary school employee but one of a handful of Roncalli’s “key, visible leader[s].” App.23-24 ¶30. The *Our Lady* plaintiffs were teachers, and their central religious function was teaching a religion class (along with the rest of the curriculum). 140 S. Ct. at 2057, 2059. But Fitzgerald was elevated above a teacher role to one of the most senior leadership positions in the school. App.18-19. At the time she was nonrenewed, she co-directed the guidance department (thus also serving in Roncalli’s Department Chairpersons group), *and* was one of nine members of Roncalli’s core decision-making body, the Administrative Council, *and* held the only position (aside from the Principal and Assistant Principal) that served on *both* leadership bodies. App.19 (Administrative Council is “lifeblood of decision-making at the school”).

Fitzgerald’s leadership role alone disposes of this case. As Justices Alito and Kagan explained in *Hosanna-Tabor*, the ministerial exception “should apply to any ‘employee’ who”—*inter alia*—“leads a religious organization.” 565 U.S. at 199. And even the two *Our Lady* dissenters recognized that the exception applies to a religious organization’s “leaders.” See 140 S. Ct. at 2067 n.26. This makes good sense, since if an organization’s very purpose is to pass along a religious faith, then its leaders by definition perform “important religious functions” in directing its operations to that end. *Hosanna-Tabor*, 565 U.S. at 192; see also *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.”).

Here, as this Court explained in *Starkey*, the Co-Director of Guidance “served in a senior leadership role in which she helped shape the religious and spiritual environment at the school and guided the school on its religious mission.” *Starkey*, 2021 WL 3669050, at \*7. Fitzgerald led, managed, and evaluated Roncalli’s guidance department. And as a member of the Administrative Council, she helped steer the entire religious mission of the school. These are leadership roles “distinct from that of most” Roncalli employees, requiring her to “personify” its beliefs in an especially important way. *Hosanna-Tabor*, 565 U.S. at 188, 191, 195. Thus, as this Court held, “the Co-Director of Guidance at Roncalli falls within the ministerial exception.” *Starkey*, 2021 WL 3669050, at \*7; see also *Fratello*, 863 F.3d at 209 (Catholic school principal was subject to the ministerial exception because she “managed” and “evaluated” subordinate staff to help “execute the School’s religious education mission”).<sup>4</sup>

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<sup>4</sup> Many other courts have likewise recognized that the ministerial exception applies to the unique leadership role of senior administrators at religious schools. *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011); *Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash., Inc.*, 875 A.2d 669 (D.C. 2005); *Archdiocese of Miami v. Miñagorri*, 954 So.2d 640 (Fla.



## 2. Other considerations confirm Fitzgerald was a minister.

All the evidence above goes to religious function, which *Our Lady* establishes is alone sufficient to trigger the ministerial exception. 140 S. Ct. at 2063-66; *Alicea-Hernandez*, 320 F.3d at 703. But three other “considerations” identified in *Hosanna-Tabor* further confirm that Fitzgerald qualifies as a minister.

**Title.** First, the Court in *Hosanna-Tabor* looked to whether the plaintiff’s school “held [her] out as a minister,” which it evaluated by looking to her “title.” 565 U.S. at 191. Here, Fitzgerald’s job title was Co-Director of Guidance, and Roncalli “held her out as a minister” by titling her contract a “Ministry Contract,” App.507, and by expressly identifying her in her job description as a “minister of the faith.” App.509.

Beyond that, her title of Co-Director of Guidance reflected her leadership “role[,] distinct from ... most” other Roncalli employees. *Hosanna-Tabor*, 565 U.S. at 191. And as this Court said in *Starkey*, “the term itself—Director of *Guidance*—suggests that those who fill that role are tasked with guiding students as they mature and grow into adulthood.” *Starkey*, 2021 WL 3669050, at \*7. The title consideration, then, confirms that Fitzgerald was a minister. *See also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (finding that an individual was “clearly” a minister where she performed religious functions and had a religious title).

