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

APPELLANT'S BRIEF
& Special Appendix

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PRELIMINARY STATEMENT

Plaintiff-Appellant Joanne Fratello ("Ms. Fratello") appeals the District Court's grant of summary judgment on ministerial immunity grounds in favor of the Defendant-Appellees Roman Catholic Archdiocese of New York ("Archdiocese"), St. Anthony Shrine Church ("Parish") and St. Anthony School ("School"), and the District Court's denial of her cross-motion to strike Appellees' ministerial immunity defense.

Ms. Fratello's underlying claim is wrongful termination of her employment (non-renewal of her contract) due to gender discrimination after the arrival of a new parish pastor. The merits of her claims have not been addressed.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a case of unlawful gender discrimination and retaliation commended by Ms. Fratello under the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.("Title VII")*. The district court below had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The district court (Siebel, J) issued its Opinion and Order on March 29, 2016, with final judgment entered on March 30, 2016 granting summary judgment to Appellees based upon "ministerial immunity." Ms. Fratello timely filed her Notice of Appeal on April 25, 2016. Thus, 28 U.S.C. §1291 provides the Court with appellate jurisdiction over all issues.

ISSUES PRESENTED

1. Did the lower court err in concluding that Appellant was a "minister" for ministerial immunity purposes, where the Appellees never viewed Appellant as a minister of the faith; hired her under an expressly "lay" contract of employment with the only religious BFOQ being "practicing Catholic"; gave her no pastoral duties or ecclesial role; and took no ecclesial action whatsoever against her? Yes. Review is *de novo*.

2. Did the lower court err in expanding the doctrine of ministerial immunity far beyond the holding in *Hosanna-Tabor*, where the lower court's "duties performed" interpretation, taken to its logical conclusion, will allow any religiously affiliated entity or corporation to impose religious duties upon, and then retroactively deem, any employee a "minister" and thus obtain absolute immunity from employment law wrongdoing? Yes. Review is *de novo*.

3. Did the lower court err in granting an expansive view of ministerial immunity, which view will nullify the statutory and constitutional rights of Church-affiliated employees and allow the Church-affiliated entity to place "No Blacks, Women or Disabled Need Apply" on its employment applications? Yes. Review is *de novo*.

4. Did the District Court err in failing to look to "neutral principles of law" in ruling on ministerial immunity, such as examining Appellant's written contract, and examining whether any ecclesial action was taken by religious authorities of the Church against her? Yes. Review is *de novo*.

STATEMENT OF THE CASE

A. Nature of the Case

Ms. Fratello commenced this employment discrimination action in the Southern District of New York on October 1, 2012. After filing an Amended Complaint on March 5, 2013 and engaging in limited discovery on the issue of ministerial immunity, the parties filed summary judgment motions on the issue of ministerial immunity. *See*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). The district court (Hon. Cathy Siebel, USDJ) granted summary judgment to Appellees on March 29, 2016, and Ms. Fratello timely appealed. The lower court's Opinion and Order is unreported, but is available at 2016 WL 1249609.

B. Two-Prong analysis of Ministerial Immunity

The lower court's holding interprets *Hosanna-Tabor* far more expansively than the Supreme Court's holding, and dangerously so. Therefore, Appellant Fratello proposes that this Court adopt a two-prong analytical approach to analyzing cases involving the ministerial immunity defense. The approach fully comports with *Hosanna-Tabor* and will help the courts avoid excessive judicial entanglement with organized religion and deprivation of individual rights.

As to the method of analysis proposed here, Prong One focuses on the secular employer-employee terms of employment, and specifically, what the parties mutually bargained for. Did the employer hire a person to be a lay

employee, or did it want a credentialed minister? A religious employer can require or prefer a religious credential from the employee, for example, that the applicant be of the same religious faith, or be a titled religious minister (e.g., a priest, nun, monk, or rabbi) of the religious faith. Federal statute allows such religious discrimination as a "BFOQ" in employment. *See*, e.g., § 702 and § 703 of Title VII.[1] With a BFOQ, there was no need to resort to the First Amendment or ministerial immunity. Religious discrimination alone is permissible under Prong One, the employment inquiry.

Prong Two involves the ecclesial inquiry. It involves the entity that the Supreme Court in *Hosanna-Tabor* found must as a matter of the First Amendment be immune from employment discrimination lawsuits, namely, the Church. Prong Two examines what ecclesial decision-making is involved. The Lutheran Church made an ecclesial decision to revoke Ms. Perich's credential of "Minister of Religion, Commissioned." The Catholic Church could do this by defrocking or suspending its priest or deacon. Other religions have their own means to select and remove ministers. *Hosanna-Tabor* provides factors for a court to consider in determining whether to provide ministerial immunity based upon the ecclesial

[1] *See*, 42 U.S.C. § 2000e-1(a) and § 2000e-2(e)(1 & 2). Essentially, § 702(a) makes Title VII inapplicable to religious entities and § 703(e)(1) allows religious employers to use religion as a BFOQ defense. Sections available online at: https://www.eeoc.gov/laws/statutes/titlevii.cfm.

action. The Supreme Court in *Hosanna-Tabor* describes the factors involved, and these are set forth below in the proposed "Prong Two" analysis (*See*, Point II).

Hosanna-Tabor is not inconsistent with this two prong approach. The day after the Hosanna-Tabor Church took the Prong Two ecclesial action of revoking Ms. Perich's religious title, it took the Prong One action of terminating Ms. Perich's school employment. Without explicitly stating it, Ms. Perich had lost her "commissioned minister" BFOQ. [2]

In the present case, as to the first prong, the Appellees contracted for Ms. Fratello's employment specifically as a "lay principal," with a BFOQ of "practicing Catholic." As to the second prong, there was no ecclesial action whatsoever taken by the Roman Catholic Church regarding Ms. Fratello.

C. Statement of the Facts

A detailed recitation of the relevant facts relevant to the asserted ministerial immunity can be found in Ms. Fratello's summary judgment papers—her declaration, *Appx. 290*, reply declaration, *Appx. 417*, Rule 56.1 Counter-Statement, *Appx.* 300, and Rule 56.1 Statement in Support of her cross-motion, *Appx. 344*.

Essentially, Ms. Fratello was hired as a lay employee by the Appellee School, an Archdiocese parochial school that provides a secular education, with Christian and Catholic elementary school students. Approximately one-quarter of

[2] 132 S. Ct. at 700 ("The congregation voted to rescind Perich's call on April 10, and Hosanna–Tabor sent her a letter of termination the next day.").

the students at the Archdiocese's schools are non-Catholic. *Appx. 184*. Ms. Fratello was hired as an educator, and was never told that she would be considered to be a "minister" or a person with ministerial or pastoral duties. *Appx.* 415-420. Her contract of employment expressly stated that her job was "lay." [3] *Appx.* 84. The Archdiocese has a different form contract for a religious principal.[4] Ms. Fratello's personal religious belief, supported by her canon law expert, is that the Roman Catholic religion prohibits a lay person from having a pastoral or spiritual role. *Appx.* 419 (¶¶ 15, 17). This view is supported by the Archdiocese's Manual, which expressly states that the parish pastor (the priest) is the "spiritual leader" and provides the "religious ministry," and that the pastor provides leadership to the school principal. *Appx.* 128. The principal acts as "direct administrator of the school on a day to day basis," *Appx.* 128, 132, 133 & 141, and is the "Catholic leader"[5] of the school but not its spiritual leader (the pastor's role). *Appx.* 132 & 415-420. Ms. Fratello's job was not to evangelize the students (who are of many creeds), but to educate them. *Appx.* 416. The Roman Catholic Church and its local parish did not place Ms. Fratello into any ecclesial position, nor did it remove her

[3] *See* footnote 5 and the Archdiocese's "religious principal" form.

[4] *See* footnote 5 and *Appx.* 166.

[5] Appellees refer to Ms. Fratello as a "religious leader." They provide no evidence whatsoever that any religious authority placed Ms. Fratello in any kind of "pastoral" (spiritual) role. The Appellee Archdiocese distinguishes between the "pastoral" and the educational (and other "ministries of service" *Appx.* 417 (¶ 8), 126 ("educational and pastoral ministries"), & 356. The Archdiocese has a standard form contract for a "religious" principal. *Appx.* 141 (¶ 333) & 166.

from any. Her lay employment contract was simply not renewed, and not renewed in violation of the anti-discrimination provisions of Title VII.

1. Lay Principal's Employment Contract and Hiring Criteria

Ms. Fratello was originally hired in the Archdiocese, at another school, as a lay teacher. *Appx. 344 (*Pl.56.1 Smt at ¶ 1).[6] The Archdiocese does not require that its parochial school teachers be Roman Catholic. *Id*. (¶ 2). In applying for employment with the Archdiocese, Ms. Fratello was applying for an educational position. *Id*. (¶ 3). Her academic credentials are in education, and she has no academic credentials whatsoever in religion or theology. *Id*.(¶ 4). In being promoted to (lay) elementary school principal, she reasonably believed that she was being advanced as an educator. *Id*. (¶ 5).

a. *Interview process*

Ms. Fratello was interviewed by officials of the Archdiocese Superintendent of Schools and found qualified to be hired as an elementary school principal. *Appx.* 345 (¶ 9). During this interview process, she was not asked about any religious matters, other than her stating on her application that she was a practicing Catholic. *Id*. (¶ 10). She was not asked about her religious background; about whether she had any training or education in religion or theology; or about whether she felt

[6] Plaintiff's Rule 56.1 Statement in Support of Cross-Motion to Strike Ministerial Immunity Defense ("*Pl.56.1 Smt*"), beginning at *Appx.* 344. Ms. Fratello reviewed, and affirmed the truth of the matter contained in her Rule 56.1 statements, and also incorporated these into her declaration, Appx. 290 (¶ 3).

herself competent to act in any way as a minister or to perform ministerial functions. *Id*.

b. *Lay Principal contract terms*

At issue here is Ms. Fratello's last contract of employment, entitled "Contract of Employment for Lay Principals— Archdiocese of New York" ("Contract") executed on July 3, 2007. *Appx.* 84. The Contract states that the job position is "lay." *Id*. & *Appx.* 346 (¶¶ 11- 12). The Contract states that that the "Office of the Superintendent of Schools" has approved Ms. Fratello as "qualified for the position of elementary school principal." *Id*. (¶ 13). The Contract goes on to state, at "Responsibilities" (numbered paragraph 2), that "[t]he principal [Ms. Fratello] shall be subject to, and employed pursuant to, the rules, regulations, policies and procedures of the school, the Office of Superintendent of Schools, and the State of New York…." *Id*. This paragraph states nothing about any "religious," "pastoral," or "ministerial" duties or responsibilities. *Id*. (¶ 14).

Ms. Fratello was being hired as an administrator at a Roman Catholic-affiliated elementary school, and the employment included the bona fide occupational qualification (BFOQ) that she be a "practicing Catholic." *Id*. (¶ 15). There was nothing in the Contract, or in the written job application materials, indicating anything about being a "minister."

As to "Termination," the Contract states that:

> "The principal recognizes the religious nature of the Catholic school and agrees that the employer retains the right to dismiss principal for immorality, scandal, disregard or disobedience of the policies or rules of the Ordinary of the Archdiocese of New York, or rejection of the official teaching, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights a principal may have hereunder, subject, however, to the personal due process rights promulgated by Archdiocesan ecclesiastical authorities." *Appx.* 85 (¶ 3(d)) (*emphasis added*)

There is no mention of ministerial duties, nor any indication of any "ecclesial" credentialing. Rather, under the Contract the employer is permitted to terminate Ms. Fratello for cause, for example, if she rejected the teachings of the Roman Catholic Church. The Contract concluded by stating that:

> "This contract constitutes the complete agreement between the parties and may only be amended by a written addendum signed by the parties." *Appx. 85* (¶ 5)(*emphasis added*).

c. *Archdiocese's Qualifications for Principal ("School Leader")*

Beyond the written contract, the only religious requirement that the Appellee Archdiocese has for being hired into the position of principal ("school leader") is that the person be a "practicing Catholic." *Appx.* 347-348 (¶¶ 19 - 20). The Archdiocese's website sought principals with the following qualifications:

> *"School Leader Qualifications*
> *The Archdiocese of New York seeks qualified applicants for leadership positions in our schools.*
> We look for intelligent, results-oriented candidates with outstanding educational vision, leadership skills, organizational ability and interpersonal strengths to serve as principals for elementary (grades

> PreK-8) and secondary (grades 9-12) schools. These leaders must be committed Catholics who can inspire faculty and staff and engage parents and students in the promise of spiritual development and academic excellence.
> ***
> Candidates must meet the following requirements:
> • Practicing Catholic
> • Minimum five years teaching experience or five years cumulative experience in teaching and/or administrative role
> • Earned Master's degree in Education or Master's equivalent (or in progress) OR NYS School Building Leader certification (or equivalent)
> • Preference is given to candidates with Level 1 and Level 2 Catechist certification or in progress (if prior position did not require Catechist certification, then both levels must be completed within three years of principalship).
> Salary is commensurate with credentials and experience."

Appx. 242 (*emphasis added*) and 347-48
(available at: http://buildboldfutures.org/careers/schoolleader- qualifications/).

The above educational requirement of a Master's Degree in Education is unrelated to an entirely different "learned profession," namely, pastoral ministry and theology. *Appx.* 417. The application information for the position of principal summarized the job as follows:

> "JOB SUMMARY: The Archdiocese of New York seeks committed Catholics who can inspire and engage faculty, staff, parents and students in the pursuit of spiritual development and academic excellence. These dynamic administrators should demonstrate outstanding educational vision, professionalism, leadership skills, organizational ability and interpersonal strengths to serve as Principals for elementary (grades K-8) and secondary (grades 9-12) schools. Candidates must set high expectations and foster a culture of continuous improvement in which every member of the school community works collaboratively to ensure the holistic achievement of every student."