**Substance reflected in title.** This consideration asks whether “the substance of [the plaintiff’s] title as conveyed to her and as perceived by others entails” the passing on of faith. *Grussgott*, 882 F.3d at 660. In *Grussgott*, for example, the court concluded that this consideration cut in favor of ministerial status because Grussgott was “expected ... to integrate religious teachings into [her] lessons” and had “significant religious teaching experience” when hired. *Id.* at 659.

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Dist. Ct. App. 2007); *Sabatino v. St. Aloysius Par.*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996); *Black v. St. Bernadette Congregation of Appleton*, 360 N.W.2d 550 (Wis. Ct. App. 1984).



The same is true here. Fitzgerald’s performance criteria and job description show she was expected to—and agreed to—“foster the integration of faith” in her students’ lives and “[c]ommunicat[e] the Catholic faith to students and families through” her “guidance curriculum.” App.509-12, 498, 527. Moreover, she was raised in an engaged Catholic family, attended Catholic schools, played an active role in forming students in the Catholic faith, and had a “track record” of “commitment to and leadership in these areas of faith formation”—all of which played a crucial role in her promotion. App.26-27 ¶43.

Further, serving on the Administrative Council required Fitzgerald to undertake continued religious education, which consisted of participating in book studies on the “principles of evangelization and missionary discipleship” and forming others in the Catholic faith. App.895-96 at 83:21-84:10; *see* App.20-21 ¶¶14-17; App.481-82. Finally, that Fitzgerald’s position would have been “perceived by others” to reflect a religious role, *Grussgott*, 882 F.3d at 660, is demonstrated by the Teacher Handbook, which identifies the Co-Director of Guidance as specifically responsible for “assist[ing] the students in ... Christian development,” App.435, and by the fact that “[t]he Director or Co-Director of the Guidance Department is recognized by faculty and staff as a key, visible leader of the school” as a whole, App.23-24 ¶30.

***Employee’s use of title.*** This consideration asks whether the employee “held herself out” as a minister. 565 U.S. at 191-92. The answer here is yes: Fitzgerald “understood that she would be perceived as a religious leader.” *Fratello*, 863 F.3d at 208.

For one thing, Roncalli guidance counselors participate in an annual ceremony in which the assembled faculty publicly commits in prayer to serve as a “minister of the faith.” App.21-22, 33-36, App.356-57 at 215:22-216:11; App.660-61 ¶13 (Fitzgerald’s participation in Day of Reflection).

Moreover, just as the *Hosanna-Tabor* plaintiff identified as a minister to claim a “housing allowance on her taxes,” 565 U.S. at 191-92, so Fitzgerald joined Starkey in

identifying Roncalli guidance counselors as ministers in seeking a financial benefit. In 2016, discussion arose within Roncalli about moving guidance counselors to hourly pay. Resisting this change, Starkey transmitted to Principal Weisenbach, over her and Fitzgerald's signatures, a strongly worded letter to the rest of Roncalli leadership, arguing that "school counselors qualify for a salaried contract to the same degree as [Roncalli] teachers do," because they perform the same "Ministry" functions. App.498. The Principal agreed, stating that Fitzgerald and Starkey provided "very clear reasons why a guidance counselor qualifies for the same ministerial exemption as the teachers." App.139-40. And Fitzgerald thanked the Principal for supporting "our side." App.505; see App.260 at 119:1-5.

\* \* \*

This Court correctly held that "it is apparent that the ministerial exception covers Starkey's role as Co-Director of Guidance." *Starkey*, 2021 WL 3669050, at \*4. Fitzgerald held the same role. Thus, the ministerial exception equally applies.

**C. All of Fitzgerald's claims are barred.**

As this Court has already noted, "if the ministerial exception applies," "all of Fitzgerald's claims will be barred" ([Dkt. 117](#) at 4)—just as this Court held in *Starkey*. *Starkey*, 2021 WL 3669050, at \*7-8. Indeed, Fitzgerald brings the same five claims challenging the same employment action as the Plaintiff in *Starkey*: "(1) Title VII discrimination; (2) Title VII retaliation; (3) Title VII hostile work environment; (4) intentional interference with contractual relationship; and (5) intentional interference with employment relationship." *Id.* at \*7; [Dkt. 1](#) ¶¶77-117, 125-37. As this Court explained in *Starkey*, the ministerial exception bars "claims that result in the government's interference with a church's selection or supervision of its ministers." *Starkey*, 2021 WL 3669050, at \*8. "Here, the decision to not renew [Fitzgerald's] employment contract goes to the heart of the church's right to 'select and control who will minister

to the faithful.” *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 194-95). Thus, “the ministerial exception bars all of [Fitzgerald’s] claims.” *Id.*<sup>5</sup>

## II. Fitzgerald’s federal claims are barred by RFRA.

The Religious Freedom Restoration Act (RFRA) provides “very broad protection for religious liberty” by exempting religious objectors from federal laws that substantially burden the exercise of their religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA “operates as a kind of super statute” that applies to all of federal law and “might supersede Title VII’s commands in appropriate cases.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). This is such a case.<sup>6</sup>

Fitzgerald’s Title VII claims substantially burden the Archdiocese’s exercise of religion. A “substantial burden” occurs when application of federal law “puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Korte*, 735 F.3d at 682 (cleaned up). This includes significant financial pressure “undermin[ing]” a religious organization’s “ability to give witness to [its] moral teachings.” *Id.* at 683. Here, accepting Fitzgerald’s claims would substantially burden the Archdiocese’s beliefs. Indeed, there “can be no clearer example of an intrusion into the internal structure or affairs of a[ religious] association than” forcing it either to “accept members it does not desire,” *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 861, 863 (7th Cir. 2006), or have its religious exercise declared “unlawful” and incur damages if it resists, see *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875, 881-82 & n.6 (9th Cir. 1987); see [Dkt. 1](#) at 12-13.

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<sup>5</sup> Following its identical ruling in *Starkey, Starkey*, [Dkt. 93](#) at 23-25, this Court has already held that Fitzgerald’s Title IX claim ([Dkt. 1](#) ¶¶118-24) is preempted by Title VII. [Dkt. 98](#) at 6.

<sup>6</sup> A panel of the Seventh Circuit held that “RFRA does not apply when the ‘government,’ as defined in RFRA, is not a party to the action.” *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015). This is now questionable in light of *Bostock* and contrary decisions of other circuits.

Courts have thus had “no difficulty” finding that such intrusions on the religious beliefs and expression of a religious group can constitute a “significant[] burden,” as they “would cause the group as it currently identifies itself to cease to exist.” *Walker*, 453 F.3d at 862-63 (quoting *Dale*). For instance, in *EEOC v. Catholic University of America*, the D.C. Circuit found that imposing Title VII’s “secular standards” on a religious school’s selection of its religious faculty imposes a substantial burden (and violates RFRA). 83 F.3d 455, 467 (D.C. Cir. 1996). And in *Bear Creek Bible Church v. EEOC*, a federal court held that it is a substantial burden—and a RFRA violation—to apply Title VII to “[f]orc[e] a religious employer to hire, retain, and accommodate employees who conduct themselves contrary to the employer’s views regarding homosexuality.” No. 4:18-cv-00824, 2021 WL 5052661, at \*23-25 (N.D. Tex. Oct. 31, 2021); *see also Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1147-48 (D.N.D. 2021) (Title VII liability for religiously motivated conduct “indisputably qualifies as a substantial burden”).

Under RFRA, these substantial burdens are permissible only if Fitzgerald can show they are the “least restrictive means” of furthering a “compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). The pleadings show Fitzgerald cannot meet that standard. *Walker*, 453 F.3d at 863 (non-discrimination policy failed strict scrutiny); *see also Bear Creek*, 2021 WL 5052661, at \*24 & n.22 (Title VII’s “carve outs undermine” a strict-scrutiny showing).