Appx. 248 (¶ 22)(*emphasis added*),
available online at http://buildboldfutures.org/assets/files/SchoolLeadersStage1.pdf

The above does not require, or even suggest, that pastoral or ministerial skills are required. *Id*. (¶ 23). As to Ms. Fratello's contract, no religious figure or religious authority was part of this approval process. *Appx.* 348 (¶ 21).

d. *Appellee St. Anthony's School (the employer) is not a Church*

Ms. Fratello was offered employment by St. Anthony's School ("School"). The School is a church-affiliated private school, not a church. *Appx. 350* (¶ 30). The N.Y.S. Department of Education governs the School as a private school. *Id*. The Archdiocese acknowledges (expressly or impliedly) that its parochial schools, such as St. Anthony's School, are considered private schools under the New York State Education Law. *Id* (¶ 31). Moreover, the Appellee School is an Internal Revenue Code § 501(c)(3) not-for-profit organization. *See*, Deposition of Mary Jane Daley ("*Daley Tr*.) at page 20, line 23 (Exhibit 34); *Appx.* 351 (¶¶34). The § 501(c)(3) exempt purpose for St. Anthony's School was "educational." *Appx.* 351 (¶ 35).

2. Non-Discrimination Policy of Archdiocese & St. Anthony's School

The Archdiocese and the School both have non-discrimination policies. Archdiocese schools "pursue their educational goals and all activities with an understanding of the essential quality of all persons as rooted in the teachings of Jesus Christ[,]" and that it is the policy of the archdiocese not to "discriminate on

the basis of race, creed, color, national origin, sex, age, disability, and marital status or alienage in their employment, educational and admission policies." *Appx.* 112 and 350 (¶32) (*emphasis added*). Appellee School's policy prohibited religious discrimination as well. The Catholic Schools and the Appellee School do not seek to proselytize or indoctrinate non-Catholic students. *Appx.* 294 (¶ ¶ 24-25).

The school leader (principal) has the responsibility of ensuring that the Archdiocese's and School's non-discrimination policies are complied with. *Appx.* 351 (¶ 33). That is easily done in an administrative capacity. However, if the principal is deemed a Catholic "minister," it would be much more difficult. An obvious religious conflict of interest may arise for the Catholic "minister" encountering, for example, Catholic students harassing or attempting to proselytize a Methodist or Muslim student. The students need even-handed protection from a principal, not a preacher.

3. Role of Lay Principal—*In Loco Parentis*, not Pastoral

Additionally, primary school students need other protection as well. They need the protection of the teachers and principal, who stand in the shoes of their parents, "*in loco parentis,*" with the children entrusted into their care. *Appx.* 353-54 (¶¶48-58). As principal, Ms. Fratello had a *de jure* parental responsibility

toward the children entrusted to her care by the children's parents—a responsibility superior to any religious responsibility at the school. *Id*. (¶ 48 - 52).

If a parent failed to ensure their child's education, it would be educational neglect. This is likewise for a school's educational staff acting *in loco parentis.*[7]

4. State Education Law and other regulatory compliance

Thus, Ms. Fratello, as school principal, had dual responsibility of acting *in loco parentis*, and related to that, both ensuring compliance N.Y.S. health and safety laws and regulations, and also ensuring that the requirements of the N.Y.S. Educational Law was followed and the children taught the required secular subjects. *Id (¶¶ 57*-58). The Catholic Schools, as private schools under N.Y.S. law, must provide a substantially equivalent education as is provided in the public schools. *Appx.* 357 (¶¶ 72–74).

5. Religious versus Educational Missions of Roman Catholic Church

The Archdiocese's home page on its website (http://archny.org/) has separate heading for "Pastoral" and "Education." *Appx.* 352 (¶ 41). The "pastoral" activities of the Archdiocese are its (especially in-church) spiritual activities, and

[7] The Court can take judicial notice of news reporting about certain (non-Catholic) Orthodox schools in the New York region, and specifically, criticism that the schools do not provide an adequate N.Y.S.-required secular education to the students. In those schools, it may be the case that the principals and teachers view themselves primarily as ministers/rabbis, not educators, to the detriment of the students and pluralistic democracy. Fostering religiously-insular groups is inconsistent with the ideal of the American "melting pot" and traditional notions that democracy requires citizen involvement. *Cf.. Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

its "educational" activities involve a private school secular education of children in a principally non-denominational Christian environment, in a Catholic setting. *Id*.

In the Archdiocese's Catholic Schools, 23 percent of the students are non-Catholic. *Id*. (¶ 42); *see also*, http://buildboldfutures.org/about-us . The Archdiocese sells its brand—the "Catholic Schools"—to the public with its potential customers (school-aged children and their parents) being any and all faiths. *Id*. (¶ 43). Even non-believers are welcome. *Id*. (¶ 44). The current "Catholic Schools" webpage of the Archdiocese has a "careers" site which solicits job applicants. *Appx*. 353 (¶ 45). It reads as follows:

> "**Teach. Lead. Serve.**
> The principals and teachers of our schools are well-educated, motivated and committed people who are eager to share their faith and talents with the children in our vast school system.
> ***
> We are committed to the personal and professional growth of our teachers and principals. We value their faith-filled service and applaud their commitment to Catholic education."
>
> *Id*. (¶ 45); s*ee also*, http://buildboldfutures.org/careers/.

The Archdiocese seeks qualified teachers, including non-Catholics, though it may give preference to practicing Roman Catholics. *Id*. (¶ 46). No pastoral or ministerial functions are indicated. *Id*. (¶ 47).

6. Plaintiff essential duties as lay principal were private school administration

From Appellee Archdiocese's "Administrative Manual," it is clear that the school principal's role is education:

> "The principal is the Catholic leader and the administrative head of the school and is responsible for the effective operation of the school as an educational institution within the total parish educational program. Ordinarily, in order to devote full time to the administration and supervision of the school program, the principal does not assume any teaching responsibilities. ***
>
> Effective school administration is achieved by cooperation and mutual understanding between the pastor and the principal. Each shares the responsibility for providing the leadership which will ensure that the school atmosphere is one of mutual respect and cooperation among clergy, principal, teachers, students, parents, other members of the school staff, and the community." *Id*. at § 320 (*emphasis added*)

Appx. 132 (§ 320). This is clearly not a pastoral or spiritual role; it is an administrative and private school education role. The parish priest has the pastoral role. *Appx.* 285 (¶ 16).[8] Ms. Fratello did not supervise the teaching of religion, nor did she teach religion. *Appx.* 364 (¶ 120).

The differences between Ms. Fratello's employment and that of *Hosanna-Tabor*'s Ms. Perich are detailed in Ms. Fratello's declaration and Rule 56.1 statements, *e.g.*, *Appx.* 359 – 365, with a side-by-side comparison found in the Amended Complaint, *Appx.* 31 – 36 (¶¶ 101). An itemization of Ms. Fratello's

[8] See also footnote 5 and accompanying text.

duties and responsibilities as lay principal is found at ¶¶ 128 - 146 of the Amended Complaint. *Appx.* 40 – 44.

7. Rules, Structure & Governance of the Roman Catholic Church

The canon law of the Catholic Church is the system of laws and legal principles made and enforced by the hierarchical authorities of the Church to regulate its internal and external organization and government. Canon law serves as the Roman Catholic Church's bylaws.[9] *Appx.* 355 (¶59).

Roman Catholic lay officials (such as the Superintendent of Schools and his subordinates) had no ecclesiastical jurisdiction over Ms. Fratello, either as an individual or in her capacity as lay school principal. *Appx. 355* (¶ 60). Appellees offer no evidence to the contrary.

Moreover, Ms. Fratello's understanding of Church doctrine is that the parish priest had no ecclesial jurisdiction over her. The bishop is the person who holds ecclesial power over church members. *Id (¶ 61); see also Appx. 284 (Decl. of Sr. Kate Kuenstler, JCD, at ¶ 10).* The Catholic Church describes as its hierarchy its bishops, priests and deacons, with authority resting chiefly with the bishops, while priests and deacons serve as their assistants, co-workers or helpers. *Id*.

As to preaching the Gospel of God, this is done by "Bishops, with priests as coworkers." *Appx.* 355 (¶ 63). Canon 230, §1 indicates that Lay men can be

[9] The Roman Catholic Church canon law is available online at: http://www.vatican.va/archive/ENG1104/_INDEX.HTM.

admitted "…through the prescribed liturgical rite to the ministries of lector and acolyte." A woman cannot. *Appx.* 356 (¶ 65)(*emphasis added*).

The Roman Catholic Church sponsors ministries of service**,** which include education, literacy, social justice, health care and economic development. *Appx. 356* (¶ 66). These ministries include catholic schools, and are not pastoral (spiritual). *Id* (¶ 67). The pastoral ministry is through ordained ministers. *Id*. (¶¶ 68 – 69). As stated at Canon 515 - §1, "the pastoral care of the parish is entrusted to a pastor as its own shepherd under the authority of the diocesan bishop." *Id*. (¶ 68). All this is the ecclesiastical, and none of this, or any other ecclesial action, was taken by the Church regarding Ms. Fratello.

8. The only BFOQ for the job was to be a "practicing Catholic"

Appellees could, and did, require Ms. Fratello to be a practicing Roman Catholic to be hired for the lay principal job. *Appx.* 366 (¶ 128). Title VII allows employers to use religion as a bona fide occupational qualification ("BFOQ") whenever "reasonably necessary to the normal operation of that particular business or enterprise."[10] *Id*. (¶ 129). The School could have required a clergyman or nun. (The Archdiocese has a "religious" employee form agreement for this. *Appx.* 166.) It did not.

[10] *See* 42 U.S.C. § 2000e-2(e)(l)("Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... , on the basis of his religion, ... in those certain instances where religion, ... is a [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.").

SUMMARY OF ARGUMENT

The lower court's expansive view of ministerial immunity is both unwarranted and dangerous to our Nation and individual rights. First, Ms. Fratello did not "sign up" to be a religious minister of the Church. She applied and was hired for the job of "lay principal." She finds it astonishing that Appellees (though not anyone with actual ecclesial authority) seek to characterize her as a "minister"—someone providing pastoral or spiritual services—without ever anointing her with any such title. The pastor was the minister, and to deem a lay principal as one is contradicts Ms. Fratello's own religious beliefs and understanding of Catholicism (backed by her canon law expert[11]). In this, the lower court has entwined itself into religion by examining and choosing Appellees (purportedly) religious view that Ms. Fratello should be deemed a minister of the Church (for civil law purposes only), while disregarding Ms. Fratello's view (supported by Roman Catholic canon law) that she is not a minister.

Second, with its sweepingly broad view of ministerial immunity, the lower court is setting the stage for jurisprudential havoc, as "religious groups" realize that they can obtain immunity from suit by tasking employees with some religious duties. This will help "establish" the religion or professed religion. It will support and foster both major organized religions (e.g., the Roman Catholic Church) as

[11] *See*, Declaration of Sr. Kate Kuenstler, PHJC, JCD. *Appx.* 283.

well as minor or radical groups (the First Amendment makes no distinction), and do so over individual belief and secular civil law. Ministerial immunity allows the "religious" employer *carte blanche* to ignore antidiscrimination and wage laws to deprive a citizen of his or her civil rights and the equal protection of the law.

This Court's ruling will undoubtedly set a national precedent which will affect Church-affiliated schools of all faiths, and not merely at the elementary and high school level. Rather, the lower court's expansive interpretation of *Hosanna-Tabor* places in jeopardy the civil rights and religious liberty of a large and growing segment of American society—people employed by "religious groups" and Church-affiliated entities. Left unconfined by *Hosanna-Tabor* and the principled analytical approach proposed in this Brief, ministerial immunity will increasingly burden the federal courts with more and more employers seeking immunity to stifle the rights of employees who had advance warning that they might lose their civil rights by accepting Church-affiliated employment.

Appellant Fratello proposes a principled approach to analyzing ministerial immunity. The Two Prong approach provides a means for the courts to avoid entanglement in religions matters, protects the statutory and constitutional rights of the individual, while preserving religious groups' and individual's religious liberty. It is an approach is fully consistent with *Hosanna-Tabor*

Point I below sets forth **Prong One** of ministerial immunity analysis—the secular employer-employee agreement, that is, the mutual understanding of the parties as a matter of contract law. It examines the job offered to the job applicant, and the "meeting of the minds" that resulted in an employment relationship. As applied to the present case, Prong One analyzes the job position offered to and accepted by Ms. Fratello. Hers was a "lay" job, by express written contract, not a ministerial appointment. The job included a religious requirement, namely, that Ms. Fratello be a "practicing Catholic." This was a Bona Fide Occupational Qualification ("BFOQ"), and permissible. The employer, as a religious organization, could can legally discriminate on the basis of religion (employing only "practicing Catholics," or a subset such as "ordained Priests"). Congress has allowed this by statute, namely, by Sections 702 and 703 of Title VII.

As to Ms. Fratello, Appellees could have required as a BFOQ that the occupant of the school principal position be an ecclesiastically credentialed individual. Appellees did not. There was no BFOQ that Ms. Fratello be qualified or certified in any type of ecclesial title or position. The BFOQ that Appellees required of her was merely that she be a "practicing Catholic."

The Court should study the job that was offered and accepted by Ms. Fratello, not the Appellees' self-interested post hoc rationalization. Prong One uses neutral principles of secular contract law to ascertain whether the job was that

of a religious "minister." As to this, the lower court erred in concluding that the job of "lay principal" entailed post-contract ministerial duties that transformed Ms. Fratello's job into one materially different from the job she had agreed to, with civil rights forfeited.

Point II below sets forth **Prong Two** of ministerial immunity analysis—the ecclesial relationship and decision-making between the Church (the religious group) and its Church member (who may or may not be one of its "ministers"). This prong was the focus in the *Hosanna-Tabor* case—to determine whether the Church's ecclesial relationship with Ms. Perich was that of "Church-minister" for purposes of granting the Lutheran Church and its school ministerial immunity against Ms. Perich's employment discrimination lawsuit. This Court has already dealt with the ecclesial relationship between the Catholic Church and its clergy.[12]

The Supreme Court in *Hosanna-Tabor*, mentioning the Magna Carta and need for the Church to remain unsupervised by the secular sovereign in selecting its clergy, unanimously held that a Church has the exclusive right, as an ecclesial matter, to select its own ministers. 132 S.Ct. at 706. The Lutheran Church selected, and then unselected, its clergywoman in *Hosanna-Tabor*. The Lutheran Congregation, as a matter of internal Church governance, revoked Ms. Perich's Minister of Religion religious credential. The Supreme Court prohibited

[12] *See, e.g., Rweyemamu v. Cote,* 520 F.3d 198 (2d Cir. 2008)(ordained Priest).

governmental intrusion into that decision, because all the factors identified by the Court warranted the conclusion that it was an ecclesial decision regarding Ms. Perich, who was anointed by her Church as its *bona fide* minister until that same Church revoked the ecclesial credential. The Supreme Court focused on whether the lower courts could intrude into the ecclesial decision-making. It did not need to engage in a Prong One analysis, because there was no dispute as to whether being a commissioned minister of religion was a BFOQ of Ms. Perich' teaching job. That was apparent.

Ms. Fratello's situation is the completely the opposite of Ms. Perich's. The factors that compelled the finding that Ms. Perich was a minister compel the finding that Ms. Fratello was not. Ms. Fratello prevails under both Prong One and Prong Two analysis.

As argued in **Point III**, an expansive application of ministerial immunity will infringe upon employees' religious beliefs, and, without advance warning, deprive an increasing number of religious Americans of equal protection of the law, of their civil rights and their reasonable employment expectations. A broad interpretation of ministerial immunity will give license to religious-affiliated employers to engage in overt racism, sexism, disability discrimination and homophobia.

The federal government already has a model for the Two Prong approach. One of the most egalitarian societies in the United States is our U.S. Army. It has a long history with successfully applying the proposed two prong analytical approach in the U.S. Army's Chaplains' Corps. *See*, Point III (E.). An Army chaplain is commissioned (hired—the contract) by the U.S. military, but will be separated if the officer/chaplain loses the ecclesial (religious) credential from his or her Church.

Absent constraint, the ministerial exception will swallow the rule. The "Religious Law Office" hypothetical will be the end result. With absolute immunity, a religious employer can put up a sign, "Blacks, Women, Disabled need Not Apply," or do as Appellees have done here, argue for and win immunity after-the-fact. In sum, the lower court erred in granting the Ms. Fratello's employer ministerial immunity because:

- Ms. Fratello was not hired to be a minister (Prong One analysis) as a matter of contract law (Point I below);
- No ecclesial decision-making revoked or suspended any religious BFOQ credential held by Ms. Fratello (Prong Two analysis), and
- The grant of ministerial immunity is unwarranted because Title VII already safeguards the employer's religious liberty, and the retroactive grant of ministerial immunity deprives the employee of vital statutory and constitutional rights (Point III below).

Accordingly, the lower court must be reversed.

ARGUMENT

> "Requiring a church to accept or retain an unwanted minister … interferes with the internal governance of the church…."
>
> *Hosanna-Tabor*, 132 S.Ct. at 706.

> "But 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 v. Archdiocese*, 2016 WL 1249609 at *12.

> "No person shall be … deprived of … liberty, or property, without due process of law …."
>
> *Fifth Amendment to U.S. Constitution*

A. Standard of Review

The standard of review of this Court in reviewing a grant of summary judgment is *de novo.* This Court reviews a grant of summary judgment *de novo,* applying the same standard as a district court. *Graham v. Long Island Rail Road,* 230 F.3d 34, 38 (2d Cir. 2000); *Carlton v. Mystic Transportation, Inc*., 202 F.3d 129, 133 (2d Cir. 2000). "When *de novo* review is compelled, no form of appellate deference is acceptable." *Zervos v. Verizon N.Y., Inc*., 252 F. 3d 163, 168 (2d Cir. 2001) (*quoting Salve Regina College v. Russel,* 499 U.S. 225, 238, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991).

B. Overview--Expanding *Hosanna-Tabor* beyond its holding imperils civil rights and American democracy

The Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012)("*Hosanna-Tabor*") issued a unanimous

decision that, on its face, is both narrow and non-controversial. A church should be able to choose its own clergy and ministers without governmental interference or supervision. There is nothing profound in this. There are a long line of Supreme Court cases prohibiting governmental (judicial) involvement in the internal affairs of churches, especially church governance and membership (including designation of clergy). *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 733–34, 20 L. Ed. 666 (1871); *see also, Rweyemamu, supra.*

However, if the federal courts expansively interpret the religious functions of churches to include functions separate and apart from church governance and the preaching of the religion, but instead activities very secular in nature (such as running private schools,[13] hospitals,[14] charities, religious media companies,[15] and perhaps even for-profit companies' operations[16]), then absolute "ministerial

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[13] *See, e.g., Redhead v. Conference of Seventh–Day Adventists*, 440 F.Supp.2d 211, 221–222 (E.D.N.Y. 2006)(Seventh Day Adventist elementary school teacher not a "ministerial" employee; teaching duties were primarily secular, with one hour of Bible instruction per day); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1397 (4th Cir.1990)(teachers who integrated biblical material into traditional academic subjects were lay teachers for purposes of the ministerial exception); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986)(teachers at a church owned and operated school were not ministerial employees).

In contrast to the above would be a school that specifically teaches the religion's theology, to aid in its spiritual and pastoral mission. *See, e.g., E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463–65 (D.C.Cir.1996)(person with religious title taught Roman Catholic canon law and church doctrine).

[14] *See, e.g., Penn v. New York Methodist Hospital*, 2016 WL 270456 (S.D.N.Y. 2016), appeal pending, Second Circuit No. 16-0474-cv.

[15] *E.E.O.C. v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1992)(holding that § 702 of Title VII applies only to employees whose duties "go to the heart of the church's function.")

[16] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014)("Hobby

immunity" will become a tool for both establishing religion, impairing the individual religious freedom, coercively controlling church members, and disenfranchising church members of their civil rights. Ministerial immunity is draconian because it gives the "religious" employer immunity to discriminate on any and all otherwise impermissible grounds. *See generally*, M. HAMILTON, GOD VS. THE GAVEL, THE PERILS OF EXTREME RELIGIOUS LIBERTY (Rev. 2d Ed. 2014), pp. 219-230. This is far more license than Congress provides to religious employers, allowing them to discriminate on religious grounds. *See, e.g.*, Sections 702 and 703 of Title VII.[17]

Hosanna-Tabor clearly allows Churches to select its own pastoral ministers. However, the lower court here, and cases such as *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015), grant a "license to kill" (i.e., the employees' civil rights).

If the lower court is upheld, any religious organization (a church, a church-affiliated entity and perhaps even a *Hobby Lobby*-type business corporation) may receive absolute immunity from employment laws by simply anointing their paid employees as "ministers," or by having them engage in enough "religious" activity for a federal judge to see fit to grant the immunity and dismiss another case from

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Lobby").

[17] *See*, 42 U.S.C. § 2000e-1(a) and § 2000e-2(e)(1 & 2). Essentially, § 702(a) makes Title VII inapplicable to religious entities and § 703(e)(1) allows religious employers to use religion as a BFOQ defense. Sections available online at: https://www.eeoc.gov/laws/statutes/titlevii.cfm.

its docket (as occurred in this case).

American will then be on its way to becoming a theocracy, as religious groups engage in secular (not exclusively religious) activities far from their church house pulpit. With absolute immunity they will be able to close their doors to potential workers who are Afro-Americans, females or, the most recent targets of discrimination, homosexuals.

Immunizing religious groups from civil liability aids and promotes organized religion, and entangles civil society with religion when the religious groups' activities go beyond church governance, preaching and ministering to their own members. Granting the (reputable) Roman Catholic Church immunity on unprincipled grounds unsupported by the facts or the law (as enunciated by the unanimous Supreme Court in *Hosanna-Tabor)* will create a slippery slope to disaster. Less reputable or disreputable religious actors—fundamentalists, fringe or radical religious groups, potential jihadists—will see an opportunity for obtaining coercive power over their employees, for brainwashing their "faithful," and for gaining power in American society. Immunization from lawsuits is dangerous for society.

This Court must be cognizant of the broad implications of an expansive view of ministerial immunity. Democracy requires rational thought and an educated citizenry, not theocracy. Evolutionary psychology suggests that humans are biased

toward believing in religion, and value sanctity and authority. *See, e.g.*, E.O. WILSON, THE MEANING OF HUMAN EXISTENCE (2015), Chapter 13; J. HAIGHT, THE RIGHTEOUS MIND, WHY GOOD PEOPLE ARE DIVIDED BY POLITICS & RELIGION (2012) . This psychological bias gives organized religion an advantage over individuals. Our human bias is to favor the Church.

The Founding Fathers did not have the evolutionary science, but did have the historical understanding to understand the danger posed by organized religion. The Founders kept religion out of the Constitution, and the First Amendment of the Bill of Rights maintains the principle of separation. The principled approach to ministerial immunity set forth below protects the legitimate interests of religious groups, and individual believers, without sacrificing individuals' civil rights and statutory protections on the altar of religion.

POINT I:
PRONG ONE OF MINISTERIAL IMMUNITY ANALYSIS— WHAT DID THE PARTIES MUTUALLY AGREE? (ANSWER: TO "LAY" EMPLOYMENT)

Previewed above in the Summary of Argument are the Two Prongs of proposed analysis for evaluating employers' assertion of a "ministerial immunity defense. This Point discusses Prong One.

A. Prong One is a Neutral-Principles-of-Law Analysis of the Employer-Employee Contract

Freedom of religious belief is absolutely protected by the First Amendment, but freedom to act upon belief is not. *See, Cantwell v. Connecticut*, 310 U.S. 296,

303-04 (1940); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). A religious group may believe it should "spread its word," or in the case of the Roman Catholic Church, believe in non-pastoral missions of civic virtue such as charitable work, social justice, health care and education. How the religious group implements its beliefs is action that may permissibly be subject to governmental regulation.

"Prong One" of ministerial immunity analysis examines the secular employer-employee contractual relationship. Employment relationships, whether by written agreement or an oral understanding, and whether for a definite period of time or "at will,"[18] are contractual in nature. The creation of the contract—the necessary "meeting of the minds," is action that defines legal rights, and thus is action subject to governmental regulation. The contractual relationship can easily be examined by a court using "neutral principles of law" commonly understood by judges without reference to religion. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Smith, supra*. Even cases involving *bona fide* ministers can include judicial review of a secular contract,[19] or as to members, whether church officials had actual authority to act.[20]

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[18] *See, e.g., Lauture v. Int'l Bus. Machines Corp.*, 216 F.3d 258, 261 (2d Cir. 2000)("… Lauture's promise to perform work …for IBM's promise to pay her, was a contract").

[19] *See, e.g., Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990), where the court observed:

Ministerial immunity cases involve First Amendment religious rights. Therefore, for Prong One the reviewing court must examine how the religious rights might fit into the secular employment agreement.

Thus, if a qualified employer[21] wishes to discriminate in favor of its Church members (or a subset of members, such as its clergy), it can permissibly do so under § 702 and § 703 of Title VII.[22] The employer can include the religious requirement or preference into its express or implied employment contract, such as a requirement (in Ms. Fratello's case) that the employee be a "practicing Catholic," or a requirement (found in Ms. Perich' case but not in Ms. Fratello's) that the employee be a "commissioned" or otherwise Church-appointed minister.

Using this approach, the Court can examine whether the employer made a

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> "In [*Jones, supra*], Supreme Court specified that courts may always resolve contracts governing 'the manner in which churches own property, hire employees, or purchase goods.' Even cases that rejected ministers' discrimination claims have noted that churches nonetheless 'may be held liable upon their valid contracts.'"

Id., 894 F.2d at 1359 (*citations omitted, emphasis added*).

[20] *See, Bouldin v. Alexander*, 82 U.S. 131, 139–40 (1872)("But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others.").

[21] Title VII defines qualifying employers. The First Amendment does not. Nevertheless, a construction company cannot likely plausibly assert that its arc welding foremen are ministers, even if they can perhaps "see the light." *But see, Hobby Lobby, supra*. Rather, the employer must be a religious entity that can in good faith claim that it can make employment decisions based upon religion, such as hiring its own Church members. Title VII's exemptions discussed here expressly allow for religious organizations to discriminate in favor of their own.

[22] *See, supra*, note 17**;** *see, also, Corporation of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos*, 483 U.S. 327 (1987)(upholding the Title VII religious exemption).

religious factor a BFOQ for the job position in dispute. Thus, using *arguendo* the Roman Catholic religion, a Catholic-affiliated organization or parish could hypothetically require or prefers that its:

- Janitor be Catholic. It can then decline to hire Methodists, or fire the janitor if he becomes excommunicated by a Catholic ecclesial body.
- Hospital chaplain be an ordained deacon or priest. It can then hire only deacons or priests, and can fire them if defrocked or otherwise disciplined by ecclesial authority (an authorized body of the Church).
- Military chaplain be an ordained priest. *See*, Point III (E.) below.
- Parish School principal be an ordained deacon or priest or otherwise religiously "commissioned" (as in *Hosanna-Tabor*). If the Church removes the religious status, by suspending or defrocking the priest as an ecclesial matter, the School can then permissibly terminate the employment as a matter of contract, as the religious status was a BFOQ of the job.
- Parish School principal have no religious title, but as a BFOQ be a "practicing Catholic" (Ms. Fratello's situation). The BFOQ allows termination of employment if the layperson is excommunicated by an ecclesial body (or if the "morals clause" of the contract is violated).
- Parish Pastor be an ordained priest. If the bishop removes him, that is

ecclesial action, subject to ecclesial appeal and not subject to judicial review. *See*, *Rweyemamu*, *supra*.

In each of the above examples the Court can examine precisely what the employer expected from the employee as far as religious qualifications. If the employer is a Catholic religious organization and requires a) a practicing Catholic or b) an ordained priest or deacon, it can make this a BFOQ. If the employee is thrown out of the Church, or if the priest or deacon is suspended or defrocked from the ecclesial ministry, the employer can terminate the employment, immune from potential liability by the § 702 and § 703 exemptions of Title VII. This is a secular employment matter where contract law rules of neutral applicability apply. In this Prong One of analysis, the Court has no need or purpose for intruding into any ecclesial matter. All the Court needs to do is determine whether a religious organization has a BFOQ for a job title, and then, if so, appropriately defer to the Church authority that makes the ecclesial determination as to religious status (the Prong Two analysis –Point II below).