### **III. Fitzgerald’s Title VII claims are barred by Title VII.**

Fitzgerald’s claims are also foreclosed by Title VII. Although the Court initially rejected most of the Archdiocese’s Title VII arguments on the pleadings by “adopt[ing] the reasoning and conclusions ... in *Starkey*” ([Dkt. 98](#) at 1-2), the Archdiocese requests reconsideration and incorporates its prior briefing by reference ([Dkt. 42](#), [Dkt. 55](#), [Dkt. 80](#)). The Archdiocese also renews its Title VII argument that the Court’s

prior order appeared not to address—that Fitzgerald failed to plead “but-for” causation with respect to her Title VII retaliation claim. [Dkt. 107](#), [Dkt. 113](#).

*First*, Fitzgerald’s claims are barred by Title VII’s religious exemption. The exemption says Title VII “shall not apply” to a religious “educational institution” when it employs “individuals of a particular religion.” 42 U.S.C. § 2000e-1(a). Title VII then defines “religion” to include “all aspects of religious observance and practice, as well as belief.” *Id.* § 2000e. Thus, when a religious organization hires based on an individual’s particular religious belief, observation, or practice—as the Archdiocese did here—it is protected by Title VII. [Dkt. 42](#) at 8-12.

In ruling otherwise, this Court expressed concern that this interpretation of the religious exemption would “swallow Title VII’s rules,” amounting to a “complete exemption” from claims based on “race, color, sex or national origin” discrimination. *Starkey*, [Dkt. 93](#) at 9-11. But that concern rests on a false dichotomy. The choice here is not between a “complete exemption” from all claims of race, sex, or national origin discrimination on the one hand, versus confining the exemption to claims of religious discrimination on the other. Rather, the text of Title VII offers a third way: religious employers are exempt when their hiring decision is based on an individual’s particular religious belief, observance, or practice (regardless of what type of claim is brought); but they remain subject to all types of Title VII claims when it is not.

This interpretation is not only required by the exemption’s plain text ([Dkt. 55](#) at 9), but also supported by scholars and other courts. *Starkey*, [Dkt. 95-1](#) at 12-14; *see also Bear Creek*, 2021 WL 5052661, at \*6 (“The plain text of this exemption ... is not limited to religious discrimination claims; rather, it also exempts religious employers from other form of discrimination under Title VII, so long as the employment decision was rooted in religious belief.”). And it is supported by *Bostock*, in which the Supreme Court said that Title VII’s “express statutory exception for religious organizations” may be relevant “in cases like ours”—*i.e.*, cases alleging sexual-orientation

discrimination. 140 S. Ct. at 1753-54. This statement makes no sense unless Title VII's religious exemption can extend beyond claims of religious discrimination.

*Second*, Fitzgerald was dismissed for a legitimate, nondiscriminatory reason: she violated her employment contract. [Dkt. 42](#) at 13-14. There has never been any dispute that Fitzgerald violated her contract. *Id.* Thus, the Archdiocese had nondiscriminatory grounds for nonrenewal.

*Third*, the Archdiocese's decision was based on Fitzgerald's conduct—not status. *Id.* at 14-16. As previously explained, there is no factual dispute that “the Archdiocese placed Fitzgerald on paid leave and declined to renew her contract not because of her ‘sexual orientation’ but because of her ‘conduct’ in entering into a same-sex union and rejecting Church teaching.” *Id.* at 15 (quoting *Walker*, 453 F.3d at 860-61). When an employment decision is based on “any reason other than” a protected characteristic, “no federal claim is implicated.” *Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1162 (7th Cir. 1994). Thus, judgment for the Archdiocese is warranted.

*Fourth*, Fitzgerald failed to plead “but-for” causation with respect to her Title VII retaliation claim, because the challenged employment decisions were made *before* her alleged protected activity took place. [Dkt. 42](#) at 16-18; [Dkt. 107](#) at 3-5. According to the complaint, the complained-of adverse employment actions—paid leave, conditions on returning to campus, and nonrenewal—simply carried out the Archdiocese's “statement of intent in the meeting with Fitzgerald on August 10, 2018.” [Dkt. 1](#) ¶¶54, 67. Meanwhile, Fitzgerald's activities opposing the Archdiocese's policies have occurred “[since] August 10, 2018.” *Id.* ¶¶69-76 (emphasis added). Because a retaliation “theory doesn't work” if the allegedly retaliatory decision “precedes the protected activity,” *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 676 (7th Cir. 2011), Fitzgerald's Title VII retaliation claim must be dismissed.