The courts can easily analyze whether the employer required a BFOQ. If so, the court can proceed to Prong Two to ascertain whether a religious authority made an ecclesial decision awarding or revoking the religious membership status or ministerial credential.

If no BFOQ was required, then the ministerial immunity inquiry should end at Prong One, because the courts should not allow the employer to retroactively change the contractual understanding and the mutually agreed employment relationship by adding a new religious term to the contract. If religious duties were not a BFOQ requirement of the job at the time of hire, it is unlikely this changed during the employment (at least absent formal religious titling and ceremony). If the employer seeks ministerial immunity regarding employment that had no contractually sufficient (i.e., mutually agreed) religious BFOQ, the employer is seeking to materially alter the contract after execution, to add a new term, namely, "you are a minister now, and therefore you cannot sue us." Permitting the addition of an after-the-fact religious BFOQ that the original agreement did not contain defeats the mutually-agreed expectations of the parties, including the employee's reasonable expectation of protection under State and federal employment discrimination and wage laws.

As Professor Marci Hamilton has pointed out, it is manifestly unfair for an individual to become employed by a religious entity only to find out after confronted with unlawful discrimination that the employer claims (and may receive) "ministerial immunity." *See*, GOD VS. THE GAVEL, supra, p. 227-28. It deprives the employee of vital rights. *See*, Point III.

Requiring the religious employer to clearly identify any religious BFOQ at the time of hire will result in transparency and predictability. The parties to the contract and the courts will avoid the uncertainty that currently exists when, after an employment discrimination lawsuit is filed, the employer raises the defense of ministerial immunity. Requiring the religious employer to be up front about this to its employees will avoid the specter of the employer sand-bagging the employee who files a Title VII lawsuit. If the courts require clear contracting with clear BFOQs, and apply neutral principles of basic contract law, the ministerial immunity issue can be avoided completely, or litigation greatly simplified if it arises.

Ms. Fratello's specific situation is discussed next.

B. Appellee School's BFOQ for Ms. Fratello was "practicing Catholic"

The Appellee School and Appellee Parish did not require, or state a preference for, a Church-anointed, formally titled or even informally titled pastoral or "religious" minister to serve as the school's principal. It could have required this, but did not. Nor did the Appellee Archdiocese require that the principal be a "religious" employee. It could have.[23] It has a special "religious" employee form

[23] Except for the fact that as a matter of Roman Catholic Church canon law and doctrine, a lay person such as Ms. Fratello cannot serve as a pastoral minister. No authorized church official (e.g., the Cardinal, a bishop or a Roman Catholic canon lawyer) contradicted Ms. Fratello as to this. *See*, Point II.

for this. *Appx.* 166. It did not require or hire a "religious employee."

Thus, Appellees fail to meet Prong One—that the position of lay principal required or preferred a person holding the church title of "minister," ordained or otherwise, as a BFOQ.[24]

Accordingly, on the basis of contractual interpretation, and the absence of any BFOQ for Ms. Fratello other than that she be a "practicing Catholic," this Court must hold that the District Court erred in pronouncing Ms. Fratello a minister. The "lay principal" contract did not provide for such. The lower court erred in essentially adding this to the original contract as a new BFOQ (and one that Ms. Fratello was not informed of nor agreed to), namely, that she would also simultaneously serve as a lay principal and also as a religious minister.

Appellees fail to produce any evidence whatsoever that being a minister was a BFOQ of the job of lay principal. On the contrary, all the evidence is that being a minister was <u>not</u> a requirement of the job, beginning with the "lay principal" contract given to Ms. Fratello (in stark contrast to the "religious principal" contract

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[24] The Court should be clear that the ministerial immunity issue involves a pastoral or spiritual minister. The word "minister" can be used in an administrative sense (e.g., "minister of finance") or a broad, secular sense (e.g., the Roman Catholic Church's "ministries of service"). This Court should confine "ministerial" to a pastoral/spiritual/religious sense for First Amendment purposes.

A dictionary definition is also useful, especially as dictionary definitions of the term "minister" will make no sense if a non-minister is deemed to be a minister. *See, e.g.*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY ("… one officiating or assisting the officiant in church worship… a clergyman, esp. of a Protestant communion…"); BLACK'S LAW DICTIONARY, 5th Ed. ("A person ordained according to the usages of some church or associated body of Christians for the preaching of the gospel and filling a pastoral office.")

available to the Archdiocese and its Parish), and including the work she actually performed (where the "religious" things she did were nothing that any practicing Catholic could not do). The contract did not even require that Ms. Fratello be a member of Appellee St. Anthony's Church—the local parish (she belongs to a different Catholic parish)—and so she certainly was not part of parish/Church governance.[25]

Thus, Appellees fail to establish the first prong of the suggested analysis. The contractual basis for Ms. Fratello's employment did not include her being a religious minister, but only a practicing Catholic. And as argued in Point II (discussing Prong Two), there was no ecclesial decision-making regarding Ms. Fratello even if *arguendo* she had been titled with some type of religious appointment.

C. Congressional protection against Racial, Gender, Age or Disability Prejudice

Requiring that a religious employer articulate a BFOQ allows Congressional

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[25] The Court should take notice that Appellees have previously taken the position that Ms. Fratello was hired by the Appellee St. Anthony's School, not the Appellee Archdiocese or Appellee Parish. *See*, Defendants' Brief in support of its motion to dismiss, filed April 26, 2013 (Docket document 13). Defendants' Brief states at page 18:

> "Succinctly, Plaintiff cannot be considered an "employee" of the Archdiocese because the Archdiocese did not hire or provide remuneration to Plaintiff. The School, and not the Archdiocese presented Plaintiff with an offer of employment (the Contract). The School, and not the Archdiocese, paid Plaintiff's salary and provided Plaintiff's employment benefits, *id.*, including her health benefits." (*emphasis added*)

Thus, Appellees should be judicially estopped from any argument that Ms. Fratello was "employed by the Church."

prohibitions against certain types of discrimination (e.g., age, gender, ethnicity, disability and race) to remain in force. Otherwise, nothing is certain or predictable.

Without a BFOQ, an employer may assert "ministerial immunity" as to a particular job position. If the courts agree as to that job (e.g., the lay principal job here, or the hospital position at issue in *Penn*, *supra*, pending in this Court), then the employer can thereafter can put a sign on their respective employment applications saying "No Blacks, Italians, women or disabled persons need apply!" Ministerial immunity grants immunity against otherwise unlawful discrimination. This clearly is not what the Congress intended. Nor what the Bill of Rights intends, where equal protection of the law becomes non-protection of the employee and overprotection of the employer.

POINT II:
PRONG TWO OF MINISTERIAL IMMUNITY ANALYSIS— WHAT (IMMUNE FROM GOVERNMENTAL SCRUTINY) ECCLESIAL ACTION, IF ANY, DID THE CHURCH TAKE? (ANSWER: NONE.)

The fundamental question regarding ministerial immunity is whether there is ecclesial action by a Church, involving its internal governance and religious belief. The Supreme Court teaches that the judiciary will give deference to the determination of an "authoritative ecclesiastical body."[26] In *Hosanna-Tabor* there was such a determination. As to Ms. Fratello, there is not.

[26] *Jones v. Wolf*, 443 U.S. 595 (1979). The question commonly arises in Church property disputes, *id.*, but is no less applicable to Church ministerial appointments. As stated in *Jones*:

> "the First and Fourteenth Amendments mandate that civil courts shall not disturb the

First Amendment jurisprudence is clear that a person's individual religious beliefs, as well as the religious belief the individual shares with others as a group[27] —his Church—are beyond the regulatory reach of government. The religious belief of the group can be effectuated in the Church's ecclesial selection (religious belief-centered[28]) of its ministers. This is the holding of *Hosanna-Tabor*.[29]

A. The EEOC avoided, and thus the Supreme Court did not address, Prong One analysis in *Hosanna-Tabor*

In *Hosanna-Tabor*, the Lutheran Congregation, acting as a religious body, revoked its member's religious credential, Ms. Perich's title of "Minister of Religion, Commissioned." This was the Lutheran Church's "ecclesiastical" action—its choosing for itself its ministers through its local congregation's action.

Because the EEOC contested the employment action, the Supreme Court granted *certiorari* and unanimously ruled on what should have been obvious to the EEOC—that the Lutheran Church anointed Ms. Perich as its minister, and

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> decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."

Id., 443 U.S. at 609 note 8 (*emphasis added*).

[27] The religious group is the Church, which can be very small or as large as the 1 billion+ member Roman Catholic Church.

[28] This is in contrast to secular non-ecclesial actions of the religious group, such as hiring an architect and construction firm to build a building.

[29] 132 S.Ct. at 704 & 710 (citing *Kedroff, infra*); *see also*, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)(ecclesial dispute regarding church property); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

thereafter revoked this ministerial appointment by revoking her religious credential.

The EEOC did not help the cause of clarity in this area of the law by failing to recognize and present to the Supreme Court the two prong approach proposed here. That was understandable, as the two prong approach would have hurt Ms. Perich's case.

As to the Prong One, Ms. Perich could not argue that being a minister was not a BFOQ of the job she applied for, as she knowingly took all the steps to become a minister and applied for the religious, non-lay teaching job. In fact, Ms. Perich was given the employment precisely because of her minister credential. This was the clear mutual understanding of the parties. Ms. Perich knowingly and intelligently knew that her religious credential was bestowed by her Church as an ecclesial matter. Thus, her secular contract of employment—the employer-employee relationship—included the condition that she continue to meet a religious BFOQ, namely, that she be and remain a "Minister of Religion, Commissioned." When her commission was ecclesiastically revoked by the Church, she became BFOQ unqualified and so was fired by the School the next day.[30]

[30] *See*, note 2, *supra*.

The Hosanna-Tabor School fully met what was required of it under the Prong One analysis discussed above. Ms. Perich expressly agreed to the BFOQ of being and remaining a commissioned minister of religion.

Thus, the Supreme Court focused only on the Prong Two issue—whether Ms. Perich qualified as a minister? The application of Prong Two to Ms. Perich in *Hosanna-Tabor* is discussed next.

B. EEOC and Ms. Perich lost on Prong Two in *Hosanna-Tabor*

1. Revocation of Ms. Perich's religious commission was ecclesial action

Prong Two deals with the Church-minister relationship (an ecclesial matter, based upon the Church's internal religious practices, for example, Roman Catholic Church canon law and doctrine). As an example of ecclesial action, if an ordained Catholic priest lost his job as the pastor of a parish church because the bishop found him to be unfit as a priest, the priest could appeal that decision to ecclesiastical tribunals, but not to civilian courts. No American civil court would involve itself in a purely internal church matter. [31] A church, as a religious body, can pick and manage its ministers.

The lines were much more blurred in the *Hosanna-Tabor* case. This, and the EEOC's blatant disregard for the Synod's right to internal ecclesial decision-making regarding its minister, is undoubtedly why the Supreme Court took the

[31] *See*, prior footnote.

case. Yet it was not obvious to the Supreme Court how to draw the lines. Instead, the Supreme Court merely provided some guideposts, not a rigid formula.[32]

As to the Prong Two inquiry, the Supreme Court was clearly correct as to Ms. Perich. She was anointed with a clearly religious title—Minister of Religion, Commissioned—that reflected years of effort including deep theological study, examination, and selection by the Congregation, a duly constituted religious body, which selection made her a governing member of the national church, the Synod. After Ms. Perich's personal conduct came into question, as a religious matter the Congregation took ecclesial action and revoked Ms. Perich's religious title.

2. *Hosanna-Tabor*'s ministerial immunity factors—its Syllabus

In examining whether a religious groups' action is entitled to ministerial immunity, the Supreme Court was decidedly "reluctant … to adopt a rigid formula for deciding when an employee qualifies as a minister." 132 S.Ct. at 707. It has left this for the Circuits to develop. The Second Circuit can assist here. It can make clear that the Supreme Court's analysis dealt with the Prong Two analysis, not Prong One. This Court can then adopt this proposed Two Prong analysis as a principled means for resolving ministerial immunity questions. The High Court and other Circuits will welcome the principled approach.

[32] 132 S.Ct. at 707 (no rigid formula).

It is helpful to examine the Syllabus in *Hosanna-Tabor*, as that concisely presents the factors that were relevant to the Supreme Court—all of which involve facts related to the ecclesial (Prong Two), not the contractual (Prong One). As the Reporter of Decisions summarized in the following paragraph of the *Hosanna-Tabor* syllabus:

> "… The Court … does not adopt a rigid formula for deciding when an employee qualifies as a minister. Here, it is enough to conclude that the exception covers [Ms.] Perich, given all the circumstances of her employment. Hosanna-Tabor held her out as a minister, with a role distinct from that of most of its members. That title represented a significant degree of religious training followed by a formal process of commissioning. Perich also held herself out as a minister by, for example, accepting the formal call to religious service. And her job duties reflected a role in conveying the Church's message and carrying out its mission: As a source of religious instruction, Perich played an important part in transmitting the Lutheran faith."[33] (*emphasis added*)

In sub-Point II.C.2, below, this Brief uses the syllabus to show that Ms. Fratello was ecclesiastically the polar opposite of Ms. Perich for ministerial immunity purposes. Most significantly, the Supreme Court inquiry was whether the employee "qualifies as a minister." The Appellees here have never alleged that Ms. Fratello was a "minister." They argue only that she had a "ministerial" role as the administrative head of the school and so should be regarded as a minister.

In considering the totality of the circumstances, the Supreme Court found that the ecclesial action of the Lutheran Church, taken together with all the

[33] 132 S.Ct. at 697-98.

circumstances of Ms. Perich's situation, warranted the grant of ministerial immunity. This was necessary to protect the Synod regarding its handling of an internal religious matter—the revocation of Ms. Perich's religious title. The selection of ministers is essential to internal church governance and the Church's exclusive province. Ms. Fratello's situation is the opposite.

C. Ms. Fratello prevails on Prong Two, under the teachings of *Hosanna-Tabor*

1. No "ecclesial" action by the Church

First and foremost as to Prong Two, the Appellees took no "ecclesiastical" action whatsoever regarding any religious position held by Ms. Fratello (which is not surprising, as she held none). Unlike Ms. Perich's situation, where the Congregation as an ecclesial body revoked the religious title "Minister of Religion, Commissioned," Ms. Fratello had no religious title. Her title was in her secular written contract, the title of "Lay Principal." The Roman Catholic Church took no ecclesial action for or against Ms. Fratello. It did not excommunicate her. It did not "defrock" her. It did not remove or suspend her from any religious position. And if it had taken any religious action, Ms. Fratello would have had the right of an ecclesiastical review, as the Church's bylaws (specifically Canon Law 221 § 1) provides for such.

The only action taken by the School (influenced by the newly arrived and sexist Parish Priest) was to not renew Ms. Fratello's secular contract of lay

employment. This action has nothing to do with the Roman Catholic Church's selection of ministers for governing the Church. It certainly was not an ecclesial decision.

Tellingly, no religious authority of the Church (e.g., the Archdiocese's Cardinal Dolan or one of his bishops, or any canon law expert) has indicated or even suggested that an ecclesial decision was rendered as to Ms. Fratello. Nor did Appellees submit any affidavit to the Court below stating that the Church viewed Ms. Fratello as a minister, or a person with pastoral ministerial duties, or that she was in any way a person placed in a position where she had a role in the governance of the Roman Catholic Church, or that she had a pastoral role. The evidence, including the Archdiocese's Employee Manual, is to the contrary.

No activities undertaken by Ms. Fratello reveal a pastoral role or ecclesiastical responsibilities. There is no evidence of any ecclesial decision-making by the Roman Catholic Church or its Parish. She was not a minister under the teachings of *Hosanna-Tabor*, as discussed next.

2. Nature of the Lay Principal Job and its Performance by Ms. Fratello

The facts that led the Supreme Court to conclude in *Hosanna-Tabor* that Ms. Perich was a minister for ministerial immunity purposes compel the opposite

conclusion as to Ms. Fratello. Her facts are the converse of those of Ms. Perich. Taken item by item from the Supreme Court's *Hosanna-Tabor* syllabus:[34]

> *Syllabus: "Hosanna-Tabor held her out as a minister, with a role distinct from that of most of its members. That title represented a significant degree of religious training followed by a formal process of commissioning. Perich also held herself out as a minister by, for example, accepting the formal call to religious service."*[35]

Ms. Fratello had no title, was not held out as a minister, and did not hold herself out as one.

> *Syllabus: "As a source of religious instruction, Perich played an important part in transmitting the Lutheran faith."*[36]

Ms. Fratello was not a religion teacher, had no training in religious instruction, and did none. A qualified religion teacher and the parish priest were responsible for religious instruction. The Catholic Schools do not proselytize, and with 23% of the student body non-Catholic, there is no evidence that its educational goal is to "transmit the Catholic faith."

> *Syllabus: "In concluding that Perich was not a minister …. First, [the Sixth Circuit] failed to see any relevance in the fact that Perich was a commissioned minister. Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position.*[37]

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[34] 132 S. Ct. at 697-98.

[35] *132 S.Ct.* at *697-98* and opinion at *707*.

[36] *132 S.Ct.* at *698* and opinion at *708*.

[37] *Id*.

Unlike Ms. Perich, Ms. Fratello had no religious title and no religious training or education beyond what she learned as a child in CCD during grammar school.

> *Syllabus: "Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. Though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable."*[38]

Unlike Ms. Perich, Ms. Fratello was by written contract a lay employee. Moreover, Appellees expressed no preference for having a "commissioned" (religious) principal, rather than a lay principal. If the Appellee School had, and made this a BFOQ, it certainly could have hired a priest or a deacon rather than a lay person. It did not choose this option.

> *Syllabus: "Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. Although the amount of time an employee spends on particular activities is relevant in assessing that employee's status, that factor cannot be considered in isolation, without regard to the other considerations discussed above."* [39]

The Supreme Court is clear that the time spent on secular versus religious activities "cannot be considered … without regard to the … other considerations…." 132 S.Ct. at 709. However, as to Ms. Fratello the District Court placed all emphasis on the small amount of time Ms. Fratello spent doing "religious" things—things that any intelligent lay Catholic could perform, like reciting standard prayers, opening a

[38] *Id.*
[39] *Id.*

meeting with a prayer, or attending Mass.[40] The lower court ignored the "other considerations"—the things most relevant to whether Ms. Fratello was a minister, such as whether Appellees actually considered their "lay" employee to be a minister (there is no evidence that they did, or could).

In short, of all the things that Ms. Perich did to become a minister in the Hosanna-Tabor Lutheran Church, Ms. Fratello did none in the Catholic Church. She simply did her lay job as any responsible Catholic employee would.

In sum, Ms. Fratello was a lay teacher who became, by contract, a lay principal. The contract was expressly limited to its written terms, and those written terms had only one religious BFOQ, namely, that the applicant be a "practicing Catholic." Ms. Fratello did not seek to become a minister or religious figure, and did not hold herself out as one. She did not claim a "ministry" housing allowance on her taxes. She believes as a matter of her own Catholic belief (corroborated by her expert on canon law, and not denied by Appellees) that the Parish Priest, not the lay principal, was responsible for providing pastoral and spiritual services to

[40] Parochial teachers and the principal certainly know their religious basics, and if not, have the parish priest and the certified religion teacher to guide them. They certainly can recite basic prayers that all practicing Catholics know by heart. Any intelligent Catholic can say a prayer before a meeting or before a meal, or find a prayer online to place in a newsletter. That does not transform the lay person into a minister, especially for Roman Catholics, where strict ecclesial rules (its canon law and church doctrine) distinguish the clergy from the laity.

the parish, including the School. Her responsibility was the students' education, and their welfare acting *in loco parentis*.[41]

POINT III:
AFFIRMANCE OF THE LOWER COURT WILL FAVOR THE ESTABLISHMENT OF RELIGION AND DEPRIVE MS. FRATELLO OF HER CONSTITUTIONAL AND TITLE VII RIGHTS

A. Empowering Organized Religion will Entwine Courts in the Establishment of Religion

The judicially-created doctrine of ministerial immunity is akin to legislation. Thus, the Court should consider its impact just as it would apply the "Lemon Test" to legislation in order to maintain the First Amendment protection of the Establishment Clause. The Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), laid down a strict test in this regard, where the law: (1) must have a secular legislative purpose; (2) its principal effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive governmental entanglement with religion. *Id.* at 612–13.

The proposed Two Prong analysis of ministerial immunity will help the judiciary meet the Lemon Test. First, it analyzes the secular aspect of the employment (Prong One) and keeps the judiciary out of the ecclesiastical (Prong

[41] This is not a religious duty, it is a parental duty. It means, among other things, that the Catholic teacher or principal will not proselytize, and try to convert the non-Catholic student to Catholicism. The pastor can try to do that from the pulpit during Mass. The principal and teachers should not, as that would amount to discrimination or harassment on account of "creed," in violation of the Archdiocese's and the School's antidiscrimination policies.

Two). Second, it is a neutral approach that neither advances nor inhibits religion. And third, it will help avoid excessive judicial entanglement with religion and, with contractual transparency, help eliminate unnecessary ministerial immunity litigation involving Church or Church-affiliated employees.

B. The lower court picked "religious belief" sides, depriving Ms. Fratello of her constitutional rights

In this case, the District Court impermissibly picked sides in a religious dispute. Ms. Fratello's view (supported by her canon law expert) is that she was not a minister. Appellees have not disputed this. Ms. Fratello's view (again supported by canon law) is that she cannot as a lay person perform pastoral or spiritual ministerial duties. Appellees have presented no contradictory evidence from any religious authority to the contrary. The only evidence Appellees proffered is from lay sources, not religious authorities. They have shown no ecclesial action. Yet the District Court declared Ms. Fratello to be a minister for civil law purposes, and then took away from Ms. Fratello her statutory and constitutional rights.

The federal courts should not pick sides in an internal religious debate between employer and employee, especially when to do so deprives a citizen of fundamental rights such as due process of law, equal protection and the free exercise of religion (e.g., choosing to become employed by a Church-affiliated

employer). The District Court erred in declaring Ms. Fratello to be a *de jure* minister when Appellees have not asserted that she is an ecclesial minister.

The judiciary can and should accommodate competing religious views that might arise in an employment relationship. The Two Prong analysis allows this. First, the court should examine the contract (Prong One analysis). Second, if in doubt about "religious" requirements, the court can look by analogy to the "reasonable accommodation" requirements of the Americans with Disabilities Act,[42] by asking the question: Can an employee's view that he or she is not a minister be accommodated? The answer as to Ms. Fratello must be yes, first, because under her contract the "essential functions of her job" do not require any spiritual or pastoral role. The job she performed required only a practicing Catholic who was a skilled school administrator. This is clear from looking at the job criteria set forth in the Archdiocese's employment application. Second, as to anything more desired by the employer, an interactive dialogue with Ms. Fratello would have revealed that any intelligent Catholic could perform all of the religion-related tasks required of her (if these were ecclesiastically required under Prong Two, which they were not). The burden should be on the employer to establish the inability to reasonably accommodate the differing view, especially since the

[42] *See*, Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.

employer is asking the federal court to deprive the employee of her constitutional and civil rights.

C. "No Blacks, Women, Disabled need apply"— unequal protection of law without advance notice

The District Court deprived Ms. Fratello of essentially all her civil and constitutional rights vis–à–vis her employer because she accepted the lay principal job. This is a draconian result that provides the employer with absolute immunity, at the expense of the employee, where the employee was never given any notice whatsoever that she would be subject to this extremely unequal (non-) protection of the law. Ministerial immunity also allows an employer *carte blanche* bias (e.g., "no Blacks allowed") in hiring.

1. No "knowing and intelligent waiver"

If Ms. Fratello had been employed by a non-parochial private school (even one with a religious affinity), she would be protected by employment and labor law statutes. Under the lower court's view, because she is employed by a Church-affiliated school, she has no statutory rights because it has ministerial immunity. She is thus denied the equal protection of the law because of her decision to find employment with a Church-affiliated school.

Respectfully, at a minimum she should have been informed by Appellees at the time of hire that she was waiving her statutory rights by accepting employment. In Title VII litigation, the courts made clear that a person must knowingly and

intelligently waive statutory rights for such waiver to be effective. *See, e.g. Curtis Publi'g v. Butts*, 388 U.S. 130, 145(1967)(First Amendment rights); *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir.1997)(noting that Supreme Court and Second Circuit jurisprudence "suggests that the waiver of a fundamental right in the context of civil cases must be made voluntarily, knowingly and intelligently"); *Fuentes v. Shevin*, 407 U.S. 67, 95 n. 31 (1972)("[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'").

Here, Ms. Fratello did not knowingly waive her civil rights. She had absolutely no notice that she would be deemed a "minister" if she complained of unlawful discrimination, and that as a result she would lose all State and federal employment and labor law protection.

2. Deprivation of employee's civil rights

This Court must consider that for a federal court to permit an after-the-fact interpretation of the parties' original understanding to add "ministerial" obligations not provided for in the original employer-employee agreement, and then grant the employer absolute immunity from suit, deprives the employee of basic rights. Such action may: a) infringe upon the employee's own religious freedom, b) deny the employee her statutory employment and wage rights, c) impair the employee's contractual rights, d) violate the Constitution's due process and takings clauses,

and based upon the above deprivations, e) deny the employee equal protection under the law.[43]

3. "No Otherwise Protected people need apply"

Ministerial immunity allows a religious employer to put up a sign: "No Blacks, women, or disabled people need apply." The employer has immunity from suit. The judiciary should be loath to grant such license absent an extraordinary demonstration of need by a Church or Church-affiliated employer.

A religious group's selection of its own clergy is one instance of need, for a religion and its believers can permissibly pick ministers who espouse and preach the religion's faith, even if such faith endorses racism, ethnic hatred anti-Semitism, Islamophobia, sexism, homophobia and other forms of bigotry. This is the Prong Two decision—ecclesial and protected.

However, as to Prong One, a secular contract for predominantly secular employment, such as teaching children in a private school (even if religiously themed) should not permit the employer to state on its employment application "No Minorities Welcome." As discussed above, the § 702 and § 703 exemptions allow religious discrimination. The law does not generally permit obnoxious bigotry in the American workplace. It will, however, if this Court affirms the lower court and endorses its expansive view of ministerial immunity. The lower

[43] Granting ministerial immunity may also be akin to judicial enactment of a bill of attainder or an *ex post facto* law. *See,* U.S. CONSTIT., art. 1, § 9.

court's reasoning, by granting ministerial immunity to "religious leaders," simultaneously allows the hiring of racists or other bigots (and the non-hiring of minorities) to be "leaders" of Church-affiliated elementary schools. Parochial teachers will be next. Then other workers. This is a terribly misguided constitutional path.

D. The Army Chaplain Corps applies the Two Prongs

The U.S. Army is an egalitarian society with a noble history of protecting soldiers' individual rights to the extent allowed by military necessity. As relevant here, the federal government has a long history with successfully applying the proposed Two Prong analytical approach in the U.S. Army's Chaplains' Corps.

A military chaplain is commissioned as a military officer. This is contractual (Prong One analysis). However, this military profession[44] requires a religious BFOQ, namely, that the candidate be qualified as a (usually ordained) minister by his or her Church. If the Church revokes or suspends the religious credential, then the Army will terminate the employment. The Army can assert military discipline over military chaplains (Prong One). *See*, *Katcoff v. Marsh*, 755

[44] An analogous two prong approach can be used for Army lawyers, physicians and other licensed professionals who are commissioned based upon qualifying for the job and having a professional license as a BFOQ (Prong One), but who will be separated from military service if they lose their professional license (Prong Two).

F.2d 223 (2d Cir. 1985). The chaplain's church can assert ecclesial authority regarding credentialing (Prong Two).[45]

Employment at a Church-affiliated entity is analogous. Ms. Perich lost her ecclesial credential, just as might an Army chaplain. Ms. Fratello lost no ecclesial credential. She was given none and none was required of her. Her job should be analyzed under Prong One alone.