#### IV. Fitzgerald’s claims are barred by the First Amendment.

Fitzgerald’s claims are also foreclosed by several more First Amendment defenses. [Dkt. 42](#) at 21-34. Although the Court said it was “premature” to resolve these defenses absent further information on “Fitzgerald’s role at Roncalli” ([Dkt. 98](#) at 5), those duties are now clear. Accordingly, the Archdiocese renews its request for judgment and incorporates its prior briefing by reference ([Dkt. 42](#), [Dkt. 55](#), [Dkt. 80](#)).<sup>7</sup>

*First*, Fitzgerald’s claims are barred by religious autonomy, which protects religious organizations’ right to “govern themselves in accordance with their own doctrines.” *Korte*, 735 F.3d at 677. This includes the right to select not only “ministers” under the ministerial exception, but also *non-ministers* “based on religious doctrine.” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656-60, 658 n.2 (10th Cir. 2002); [Dkt. 42](#) at 22-26. Here, the Archdiocese’s decision was indisputably based on religious doctrine—Fitzgerald’s rejection of Church teaching on marriage, [Dkt. 1](#) ¶45—so her claims are barred even if she isn’t a minister.

In finding this argument premature in *Starkey*, this Court said that applying religious-autonomy doctrine to non-ministers “would render the ministerial exception superfluous.” *Starkey*, [Dkt. 93](#) at 18. But the ministerial exception is limited to *ministers* and allows dismissal for *any* reason—including *non-religious* reasons. *See Our Lady*, 140 S. Ct. at 2059; *Hosanna-Tabor*, 565 U.S. at 178-79. By contrast, religious autonomy also protects decisions regarding a *broader* range of employees for *narrower* reasons—namely, *non-ministers* dismissed for *religious* reasons. This doesn’t render the ministerial exception “superfluous”; it provides a different (and more limited) type of protection for different employees. Many courts have so recognized. *Starkey*, [Dkt. 95-1](#) at 15-18.

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<sup>7</sup> In rejecting the Archdiocese’s First Amendment defenses in *Starkey*, this Court invoked the *Demkovich* panel opinion. *Starkey*, [Dkt. 93](#) at 17. However, that opinion has been vacated and rejected by the en banc Seventh Circuit. *Demkovich*, 3 F.4th at 985.



*Second*, adjudicating Fitzgerald’s claim would impermissibly entangle the Court in religious questions. [Dkt. 42](#) at 28-30. Fitzgerald says she was treated worse than heterosexual employees in relationships violating Catholic teaching. *Id.* at 29-30. But for Fitzgerald to prevail, the Court (or jury) would have to decide whether Catholic theology sees all violations of sexual morality as equivalent—which a court cannot do. *Id.*

*Third*, Fitzgerald’s claim is barred by freedom of association, which protects the freedom of the Archdiocese and Roncalli to disassociate from someone who would undermine their ability to communicate their views. *Id.* at 30-34; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Here, forcing the Archdiocese to retain Fitzgerald, especially given her senior leadership role and dedication to advocating positions contrary to Church teaching, would undermine its ability to communicate the Church’s teaching on marriage. And although this Court rejected the expressive-association defense on the ground that it doesn’t apply in the “employment context” ([Dkt. 98](#) at 5), multiple courts have held the opposite. *Starkey*, [Dkt. 95-1](#) at 20-21; *accord Bear Creek*, 2021 WL 5052661, at \*28 (rejecting claim “that freedom of association is no defense to a claim of discrimination under Title VII”).

*Finally*, even if it weren’t clear that Fitzgerald’s claims are barred by the First Amendment, they at least present “serious constitutional questions”—meaning that constitutional avoidance requires the Court to interpret Title VII to avoid reaching them. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); [Dkt. 42](#) at 34-35.

## CONCLUSION

Judgment should be rendered for the Archdiocese.



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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following on November 22, 2021 by this Court's electronic filing system:

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