E. The "Religious Law Office"--with Racism and Sexism immunity

The Roman Catholic Church is a major religion, yet religions come in all sorts. The undersigned author of this Brief might have an epiphany, start my own religion, and create a not-for-profit "public interest" law firm, and with its revenue, perhaps start a Church-affiliated elementary school as well.[46] I could require that my law office managers also be ministers of my new religion, as well as my school elementary school teachers and principal. They could be required to recite prayers, proselytize clients and potential clients, students and parents, and to otherwise spread the Word. As long as my religion involves a sincerely held religious belief, all this is permissible; all these employees become ministers; and under the lower court's view I will have obtained ministerial immunity from being sued. As a

[45] By substituting the word "professional" for "ecclesial," the same two prong approach is works for Army "JAG" lawyers, physicians and other professionals who are commissioned (Prong One) based upon qualifying for the job and having the BFOQ (the professional license) but who will be separated from military service if they lose their State bar license or other State-granted professional qualification (a secular Prong Two).

[46] *Appx.* 420, note 4.

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

This religious law office hypothetical is instructive, as this is what a broad interpretation of ministerial immunity will permit. First Amendment law is clear (e.g., conscientious objector cases[47]) that courts do not intrude into sincerely felt religious beliefs. The lower court's broad interpretation of ministerial immunity invites this result, as does much of the pre-*Hosanna-Tabor* case law. The two step inquiry of the proposed Two Prong analysis argued above will help avoid abuse. It will be difficult for entities not closely tied to the spiritual to meet the BFOQ of Prong One. False religions will have difficulty meeting the ecclesial requirements of Prong Two.

[47] *See, e.g., Gillette v. United States*, 401 U.S. 437 (1971).

CONCLUSION

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

Dated: Stony Point, New York
August 8, 2016

Respectfully submitted,

/S/
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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of FRAP 32(a)(7)(B) because it contains 13,484 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

Anti-Virus Certification

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

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

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

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOANNE FRATELLO,

Plaintiff,

- against -

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

Defendants.

----------x

OPINION AND ORDER

No. 12-CV-7359 (CS)

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Seibel, J.

Before the Court are Defendants' Motion for summary judgment, (Doc. 90), and Plaintiff's Cross-Motion to strike Defendants' ministerial-immunity defense, (Doc. 103). For the reasons set forth below, Defendants' Motion is GRANTED and Plaintiff's Motion is DENIED.

I. BACKGROUND

The following facts are based on the parties' Local Rule 56.1 statements[1] and responses thereto, and supporting materials, and are undisputed except where noted.

[1] "P's Counter 56.1" refers to Plaintiff's Response & Counterstatement to Defendants' Rule 56.1 Statement, (Doc. 108). "Ds' Counter 56.1" refers to Defendants' Response and Counter-Statement to Plaintiff's Rule 56.1 Statement, (Doc. 115). The parties, particularly Plaintiff, included blanket denials, legal arguments and/or hypertechnical or

Sp. Appx. 2

Plaintiff Joanne Fratello is a former principal of St. Anthony's School (the "School"), a Catholic elementary school located in Nanuet, New York. (*See* Ds' Counter 56.1 ¶ 13; AC ¶¶ 1, 12, 13, 19.)[2] Defendants are the Archdiocese of New York (the "Archdiocese"), St. Anthony's Shrine Church and the School. (AC ¶¶ 2, 5, 7.) Plaintiff served as principal of the School from 2007 until 2011, when her contract was not renewed for the 2011-2012 school year. (Ds' Counter 56.1 ¶¶ 11, 21, 106.) Plaintiff alleges that the decision to terminate her employment was the result of gender discrimination and retaliation, and she now seeks relief in this Court. (AC ¶¶ 12-16.)

A. Factual Background

The School, which is chartered under the laws of New York, is run by the Archdiocese. (Ds' Counter 56.1 ¶ 31; AC ¶¶ 34-38, 114.) Before addressing the specifics of Plaintiff's employment, it is useful to examine the Archdiocese's and the School's mission statements and manual, as well as the role of its principals in the abstract.

1. The Mission and Manual of the Archdiocese of New York and St. Anthony's School

The website of the Catholic Schools in the Archdiocese of New York proclaims that its mission is "to ensure [its] schools are Christ-centered, academically excellent, and welcoming communities that teach students to be life-long learners and leaders energized by fidelity to

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inapplicable objections in their responses to the other party's Local Rule 56.1 Statement. As counsel knows, "[f]ailure to specifically controvert facts contained in the moving party's Local Rule 56.1 Statement, or failure to support any such response with record references allows the Court to deem the facts proffered by the moving party admitted for purposes of a summary judgment motion." *Edmonds v. Seavey*, No. 08-CV-5646, 2009 WL 2949757, at *1 n.2 (S.D.N.Y. Sept. 15, 2009); *see also Montauk Oil Transp. Corp. v. Sonat Marine Inc.*, No. 84-CV-4405, 1986 WL 1805, at *8 (S.D.N.Y. Feb. 3, 1986) ("[R]eliance on legal conclusions – unsupported by specific facts – and general denials does not create a genuine factual dispute under Rule 56."). Plaintiff in particular in her 56.1 response followed the circular practice of disputing a proposition set forth by Defendants without pointing to contrary evidence except her own affidavit, which did not address the issue but rather stated in blanket fashion that all responses to Defendants' 56.1 statement were accurate. This does not, in the Court's view, amount to specifically controverting the proposition. Nevertheless, in an excess of caution, I have not, in deciding these Motions, relied on any facts the parties purport to dispute. Had I held the parties strictly to the requirements of Federal Rule of Civil Procedure 56 and Local Rule 56.1, it would only have strengthened my conclusion.

[2] "AC" refers to the Amended Complaint, (Doc. 9).

Christ, the Church, and one another." (Novikoff Decl. Ex. A, at 2-3.)[3] The Archdiocese's website further describes the "Catholic school experience" as follows:

> Our Catholic faith is central to what we do, and we proudly teach it. Gospel ideals permeate the substance and structure of our lessons. We share our faith through daily prayer and the regular celebration of Mass as a school community. We foster a spirit of Christian service as an expression of our concern for the needs of others. Character formation and personal spirituality are rooted in the study of Catholic teachings and tradition, as well as sacramental preparation. Our academic programs grounded in basic skills meet the varied needs of each school community by incorporating technology, advanced math, hands-on science, and foreign language coupled with the various forms of art study. We offer a forward-focused curriculum, integrating technology into classroom instruction, preparing our students to compete in an increasingly complex world.

(*Id.*) Similarly, the School's mission is to "provide a high-quality, educational experience that enhances each child's spiritual, emotional, intellectual and social growth. Our faculty and staff prepare our students to become future leaders and responsible stewards of God's creation." (*See* Ds' Counter 56.1 ¶ 7.) Religion is a central part of the School curriculum. (*See* P's Counter 56.1 ¶¶ 92-97.) At the same time, the School is required, by law, to provide its students with an education substantially equivalent to that of public schools. (Ds' Counter 56.1 ¶ 72.)

The Archdiocese disseminates an Administrative Manual (the "Manual") that delineates policies and procedures for principals and other administrators. (*See generally* Admin. Manual.)[4] In a cover letter for the Manual, addressed "Dear friends in the Lord," Edward Cardinal Egan, Archbishop of New York at the time of the Manual's issuance, wrote to principals:

> As principals in the schools of the Archdiocese of New York, you are providing splendid leadership to your teachers and staff and excellent academic and spiritual formation to your students. This is demanding work, and I am deeply grateful for the wisdom and devotion with which you do it. With each passing year, it

[3] "Novikoff Decl." refers to the Declaration of Kenneth A. Novikoff, (Doc. 91).

[4] "Admin. Manual" refers to Exhibit A to the Declaration of Mary Jane Daley ("Daley Decl."), (Doc. 94).

> becomes more and more clear to our Catholic faithful and the community at large that we are all greatly in your debt.
>
> This revised *Administrative Manual* is designed to assist you in the administrative tasks you must fulfill in providing the structure needed to carry out the vital work of Catholic education. The updated sections and materials give evidence of the growing demands required to provide the appropriate learning environment, and [sic] environment which enables each of our schools to offer quality academic education infused with the Catholic Faith and values that are so needed by the young people who come to us.
>
> . . . .
>
> Again, I thank you for having accepted the vocation and challenge of leadership in Catholic education. Be assured of my prayers and support for your work which is so crucially important to the Church in New York.

(Admin. Manual at 023753.) Another letter within the Manual is addressed to principals from Michael Ramos, Associate Superintendent of Schools for Professional Recruitment, and states: "The Catholic school is essential to the Church in fulfilling its teaching mission. . . . . It is your responsibility as principal to establish a climate which is identifiably Catholic and which nurtures the growth of teachers and students in all dimensions of life." (*Id.* at 023923.)

The Manual also contains a job description for principals. It states:

> The principal is the leader of the school, a unique Catholic educational institution. The principal is responsible for achieving the Catholic mission and purpose of the school as well as the quality of teaching and learning that goes on in the school. S/he is the animator of the community of faith within the school. . . .
>
> The principal must of necessity be involved in every aspect of the school operation. The principal oversees the areas of religious education, curricula instruction, formulation and communication of school policy, supervision of personnel, staff recruitment and development, student recruitment, maintenance of school records, discipline and co-curricular activities.

(*Id.* at 023924.) The Manual goes on to describe a principal's role in providing "Catholic leadership" as follows:

> The principal cooperates with the pastor in recruiting and maintaining a staff committed to the goals of a Catholic school; cooperates with the pastor in his religious ministry to the students; ensures adherence to the curriculum guidelines,

> *Guidelines for Catechists*, 1998; monitors the acquisition of catechetical certification for teachers of religion, directs the implementation of the religious education program, is committed to the mission of evangelization, involves the staff in formulating plans that enable the school to meet its religious goals; provides opportunities for student, faculty, and parent participation in liturgical and paraliturgical services; initiates programs that inculcate an attitude and foster the practice of service to others; motivates the students to take an active part in the life of the parish; promotes in faculty, students, and parents the concept of the school as a community of faith; provides opportunities for the practice of this concept; cooperates with the parish council by attending council meetings and by keeping the council informed of school matters.

(*Id.* at 023803.) The Manual then lists a multitude of day-to-day responsibilities of the principal, touching on "personnel management," "office management," "public and community relations," "budget and fiscal management," "teacher development," and "evaluation of students," among other responsibilities. (*Id.* at 023803-07.)

The Archdiocese's website presents a summary of the principal's role in its information to prospective applicants for that post:

> The Archdiocese of New York seeks committed Catholics who can inspire and engage faculty, staff, parents and students in the pursuit of spiritual development and academic excellence. These dynamic administrators should demonstrate outstanding educational vision, professionalism, leadership skills, organizational ability and interpersonal strengths to serve as Principals . . . . Candidates must set high expectations and foster a culture of continuous improvement in which every member of the school community works collaboratively to ensure the holistic achievement of every student.

(Ds' Counter 56.1 ¶ 22.)

Principals are evaluated by faculty of the school and the church's pastor. (P's Counter 56.1 ¶ 26.) In addition to more secular criteria, a principal is evaluated based on whether he or she "fosters a Christian atmosphere which enables . . . students to achieve their potential," "reviews school philosophy and goals with the staff in accordance with current Church documents," and "gives priority to a comprehensive religious education program." (Admin. Manual at 023936, 023942, 023947.) Additionally, principals are asked to fill out a self-

evaluation form. (P's Counter 56.1 ¶ 26.) The self-evaluation contains five questions, one of which is, "What are my strengths in the areas of spiritual leadership, instructional leadership, interpersonal relationships and management?" (Admin. Manual at 023942.)

Twenty-three percent of Archdiocese students are not Catholic, and practicing Catholicism is not an explicit job requirement for its teachers, although the Archdiocese may give preference to practicing Catholics. (Ds' Counter 56.1 ¶¶ 42, 44, 46.) The Archdiocese does, however, require that a candidate for the position of principal present a letter indicating that he or she is a practicing Catholic. (P's Counter 56.1 ¶ 21.) The Archdiocese also states that principals must complete the Level 1 and Level 2 Catechist Certification Program within three years of attaining that position. (Admin. Manual at 023808.) The Catechist Certification Program is an online course that "provides theological understandings, spiritual/religious formation and catechetical methodology." (P's Counter 56.1 ¶ 19.) Plaintiff maintains that this certification requirement was aspirational but not strictly enforced by the Archdiocese. (*Id.* ¶ 18.) Plaintiff also asserts that although she is indeed Catholic, her academic credentials are in education, and she does not have formal training in religion or theology. (*See* Ds' Counter 56.1 ¶ 4.)

2. Plaintiff's Employment As Principal of St. Anthony's School

When Plaintiff applied for the principal position at the School, she was interviewed by the Archdiocese's Principal Search Committee (the "Committee"). (P's Counter 56.1 ¶ 49.) According to Cathleen Cassel, the Regional Superintendent for Rockland County for the Archdiocese and a member of the Committee at the time Plaintiff was interviewed, the Committee sought to hire principals with "strong Christian values" who were dedicated to providing teachers and students with "instruction in religious truth and value, maintaining a set

of educational policies which are in conformity with the religious beliefs and moral standards of the Archdiocese and further fostering an educational environment which teaches students how to live in accordance with the teachings of Jesus." (Cassel Decl. ¶¶ 1, 5, 10.)[5] Among the questions asked by the Committee were some form of the following: (1) What is your personal relationship with the church? (2) Why do you want to be principal of a Catholic school (as opposed to a secular private school)? (3) What is your relationship with the pastor and the parents at the current school you work in? (4) What do you think is a good religion lesson? (5) What would you do at the school to implement communal prayer? (*Id.* ¶ 11.)

In 2007, Plaintiff signed a one-year "Lay Principal Contract" with the School, (Ds' Counter 56.1 ¶ 12), subject to renewal annually. The contract provided:

> The principal recognizes the religious nature of the Catholic school and agrees that the employer retains the right to dismiss principal for immorality, scandal, disregard or disobedience of the policies or rules of the Ordinary of the Archdiocese of New York, or rejection of the official teaching, doctrine or laws of the Roman Catholic Church . . . .

(*Id.* ¶ 16; *see* AC Ex. 14, at 2.) The contract did not specify Plaintiff's responsibilities as principal. (AC Ex. 14.)

Upon beginning her tenure as principal, Plaintiff implemented a new prayer system within the School in order to get the students "more involved" in prayer. (P's Counter 56.1 ¶ 66.) Every morning, an eighth grader would meet with Plaintiff, after which Plaintiff would introduce him or her over the loud speaker, and the student would then recite a prayer. (*Id.* ¶ 67.) Plaintiff would then respond to the prayer by stating, "Praise to you Lord Jesus Christ." (*Id.*; Weber Decl. ¶ 8.)[6] The student would then read another prayer over the loud speaker, following which Plaintiff would recite the "Our Father" prayer. (P's Counter 56.1 ¶ 67.) In the afternoon,

[5] "Cassel Decl." refers to the Declaration of Cathleen Cassel, (Doc. 93).

[6] "Weber Decl." refers to the Declaration of AnnMarie Weber, (Doc. 95).

Plaintiff often recited over the loud speaker a "reflection" containing a spiritual message. (*Id.* ¶ 68.)

Plaintiff's religious involvement with the student body varied depending on the time of year and corresponding holidays[7] and religious feasts. In general, Plaintiff would often attend regular mass with the students or special services to celebrate holy days or religious sacraments. (*Id.* ¶¶ 85-89.) On Fridays in October, Plaintiff would honor of the Feast of Our Lady of the Rosary by reciting over the loud speaker a "Decade of the Rosary," which consists of the "Our Father" prayer, ten "Hail Mary" prayers, and one "Glory Be" prayer. (*Id.* ¶ 69.) Throughout October and May, Plaintiff would recite the "Prayer of the Rosary" over the loud speaker and, at the beginning of her tenure, advised the faculty at a meeting that she would provide rosary beads to any student or faculty member for the purpose of facilitating prayer. (*Id.* ¶¶ 70-71.) In honor of the Feast of St. Anthony, which is held in June, Plaintiff would plan a special ceremony at the School and would attend a Sunday mass attended by students and their parents. (*Id.* ¶ 114.) Thereafter, she would meet with students, their families and faculty, bringing with her a statue of St. Anthony which was prominently placed. (*Id.*) On or around September 11 each year, Plaintiff hosted a September 11 memorial prayer at the school, where she would recite prayers and Bible verses in front of a gathering of faculty and students. (*Id.* ¶ 115.)

Plaintiff also regularly supervised teachers and their curricula. Teachers were required to submit to Plaintiff each week a copy of their lesson plan books. (*Id.* ¶ 91.) She mandated that teachers' lesson plan books identify the objective of each lesson, the method by which it would be taught, and the "Value" and "Saint" associated with the lesson. (*Id.* ¶ 93.) The Value and Saint were to be based on a chart of Catholic saints and corresponding Catholic values that

[7] The parties disagree as to Plaintiff's regular involvement in various Christmas and Advent school activities. (P's Counter 56.1 ¶¶ 72-81.)

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Plaintiff handed out to teachers at the beginning of each school year. (*Id.*) Plaintiff generally expected teachers to relate Christian and Roman Catholic doctrine and teachings to students. (*Id.* ¶ 94.) She would also observe teachers and "sought to ensure that Catholic values were found within the classroom." (*Id.* ¶ 97.)

In addition to reviewing teachers' curricula, Plaintiff would lead monthly faculty meetings at the School to discuss upcoming events. (*Id.* ¶ 102.) Each meeting began with a prayer led by Plaintiff. (*Id.* ¶ 103.) She also required that teachers attend a "Standards and Goals" meeting at the beginning of each school year, which she similarly led and began with a prayer. (*Id.* ¶ 104.)

Another of Plaintiff's responsibilities was overseeing the drafting and dissemination of the St. Anthony's Monthly Newsletter. (*Id.* ¶ 118.) These newsletters often thanked families for joining her at a school-related mass or invited them to do so. (*Id.* ¶ 121.) The newsletters also often communicated to parents Plaintiff's joy and enthusiasm in joining with the students in their "spiritual" journey in finding Christ and thanked the parents for their help in facilitating the students' journey. (*Id.* ¶ 122.) Plaintiff used the monthly newsletter as a vehicle to, among other things, encourage the religious and spiritual learning and growth of the students outside of school and to remind parents of upcoming events of religious significance. (*Id.* ¶ 123.)

At the end of each school year, Plaintiff would deliver religious messages to the graduating class. At the graduation ceremony for the eighth-grade students, Plaintiff would present a speech. (*Id.* ¶¶ 83, 124.) These speeches often included religious language and prayer. For example, the speech to her final graduating class closed with the following:

> Let us pray for the class of 2011.
>
> Dear Lord:

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> Bless these graduates as they go into the world to make it a better place. While they pursue their dreams, gently guide them, lead them, show them your way to success and happiness through service to others as they maximize their own potential. Fill them with joy as they reach their goals. Strengthen them as they deal with life's obstacles and show them that every challenge is a path to character development. Give them the intelligence to make their plans for their futures. Give them the patience and persistence to pursue their ambitions. Most of all, give them caring hearts to look for ways to help people on their life's journey. Encourage them and lift them up now. In Christ's name, we pray. In the name of the Father, the Son, and the Holy Spirit. God bless you.

(Weber Decl. ¶ 12; *id.* Ex. B.) Plaintiff would also include a religious message for the graduating class in the School yearbook. Her words of advice to the Class of 2011 included the following:

> I was very confident that your spiritual, educational, and intellectual growth would have been achieved and you have proven that following Jesus's teaching along with the love and guidance from your parents, teachers and the community members that it was possible.
>
> . . . .
>
> As you leave our school family, may the God of peace protect you, equip you, and work with you, through Jesus Christ, to whom be glory forever and ever. Amen.
>
> God Bless you always,
>
> Ms. Fratello

(Novikoff Decl. Ex. Q.)

Plaintiff was evaluated by the teachers at the School and by regional administrators. In March 2008, Monsignor Reynolds, the pastor at St. Anthony's, rated Plaintiff as "Excellent" with regard to many criteria used to evaluate her abilities as a "religious leader" – for example, "fosters a Christian atmosphere which enables staff and students to achieve their potential," "gives priority to a comprehensive religious education program," and "encourage[es] communal worship." (Novikoff Decl. Ex. J.) Similarly, Sister Helen Doychek, then the District Superintendent of Rockland County, also rated Plaintiff as an excellent religious leader of the

school. (*Id.* Ex. K.) She commended Plaintiff for "renewing the Catholic Identity of [the School,]" "setting a good example as a religious leader," "bringing a renewed sense of Christian spirituality," "creating an atmosphere rich with a sense of Catholic Community," and "making religious values, attitudes and behavior the focus of life at the School." (*Id.*) Many teachers at the School used similar descriptions in evaluating Plaintiff's abilities as a religious leader. (*See id.* Exs. L-M; Ladolcetta Decl. ¶ 26; McGuirk Decl. ¶ 11; Driscoll Decl. ¶ 24.)[8]

B. Procedural History

Plaintiff alleges that she first complained about the alleged discriminatory conduct to others in the Archdiocese. (AC ¶ 163.) On October 12, 2011, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, (*see* Doc. 15 Ex. B), which sent Plaintiff a notice of right to sue dated July 5, 2012, (AC Ex. 1). Plaintiff commenced this action within 90 days of the notice.

On March 5, 2013, Plaintiff filed her Amended Complaint, alleging that Defendants engaged in gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and section 296 *et seq.* of the New York State Executive Law. Plaintiff also asserted state-law claims for breach of contract and promissory estoppel, and sought a declaratory judgment protecting her free exercise of religion.

On April 26, 2013, Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 12.) In a bench ruling, I found that I could not determine whether the ministerial exception applied at the motion to dismiss stage because of the necessarily fact-intensive inquiry that exception necessitates, and because Plaintiff had plausibly alleged that she was not a minister, and had no religious training, duties or functions; that others handled all

[8] "Ladolcetta Decl." refers to the Declaration of Karen Ladolcetta, (Doc. 100). "McGuirk Decl." refers to the Declaration of Carol McGuirk, (Doc. 99). "Driscoll Decl." refers to the Declaration of Mary Ann Driscoll, (Doc. 96).

religiously related activities; and that she was simply a secular administrator doing what a public-school principal would do. (*See* Doc. 54 Ex. A, at 10.) I therefore directed the parties to engage in limited discovery on the issue. (*Id.* at 10-11.)[9]

On July 16, 2015, the parties filed the Motions now before me, (Docs. 90, 103). Defendants seek summary judgment on all of Plaintiff's claims based on the ministerial exception derived from the First Amendment, (*see* Ds' Mem. 1),[10] while Plaintiff seeks "summary judgment striking Defendants' ministerial immunity defense" on the theory that she was simply a "lay principal" with secular, administrative responsibilities, (*see* P's Opp. 1-2).[11]

II. LEGAL STANDARD

Summary judgment is appropriate when "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). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to present "evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*

[9] I also dismissed Plaintiff's promissory estoppel claim in that ruling. (*Id.* at 17.)

[10] "Ds' Mem." refers to Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment Dismissing Plaintiff's Claims on the Grounds that They Are Barred by the "Ministerial Exception," (Doc. 101).

[11] "P's Opp." refers to Plaintiff's Opposition to Motion for Summary Judgment, and Support of Cross-Motion to Strike Defendants' Ministerial Immunity Defense, (Doc. 107).

Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and he "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks omitted).

"A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). Where an affidavit is used to support or oppose the motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008). In the event that "a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(2), (3).

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III. DISCUSSION

The narrow question presented by the parties' Motions is whether Plaintiff's circumstances of employment cause her claims to fall within the ministerial exception, which would preclude her from bringing discrimination and retaliation claims against Defendants. The exception is an affirmative defense, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012), and accordingly Defendants bear the burden of establishing it. "[W]hether the exception attaches . . . is a pure question of law which this [C]ourt must determine for itself." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015); *see Preece v. Covenant Presbyterian Church*, No. 13-CV-188, 2015 WL 1826231, at *3 (D. Neb. Apr. 22, 2015).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other employment discrimination laws ordinarily prohibit employers from discriminating against employees and from retaliating against those employees for lodging a complaint based on such discrimination. But First Amendment questions arise about the application of these antidiscrimination laws where the employer is a religious institution. *See generally Hosanna-Tabor*, 132 S. Ct. 694; *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). The U.S. Supreme Court considered the intersection of Title VII and the First Amendment in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. That decision and the line of cases that followed govern the instant inquiry, and I examine them below before turning to the facts presented here.

A. ***Hosanna-Tabor* and Subsequent Case Law**

In *Hosanna-Tabor*, the U.S. Supreme Court held that "a 'ministerial exception,' grounded in the First Amendment, . . . precludes application of [antidiscrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." 132 S. Ct. at 705. The Court reasoned:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 706; *see also Cote*, 520 F.3d at 204-05 (discussing several rationales for why, "[s]ince at least the turn of the century, courts have declined to interfere [ ] with ecclesiastical hierarchies, church administration, and appointment of clergy") (second alteration in original) (internal quotation marks omitted).

The Supreme Court further confirmed, as the Second Circuit and "[e]very Court of Appeals to have considered the question" had previously held, that the ministerial exception does not apply only to "the head of a religious congregation." *Hosanna-Tabor*, 132 S. Ct. at 707; *see also Cote*, 520 F.3d at 206-07 (collecting pre-*Hosanna-Tabor* cases applying exception to organist, music directors, press secretary and staff of Jewish nursing home). The Supreme Court was "reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 132 S. Ct. at 707. The Court instead thoroughly examined the "circumstances of [the plaintiff's] employment" and delineated a number of factors on which it relied in concluding that the ministerial exception applied in her case. *Id.* at 707-10.

The Court first examined whether the employee, Cheryl Perich, was "held out" by her employer, a parochial school, as a minister, "with a role distinct from that of most of its members." *Id.* at 707. Perich was a "called" teacher, meaning she received a "diploma of vocation" that granted her the title "Minister of Religion, Commissioned." *Id.* She was tasked with performing that office "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures." *Id.* Her "skills of ministry" and "ministerial responsibilities" were periodically reviewed by the congregation. *Id.* The Court found that for these reasons, the church and school "held out" Perich as a minister. *Id.*

The Court next looked to Perich's title – that of "Minister of Religion, Commissioned." Aside from the obvious fact that her title included the word "minister," this title reflected a significant amount of religious training and formal process. She had to complete "eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id.* Additionally, Perich had to obtain the endorsement of her local church council "by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry-related questions." *Id.* Finally, Perich "had to pass an oral examination by a faculty committee at a Lutheran college." *Id.* All in all, it took Perich six years to fulfill these requirements. "And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach." *Id.* Perich's title and the extensive formal training behind it weighed in favor of applying the ministerial exception.

Third, the Court considered whether Perich "held herself out as a minister of the Church by accepting the formal call to religious service" or "in other ways." *Id.* at 707-08. It found that she had. Indicia of this included that Perich took a special housing allowance on her taxes for

those working "in the exercise of the ministry," and that she filled out a post-employment form describing herself as serving "in the teaching ministry." *Id.* at 708.

Finally, the Court examined Perich's job responsibilities. These responsibilities, it found,

> reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and – about twice a year – she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning.

Id. (alterations in original) (citation omitted). Thus, because Perich was "a source of religious instruction" and "performed an important role in transmitting the Lutheran faith to the next generation," her job responsibilities weighed in favor of applying the ministerial exception. *Id.*

In reversing the Sixth Circuit's decision, the Supreme Court also provided guidance as to where the court below had erred. It explained that the Sixth Circuit did not give enough weight to Perich's title (including its attendant training and education); "gave too much weight to the fact that lay teachers at the school performed the same religious duties" as Perich; and "placed too much emphasis on Perich's performance of secular duties." *Id.*

Since *Hosanna-Tabor* was decided in 2012, the Fifth and Sixth Circuits and a handful of district courts have considered the application of the ministerial exception in a diverse range of employment discrimination cases. *See, e.g.*, *Conlon*, 777 F.3d at 833-35 (holding that exception applied to "spiritual director"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176-79 (5th Cir. 2012) (applying exception to parish's music director); *Rogers v. Salvation Army*, No. 14-CV-12656, 2015 WL 2186007, at *6-7 (E.D. Mich. May 11, 2015) (ministerial exception applied to "spiritual counselor"); *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1177

(N.D. Ind. 2014) (finding "lay teacher" to be outside of ministerial exception); *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (member of janitorial staff of religious institution was not "minister" under exception). Notably, none of these courts have considered whether a parochial-school principal is a "minister" under the exception, although cases decided prior to *Hosanna-Tabor* found that they were. *Braun v. St. Pius X Parish*, 827 F. Supp. 2d 1312, 1318 (N.D. Okla. 2011) (citing *Sabatino v. St. Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996)).

In any event, in light of the Supreme Court's explicit rejection of "a rigid formula for deciding when an employee qualifies as a minister," *Hosanna-Tabor*, 132 S. Ct. at 707, I must consider the specific circumstances of Plaintiff's employment in concert with the case law discussed above to make this determination.

B. The *Hosanna-Tabor* Considerations As Applied to Plaintiff

As a preliminary matter, parochial schools are considered "religious organizations" for purposes of the ministerial exception. *See, e.g.*, *Herx*, 48 F. Supp. 3d at 1177 (examining application of ministerial exception to parochial school teacher); *Dias v. Archdiocese of Cincinnati*, No. 11-CV-251, 2013 WL 360355, at *4 (S.D. Ohio Jan. 30, 2013) (same); *cf. Conlon*, 777 F.3d at 833-34 ("It is undisputed that InterVarsity *Christian Fellowship* is a Christian organization, whose purpose is to advance the understanding and practice of Christianity in colleges and universities. It is therefore a 'religious group' under *Hosanna-Tabor*.") (emphasis in original); *Penn v. N.Y. Methodist Hosp.*, No. 11-CV-9137, 2016 WL 270456, at *3, 5 (S.D.N.Y. Jan. 20, 2016) (viewing ministerial exception on a "sliding scale," where the more religious the employer institution is, the less religious the employee's functions must be to qualify, and finding that hospital is institution to which exception applies). Because

the School is a parochial school, one purpose of which is clearly to advance the understanding and practice of Catholicism, it is a "religious organization" for purposes of the ministerial exception. The sole remaining question is thus whether Plaintiff is a "minister" under the exception.

I first examine whether Plaintiff was "held out" by the Archdiocese and the School as a minister, "with a role distinct from that of most of its members." *Hosanna-Tabor*, 132 S. Ct. at 707. It is clear from the Archdiocese's description of a principal's position that it does hold principals out as ministers. Unlike other school staff, the principal is required to be a practicing Catholic. (P's Counter 56.1 ¶ 21.) As principal, Plaintiff was tasked with "achieving the Catholic mission and purpose of the school" and being the "animator of the community of faith within the school." (Admin. Manual at 023924.) Further, the principal is described as a religious liaison between the Archdiocese, the parish, the congregation, the students, and the parents, interacting with all entities and fostering a religious community. (*Id.* at 023803.) And, as in *Hosanna-Tabor*, the record indicates that Plaintiff was evaluated by superiors in the Archdiocese, the Monsignor, and her faculty based on, among other things, her effectiveness as a religious leader. (*See* Novikoff Decl. Exs. J-M; Ladolcetta Decl. ¶ 26; McGuirk Decl. ¶ 11; Driscoll Decl. ¶ 24.) These factors demonstrate that the Archdiocese and the school held Plaintiff out as a minister, weighing in favor of application of the ministerial exception.

I next look to Plaintiff's title and the requisite education and training associated with that title. The contract that Plaintiff signed in 2007 was for the position of "Lay Principal." (Ds' Counter 56.1 ¶ 12.) As noted, in order to attain this position, Plaintiff was required to submit a letter confirming that she was a practicing Catholic. (P's Counter 56.1 ¶ 21.) Principals are also, at least in theory, required to complete a Level 1 and Level 2 Catechist Certification Program

within three years of attaining that position, (Admin. Manual at 023808), although Plaintiff maintains (and I assume for purposes of these Motions) that this certification requirement was not strictly enforced. (P's Counter 56.1 ¶ 18.) Plaintiff's academic credentials are in education, and she does not have formal training in religion or theology. (*See* Ds' Counter 56.1 ¶ 4.) Plaintiff's title and training are thus different from some other employees who fell within the ministerial exception. Unlike those cases that involved "called teachers," a "spiritual director," or a "spiritual counselor," for instance, there is nothing inherently religious about the title "Lay Principal." *Compare, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 707 ("called teacher"), *Conlon*, 777 F.3d at 834 ("spiritual director"), *and Rogers*, 2015 WL 2186007, at *6 ("spiritual counselor"), *with Herx*, 48 F. Supp. 3d at 1177 ("lay teacher"). And while principals must attest to their Catholic faith and it is at least suggested that they complete Catechist certification, nothing in the record suggests the rigorous level of education, training, and certification attained by plaintiffs such as Perich or other "called" teachers. *See Conlon*, 777 F.3d at 835. This factor in the inquiry therefore weighs against application of the ministerial exception. *See id.*

I next turn to whether Plaintiff "held herself out as a minister of the Church by accepting the formal call to religious service," *Hosanna-Tabor*, 132 S. Ct. at 707, or "in other ways," *id.* at 708. The Supreme Court in *Hosanna-Tabor* and the Northern District of Illinois in *Herzog v. St. Peter Lutheran Church* both found that "called teachers" had accepted a formal call to religious service by virtue of their positions and held themselves out as ministers as evidenced by, for example, taking special housing allowances on taxes for those working "in the exercise of the ministry." *Hosanna-Tabor*, 132 S. Ct. at 708 (internal quotation marks omitted); *see Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 673 (N.D. Ill. 2012). Plaintiff did not accept any such formal call, nor did she claim ministerial status for tax or other formal purposes, so this

factor weighs against the exception. But it does not weigh strongly because Plaintiff undoubtedly knew she would be perceived as a religious leader. The Archdiocese describes acceptance of the principal position as "accept[ing] the vocation and challenge of leadership in Catholic education." (Admin. Manual at 023753.) Whether Plaintiff ever saw this description of the position or not, she had to verify her Catholic practice and answer questions about her Catholic leadership and vision when applying for the position. (Cassel Decl. ¶ 11.) In accepting this "vocation," Plaintiff became the head of an undeniably Catholic institution. And the record demonstrates that Plaintiff held herself out to the school community as a religious authority in many ways – for example, by leading prayers for the student body and teachers, conveying religious messages in speeches and writings, and expressing the importance of Catholic prayer and spirituality in newsletters to parents. So while Plaintiff did not claim the formal trappings of a ministerial position, and while she had many secular responsibilities, she knew that in some of her public functions she would be part of "the critical process of communicating the faith," *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring), and would "personify [the Church's] beliefs," *id.* at 706 (majority opinion); *see id.* at 711 ("[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central . . . . Instead, courts should focus on the function performed by persons who work for religious bodies.") (Alito, J., concurring).

Fourth, I must examine whether Plaintiff's job responsibilities "reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 708 (majority opinion).[12] The record clearly indicates that Plaintiff filled such a role from the beginning of her tenure as principal at the School. Early on, Plaintiff instituted a new system of daily prayer in the morning to get students more involved. (P's Counter 56.1 ¶ 66.) Plaintiff would lead prayers with the

[12] As discussed, this does not require that an employee stand in front of a congregation and lead mass. *See, e.g.*, *Conlon*, 777 F.3d at 835; *Cannata*, 700 F.3d at 178-79.

school body over the loud speaker. (*Id.* ¶¶ 69-71, 85-89.) She was at the front and center of planning and facilitating special services for the Feast of St. Anthony and the September 11 memorial. (*Id.* ¶¶ 114-15.) Additionally, Plaintiff encouraged and supervised teachers' integration of Catholic saints and religious values in their lessons and classrooms. (*Id.* ¶¶ 91, 93-94, 97.) Even outside the walls of the School, Plaintiff kept families connected to their students' religious and spiritual development through the school newsletter. (*Id.* ¶¶ 118-23.) And at the end of each school year, Plaintiff sent eighth-grade students forth with a religion-infused commencement speech and yearbook message. (*Id.* ¶¶ 83, 124; *see* Novikoff Decl. Ex. Q; *see also* Weber Decl. ¶ 12; *id.* Ex. B.) Not only did Plaintiff do all of these things, but she was evaluated on how well she did them. (*See* Novikoff Decl. Exs. J-M; Ladolcetta Decl. ¶ 26; McGuirk Decl. ¶ 11; Driscoll Decl. ¶ 24.) There can be no doubt that Plaintiff's job responsibilities included "conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 132 S. Ct. at 708. Through her efforts in "fostering a Christian atmosphere" in the School, (Novikoff Decl. Ex. J), "renewing [its] Catholic identity," (*id.* Ex. K), leading prayers and sharing Catholic values, Plaintiff "serve[d] as a messenger or teacher of [the Church's] faith." *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring). Accordingly, this factor weighs strongly in favor of application of the ministerial exception.

Plaintiff's arguments against applying the ministerial exception are unpersuasive. As *Hosanna-Tabor* and other case law instructs, it does not matter what percentage of time Plaintiff spent on secular or administrative matters as compared to leading prayer or otherwise conveying the message of the Archdiocese and Catholic church, nor does it matter that other "lay" teachers engaged in similar religious activities as Plaintiff. *See id.* at 708-09 (majority opinion); *Preece*, 2015 WL 1826231, at *5; *Herzog*, 884 F. Supp. 2d at 674. The argument that Plaintiff was

acting at the direction of the Archdiocese and the Monsignor is similarly unpersuasive. Were this determinative, none of the plaintiffs in the cases discussed above would fall under the ministerial exception. *See Hosanna-Tabor*, 132 S. Ct. at 708; *Conlon*, 777 F.3d at 835; *Cannata*, 700 F.3d at 178-79; *Rogers*, 2015 WL 2186007, at *6-7; *Preece*, 2015 WL 1826231, at *5; *Herzog*, 884 F. Supp. 2d at 674. And Plaintiff's continued attempt to rely on canon law, (*see* P's Mem. 9-12), is misplaced, as I have previously held. 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. But 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. Finally, Plaintiff's suggestion that application of the ministerial exception in a case such as this would open the door to a "parade of horribles" has been rejected by the Supreme Court. *See Hosanna-Tabor*, 132 S. Ct. at 710.

Considering the factors discussed in *Hosanna-Tabor* and the totality of Plaintiff's circumstances of employment, I find on balance that the ministerial exception applies. While Plaintiff's title and attendant training and education weigh against application of the exception, and while Plaintiff's not claiming to be a minister weighs slightly against it as well, the other factors discussed above – the distinct ministerial role the Church assigns her and, most significantly, Plaintiff's job responsibilities – carry far more weight. And as the Supreme Court has cautioned, the inquiry is not intended to consist of a "rigid" checklist but is instead a holistic examination of an employee's circumstances. *Id.* at 707-08; *see Cannata*, 700 F.3d at 176 ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate."); *id.* at 177 (application of exception does not depend on finding that Plaintiff satisfies same considerations that motivated finding in *Hosanna-Tabor*);

see also Conlon, 777 F.3d at 835 (applying the ministerial exception even though not all *Hosanna-Tabor* factors were satisfied). While Plaintiff may not regard the religious aspect of her job as nearly as significant as the secular aspects, there can be no real doubt that Plaintiff "furthered the mission of the church and helped convey its message." *Cannata*, 700 F.3d at 177.

Accordingly, Defendants have carried their burden of establishing on the undisputed facts that Plaintiff falls within the ministerial exception to Title VII, and summary judgment in favor of Defendants is appropriate.

C. Plaintiff's State-Law Claims

In addition to her federal antidiscrimination and retaliation claims, Plaintiff further alleges violations of New York State Executive Law section 296 *et seq.* and breach of contract. (AC ¶¶ 206-29.) The "traditional 'values of judicial economy, convenience, fairness, and comity'" weigh in favor of declining to exercise supplemental jurisdiction where all federal-law claims are eliminated before trial. *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). Having determined that all of the claims over which this Court has original jurisdiction should be dismissed, and having considered the factors set forth in *Cohill*, I decline to exercise supplemental jurisdiction over Plaintiff's remaining state-law causes of action. *See id*. (citing 28 U.S.C. § 1367(c)(3)).

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IV. CONCLUSION

For the reasons stated above, Defendants' Motion for summary judgment is GRANTED and Plaintiff's Cross-Motion to strike Defendants' ministerial-immunity defense is DENIED. The federal claims are dismissed with prejudice and the state claims are dismissed without prejudice. The Clerk of Court is respectfully directed to terminate the pending Motions, (Docs. 90, 103), enter judgment for Defendants, and close the case.

SO ORDERED.

Dated: March 29, 2016
White Plains, New York

Cathy Seibel

CATHY SEIBEL, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOANNE FRATELLO,

Plaintiff,

-against-

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

Defendants.

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JUDGMENT

Defendants having moved for summary judgment and Plaintiff having filed a cross-motion to strike Defendants' ministerial-immunity defense, and the matter having come before the Honorable Cathy Seibel, United States District Judge, and the Court, on March 29, 2016, having rendered its Opinion and Order granting Defendants' Motion for summary judgment and denying Plaintiff's Cross-Motion to strike Defendants' ministerial-immunity defense and dismissing the federal claims are with prejudice and dismissing the state claims without prejudice; and directing the Clerk of Court to terminate the pending motions, (Docs. 90, 103), enter judgment for Defendants, and close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 29, 2016, Defendants' Motion for summary judgment is granted and Plaintiff's Cross-Motion to strike Defendants' ministerial-immunity defense is denied. The federal claims are dismissed with prejudice and the state claims are dismissed without prejudice; accordingly, the case is closed.

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Dated: New York, New York
March 30, 2016

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk