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

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

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Fitzgerald doesn't dispute that, as Co-Director of Guidance and member of the Administrative Council, she held the same role at the same school at the same time as the *Starkey* plaintiff, whom this Court held falls comfortably within the ministerial exception. As this Court said, the two cases are "virtually identical." Dkt. 98 at 1.

Nor does Fitzgerald dispute that the same core facts that supported this Court's ruling in *Starkey* are present on the record here. Like the *Starkey* plaintiff, Fitzgerald signed a contract that designated her "a minister of the faith" and charged her with fostering her students' spiritual growth, communicating the Catholic faith to them, praying with them, receiving Holy Communion with them, and participating in their religious instruction. Fitzgerald developed evaluation criteria requiring fellow counselors to embody the spirit of Saint John XXIII, regularly attend Sunday masses, and connect with students' spiritual life in counseling. She represented to Roncalli's leadership that guidance counselors perform "ministry" functions. She served on the Student Assistance Program (SAP), guiding at-risk students through some of the most sensitive issues in their lives. And she was one of the only employees who served on both the Department Chairpersons group and Administrative Council—key leadership bodies overseeing the spiritual life of the entire school.

If these facts from *Starkey* weren't enough, Fitzgerald did more. Unlike Starkey, Fitzgerald touted that she consistently used spiritual resources with her students, discussed faith formation, and shared her own spiritual experiences with them. And unlike Starkey, Fitzgerald gave the opening talk at the students' spiritual retreat—described in her own complaint as "a deeply personal and emotional experience" aimed at students' "spiritual growth." Thus, this case is even easier than *Starkey*.

In response, Fitzgerald purports to identify "factual disputes" precluding summary judgment. Opp.30. But these are the same purported factual disputes this Court considered and held immaterial in *Starkey*. For example, Fitzgerald offers self-

serving testimony that she didn't really do the religious duties set forth in her job description. Opp.2. But Starkey said the same. *Starkey*, Dkt. 126 at 15-16, 20. Fitzgerald tries to downplay the Administrative Council by saying it referred religious matters to "the school's religion and ministry teams," Opp.1, 21, despite undisputed evidence showing the Council shaped the school's religious mission, *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No-19-3153, 2021 WL 3699050, at *3 (S.D. Ind. Aug. 11, 2021). Starkey did too. *Starkey*, Dkt. 126 at 20. And just as Starkey tried to trivialize the religious duties she indisputably performed as "scant" or "rare," Dkt. 126 at 2, Fitzgerald labels hers "small," "sporadic," and "isolated," Opp.1, 21-22.

None of this sufficed in *Starkey*, and it doesn't here. This Court held "the Co-Director of Guidance at Roncalli falls within the ministerial exception," rejecting Starkey's attempt to "downplay[] the religious nature of" the job. *Starkey*, 2021 WL 3669050, at *6-7. Fitzgerald had the same position, with the same duties, at the same time—and her case warrants the same result.

ARGUMENT

I. Fitzgerald's claims are barred by the ministerial exception.

Fitzgerald doesn't dispute—and therefore concedes—that the ministerial exception, if applicable, bars all her claims. *See* Br.29-30. The sole question, then, is whether she was a minister. The answer is yes.

A. Fitzgerald performed religious functions.

Before turning to Fitzgerald's attempted rebuttals, we briefly summarize the still-undisputed evidence—which makes it "apparent that the ministerial exception covers [Fitzgerald's] role as Co-Director of Guidance." *Starkey*, 2021 WL 3669050, at *4.

1. The undisputed evidence shows Fitzgerald was a minister.

First, it's undisputed that Fitzgerald's "employment agreements and faculty handbooks specified in no uncertain terms that [she was] expected to help" Roncalli "carry out" its religious mission. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140

S. Ct. 2049, 2066 (2020). Her contract designated her "a minister of the faith" and expressly charged her with "foster[ing] the spiritual … growth" of her students, "[c]ommunicat[ing] the Catholic faith to students," "[p]ray[ing] with and for students," participating in "liturgies and prayer services" with students, "[t]each[ing] and celebrat[ing] Catholic traditions," "[m]odel[ing] the example of Jesus," and participating in "religious instruction and Catholic formation." App.509-12; *see* App.507.

Moreover, Fitzgerald helped develop criteria to evaluate counselors based on these religious duties. Under those CEAP criteria, a counselor cannot advance to the highest pay level unless she "lives out the spirit of Saint John XXIII," "consistently attends Sunday mass or their denominational church service," and "connects with students' spiritual life and resources in counseling." App.527; *see* App.37, 654. Further, in Fitzgerald's own (successful) CEAP evaluation, Fitzgerald said she discussed "personal and social issues … and faith formation" with her students, "consistently use[d] spiritual life and resources in [her] counseling conversations as well as sharing [her] own spiritual experiences," and identified her willingness to share her beliefs and love of God as "a strength when working with young people who are seeking direction" "in a faith-based school." App.43-44, 47; *see* App.599, 609.

Additionally, in 2016, Fitzgerald (and Starkey) represented to the rest of Roncalli leadership that guidance counselors actually performed the same "Ministry" duties as teachers—like "[p]ray[ing] with … students," "[c]ommunicat[ing] the Catholic faith to" them, and "[p]articipat[ing] in … Catholic formation." App.498-506.

Fitzgerald also worked with SAP, which contemporaneous documents task with identifying and addressing students' "physical, social, emotional or spiritual difficulties," App.795; Br.8-9, and which (in Starkey's words) required helping students with their "most sensitive" and "personal issues." *Starkey*, 2021 WL 3669050, at *5; *see* App.965-66 at 153:17-154:22. And Fitzgerald gave the opening talk at Roncalli's "Christian Awakening Retreat"—an event described in her own complaint as "a

deeply personal and emotional experience" aimed at students' "spiritual growth." Dkt. 1 ¶¶98-99; *see* App.363-64 at 222:11-223:2; *see also* App.26 ¶41 (retreat is "the cornerstone of the senior experience"); App.6 ¶35 (retreat's "ultimate goal … is to help students understand how Christ is present in their daily life").

Finally, Fitzgerald, like Starkey, "was one of a select group of school leaders responsible for guiding Roncalli in its mission." *Starkey*, 2021 WL 3669050, at *5. Aside from the Principal and Assistant Principal for Academic Affairs, hers was the only role to serve in the Department Chairpersons group and Administrative Council—which oversaw the school as a whole, including its "spiritual life," *id.* at *3; *see* Br.13-14. As Administrative Council member, Fitzgerald personally suggested a "prayer service" in response to gun violence, App.446-47, and weighed in on a draft Archdiocesan policy addressing transgender issues, App.229-31; *see* Br.14—controversial topics requiring sensitivity to Church teachings. And she participated in a discussion group on a book designed to help "pastoral leaders" hone strategies of evangelization. Br.15; *see* SA.11-12 ¶73.

All this is undisputed—reflected in contemporaneous documents and confirmed by testimony. Given this evidence, Fitzgerald's attempt to manufacture supposed "factual disputes" isn't "enough to preclude summary judgment" for the Archdiocese, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018)—particularly since both Supreme Court cases to address the ministerial exception, every Seventh Circuit case, and every reported federal case since *Hosanna-Tabor* have resolved the ministerial exception on summary judgment or earlier. *See Starkey*, Dkt. 132 at 3 & nn.1-2 (collecting cases).

2. Fitzgerald's counterarguments are meritless.

Fitzgerald's primary counter is that, regardless of what her contracts and job description said, she didn't actually perform the religious duties assigned there. Opp.19-23, 30-31. This argument is a nonstarter under binding precedent. *Grussgott* holds "it

is the school's expectation—that [the employee] would convey religious teachings to her students—that matters." 882 F.3d at 661. And *Our Lady*, *Sterlinski*, *Grussgott*, and many other cases tell us where to find the employer's expectations: in "employment agreements and faculty handbooks." *Our Lady*, 140 S. Ct. at 2066; *see also Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 569 (7th Cir. 2019) (relying on church document on religious importance of organ playing); *Grussgott*, 882 F.3d at 660-61 (relying on school's written description of its curriculum).[1]

Recognizing the problem, Fitzgerald tries to distort *Our Lady*, seizing on its statement that "[w]hat matters, at bottom, is what an employee does." 140 S. Ct. at 2064; *see* Opp.31. But in context, this statement merely clarifies that religious function is the primary inquiry in applying the exception, *vis à vis* the other "circumstances that informed [the Court's] decision in *Hosanna-Tabor*." 140 S. Ct. at 2063-64. It doesn't create a loophole by which an employee can opt out of the ministerial exception by refusing to perform (or saying she refused to perform) the religious duties assigned to her. Indeed, in *Our Lady* itself, the Court looked to the employment agreements and handbooks to determine what the employees did—rejecting their attempt to

[1] *See also, e.g.*, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (relying on "job description," "employment application," "list" of religious duties, and "affidavit from Bishop Slattery describing Appellant's role"; her "conclusory and self-serving affidavit" didn't preclude summary judgment); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 803 (4th Cir. 2000) ("job description[]," while not dispositive alone, "unmistakably evince[d] the religious significance of her music ministry"; further confirmed through "Church documents" and "Father O'Connor's affidavit"); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (heavily relying on "job description" to determine ministerial status); *Simon v. Saint Dominic Acad.*, No. 19-21271, 2021 WL 6137512, at *4 (D.N.J. Dec. 29, 2021) (determining "Plaintiff performed a vital religious duty" based on complaint and "Handbook"); *Zaleuke v. Archdiocese of St. Louis*, No. 19-2856, 2021 WL 5161732, at *6 (E.D. Mo. Nov. 5, 2021) (deriving plaintiff's "responsibilities" from "documents memorializing the employment relationship, specifically Defendants' employment application, Witness Statement, and Employment Agreements"); *Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803, 817 (D.S.C. 2018) ("Most importantly, based upon the description of the job position, … ."); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 670, 674 (N.D. Ill. 2012) (relying on fact that "Handbook required … called teachers [to] integrate Christian instruction into the study of every subject," though plaintiff "maintain[ed]" she didn't do so); Order Granting Mot. to Dismiss, *Cox v. Bishop England High Sch.*, No. 2019-CP-08-1720, at 7 (S.C. Ct. Com. Pl. Nov. 24, 2020) ("Standing alone, Cox's contract terms establish that she was employed in an important religious function … .").

assert that their work as actually performed was "merely" teaching "from a book." *Id.* at 2068-69.

Indeed, as *Sterlinski* explains, an employee's refusal to perform assigned religious duties doesn't make him a non-minister—it makes him a bad one, such that the "church may decide [he] *ought* to be fired." 934 F.3d at 571. And this point applies even more forcefully here, where Fitzgerald wasn't just assigned religious duties but expressly told the school she was performing them. In her self-evaluation, Fitzgerald said she "ha[s] no problems sharing my beliefs and my love of God" with students; "meet[s] with students regularly" to address "faith formation"; and "consistently use[s] spiritual life and resources in … counseling conversations as well as sharing my own spiritual experiences." App.43-44, 47. In other words, she said she performed the very duties she now claims didn't reflect reality.

Fitzgerald now says she was "exaggerat[ing]" on her evaluation because she "wanted to get a raise in pay." App.281-82 at 140:18-141:8; *see* Opp.12. But even assuming this is true—that she was lying then rather than lying now—the very fact that she would embellish her spiritual impact on students only underscores that Roncalli expected her to have such an impact. In any event, *Grussgott* holds that the exception covers "those with the *ability* to shape the practice" of the employer's faith, 882 F.3d at 661 (emphasis added)—not just those who continue to agree in litigation that they actually did so. And the ministerial exception must allow a religious employer to dismiss an employee who is expected to perform religious duties, refuses to perform them in practice, then dissembles about it for money.

Nor is the CEAP evaluation alone; the 2016 Fitzgerald–Starkey letter likewise asserted that counselors fulfilled "Ministry" duties, including praying with students, communicating the faith, and participating in spiritual formation. App.498; *see* Br.9-10. Fitzgerald now says that although the letter appears over her and Starkey's signatures, Starkey "added [her] name without obtaining her permission or discussing

the specific content with her." Opp.12-13. Starkey told a different story under oath. *Starkey*, Dkt. 114-2 at 364 ("I put this together, and she put her name to it as well in agreement, of course."). But any intra-plaintiff dispute on this point is doubly immaterial—first, because even if the letter were Starkey's alone, it confirms that guidance counselors perform ministerial duties. And second, because when the letter was circulated with Fitzgerald copied, Fitzgerald didn't dispel the appearance she was responsible for its contents. Far from it: When Principal Weisenbach responded, calling it a "letter written by Lynn *and Shelly*," and endorsing its argument that "a guidance counselor qualifies for the … ministerial exception," Fitzgerald thanked him for being "on our side." App.505-06 (emphasis added); *cf. Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966 (7th Cir. 1986) ("apparent authority").

Alternatively, Fitzgerald asserts that "[m]any of" the Archdiocese's written expectations of religious duties didn't "align with … the school's expectation for us *as I understood it*." SA.17 ¶123 (emphasis added). But given the written employment documents—including contracts Fitzgerald signed and evaluation criteria she drafted—Fitzgerald's simply asserting her own post-litigation "understanding" of the Archdiocese's expectations in a declaration doesn't create a fact dispute over their contents. Under the First Amendment, the Court must "defer to the [Archdiocese] in situations like this one," *Grussgott*, 882 F.3d at 660, unless Fitzgerald shows the written expectations are "[dis]honest," *Sterlinski*, 934 F.3d at 571-72—a showing she couldn't hope to make given her own repeated, pre-litigation affirmations of the religious expectations for her role, *see id.* (summary judgment for church where evidence of religious duties predated employee's discharge). And under basic summary-judgment law, testimony must "be based on personal knowledge"—so an employee can't "thwart summary judgment" merely by "speculating as to an employer's state of mind." *Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 460 (7th Cir. 2014).

Fitzgerald's remaining arguments on this point are equally meritless. Fitzgerald

says counselor Angela Maly's declaration is "of little relevance," since Maly started at Roncalli around the time Fitzgerald was placed on leave. Opp.23 n.5. But the Guidance Counselor Ministry Description that Maly confirms accurately describes the role is identical on all relevant points to the Teacher Ministry Description Fitzgerald and Starkey agreed described it in 2016, App.498-506—amply justifying this Court's reliance on Maly's testimony in *Starkey*, 2021 WL 3669050, at *3, *5.

Next, Fitzgerald suggests "[t]here is reason to doubt the veracity" of Maly's declaration, citing a former student's declaration claiming Maly "never … prayed with him" or "gave him any religious memorabilia." Opp.11. But that's a *non sequitur*. Testimony by *one* student that Maly didn't pray or share religious items *with him* doesn't conflict with Maly's testimony (backed by concrete examples) that she "regularly" and "often" does these things when appropriate to a student's situation. App.2 ¶9, 3 ¶13.

By contrast, Fitzgerald's declaration is contradicted by her own declarants. Fitzgerald says her counseling was "focused on scheduling" and academics, that she met with most of her students only "yearly," and "if a student was dealing with a more serious personal issue … I would send the student to the social worker." SA.3, 4, 7. But one of Fitzgerald's own student witnesses testifies that when she was "struggling with depression," she went to went to Fitzgerald at least monthly, Fitzgerald helped "ease [her] … depression," and the student met with the social worker only "once," when "Ms. Fitzgerald wasn't available." SA.67; *cf.* SA.29 ¶29.

Of course, credibility can't be weighed on summary judgment. *Cf.* Opp.18. Rather, the existence of issues like these only goes to show why courts applying the ministerial exception on summary judgment have never treated self-serving, mid-litigation attempts to minimize a religious role as trumping documented, pre-litigation religious duties, *see supra* pp.4-5 & n.1.

Fitzgerald searches far and wide for caselaw supporting her effort to evade documented job duties, but comes up empty. If anything, the two state-court cases she

invokes support the Archdiocese. In *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000 (Mass. 2021), *cert. petition filed*, No. 21-145, the court expressly "rel[ied] on the" school's "handbook" as establishing the school's expectations and the plaintiff's duties, declining to apply the exception only because there were "no formal requirements" that the plaintiff "meet with students for spiritual guidance, pray with students, directly teach them doctrine, or participate in religious rituals or services with them," *id.* at 1012-13 & n.20—the exact "formal requirements" Fitzgerald *did* face. Meanwhile, in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), the court found the ministerial exception *met*, because the plaintiff—like Fitzgerald—"was tasked with carrying out" his employer's religious "mission." *Id.* at 611.

Alternatively, Fitzgerald worries that taking written job duties seriously would allow "religious employers to shield themselves from liability by adopting across-the-board ministry contracts," turning even their unlikeliest employees into ministers. Opp.23 n.4. But this is the same argument made by the *dissent* in *Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting)—which seven Justices rejected. And it's the same argument this Court rejected in *Starkey*, explaining that though "it would be difficult to credit a religious employer's claim that a custodian or school bus driver qualifies as a minister," the Co-Director of Guidance position at Roncalli presents no such concerns. *Starkey*, 2021 WL 3669050, at *7; *cf. Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099-1100 (7th Cir. 2007) (guidance counselors "play a role similar to teachers"). This Court need go no further to reach the same result here.

Turning to her work with at-risk students in SAP, Fitzgerald claims SAP was "primarily" about drug testing. Opp.7, 13. But even if this were true, illicit drug use is a matter of religious significance for the Catholic Church, Catechism of the Catholic Church ¶ 2291, and Roncalli would expect it to be addressed consistently with "the church's tenets." *Our Lady*, 140 S. Ct. at 2060. More importantly, Starkey "confirmed that … SAP required her to help students with their 'most sensitive' and 'personal

issues.'" *Starkey*, 2021 WL 3669050, at *5. And Fitzgerald's deposition testimony—agreeing not just with Starkey (*see* App.860 at 48:12-16), but also with Maly (App.3-4 ¶¶13-18), Weisenbach (App.23 ¶29), and the student handbook (App.795; *see* App.439)—admits the program sweeps far more broadly than drugs. *See* App.183 at 42:1-10 ("someone who was going through a tough time," "depression").

Moreover, undisputed evidence shows SAP addressing a broad swath of issues in practice, developing an "over-arching mental health curriculum," App.42; *accord* App.598; and reviewing a "morality survey" covering sexual activity, honesty, and church attendance "to assist with [Roncalli's] strategic planning goal of 'Forming intentional disciples,'" App.496; *see* App.241-43 at 100:8-102:8. And Fitzgerald's own CEAP criteria required a "Master School Counselor" to "provide[] school-wide leadership on pervasive personal counseling topics … in conjunction with … SAP." App.522. So Fitzgerald's *post hoc* effort to downplay SAP can't disturb the relevant point—Fitzgerald was required to "work[] with students struggling with sensitive personal issues," and "[i]n line with ... her employment documents and the school's mission, Roncalli plainly anticipated that matters of faith and doctrine would inform [her] approach to" doing so. *Starkey*, 2021 WL 3669050, at *5.

Finally, Fitzgerald admits she gave the opening talk at the seniors' spiritual retreat; she says it doesn't count because she was just expressing her "personal faith." Opp.27 & n.8. But this misses the point—she was sharing her faith *on Roncalli's behalf*, as part of *the school's* effort to "help students understand how Christ is present in their daily life." App.6 ¶35; *see Grussgott*, 882 F.3d at 660 (rejecting argument that "voluntarily" performing religious duties defeated exception). Indeed, Roncalli provided a detailed outline to structure the talk, which requires the speaker to "include a reference to Scripture," lists religious "[i]deas that MUST be conveyed," and prescribes the "Main Point"—that "[i]t is necessary to know one's own self and story as a basis for a relationship with God and others." App.602; *see* App.311-12 at 170:22-

171:2. So in giving it, Fitzgerald was indisputably "conveying [Roncalli's] message," *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003), and helping to "guide [its] students … toward the goal of living their lives in accordance with the faith," *Our Lady*, 140 S. Ct. at 2066—quintessential ministerial functions.

3. Fitzgerald's senior leadership role independently shows she was a minister.

Beyond these religious functions as a guidance counselor, Fitzgerald was also elevated to one of the most senior leadership positions in the school—making this an even easier case. As Co-Director of Guidance, she oversaw the other guidance counselors and social worker (SA.40 ¶7), including their spiritual functions. And as a member of the Administrative Council, she "served in a senior leadership role in which she helped shape the religious and spiritual environment at the school and guided the school on its religious mission." *Starkey*, 2021 WL 3669050, at *7. This leadership role alone suffices to bring her within the ministerial exception. Br.23-26.

In response, Fitzgerald says the exception "should apply … only when" the plaintiff is the defendant's "chief instrument" for fulfilling its religious purpose. Opp.18 (quoting *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 978 (7th Cir. 2021)). But this simply isn't the law. Indeed, it's just another way of arguing the exception is "limited to the head of a religious congregation"—an argument "[e]very Court of Appeals" and the Supreme Court have rejected. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012); *see Our Lady*, 140 S. Ct. at 2067 n.26 (rejecting "[i]nsisting on leadership as a qualification"). And it wrenches its key language badly out of context. *Demkovich* said ministers *as a category* are religious organizations' chief instruments, not that the employee in question must himself be *the* chief instrument. Indeed, in *Demkovich* itself, the plaintiff wasn't "chief"—he was a music director fired by a priest, who was himself subordinate to more senior ministers. 3 F.4th at 978. In *Sterlinski*, the organist didn't even choose

his own music, yet remained a minister. 934 F.3d at 569. And in *Alicea-Hernandez*, a Hispanic Communications Manager was held a minister, though she obviously wasn't "*the* chief instrument" of the Archdiocese of Chicago. 320 F.3d at 703-04.

Unable to dispute that she helped lead a school that exists solely to "further[] the mission and purposes of" a Catholic Archdiocese, App.628, Fitzgerald is forced to claim leadership alone can't make her a minister, arguing that, if it did, the exception would cover, *e.g.*, the "IT Director" or "Head of Groundskeeping" "at a religious non-profit." Opp.25. But this argument comes bereft of caselaw and attacks a strawman. Of course not *all* supervisors are ministers—but those who "supervise[] spiritual function[s]" are. *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006). Thus an IT Director who supervises only IT work isn't necessarily covered. But Fitzgerald, who helped supervise "day-to-day operations" "closely related to Roncalli's religious mission," is. *Starkey*, 2021 WL 3669050, at *3.

Indeed, courts routinely apply such reasoning to find school administrators like Fitzgerald to be ministers. The Ninth Circuit recently held a principal was a minister, citing his "supervisory authority over aspects of religious instruction and programming." *Orr v. Christian Bros. High Sch.*, No. 21-15109, 2021 WL 5493416, at *1 (9th Cir. Nov. 23, 2021). The Second Circuit in *Fratello v. Archdiocese of N.Y.* held likewise, because the plaintiff "managed, evaluated, and worked closely with" other staff "to execute the School's religious education mission." 863 F.3d 190, 209 (2d Cir. 2017). And another district court—citing *Starkey* repeatedly—rejected a Catholic school principal's attempt to characterize herself as "an 'instructional leader,' not a 'spiritual leader,'" ruling she was a minister because she was expected to at least "'share[] the responsibility' of spiritual leadership." *Zaleuke*, 2021 WL 5161732, at *4, 6.

The Archdiocese already cited many leadership cases, Br.26 & n.4; Fitzgerald has no response. As this Court has explained, "[a]side from the Principal and the Assistant Principal for Academic Affairs, the Director of Guidance is the only staff member

that serves on the Administrative Council and as a Department Chair." *Starkey*, 2021 WL 3669050, at *5. So "there is no principled distinction to be drawn between" these positions for purposes of the exception. *Orr*, 2021 WL 5493416, at *1.

Fitzgerald also makes several efforts to minimize her Administrative Council work, none successful. First, she says "most[]" of the Council's work "involved the same secular, logistical issues that arise in the running of any school." Opp.21. But given the Council's religious responsibilities, it's "[im]material" that it "performed many secular administrative duties" too; indeed in *Hosanna-Tabor* itself "the majority of the … plaintiff's responsibilities were secular." *Fratello*, 863 F.3d at 209 n.34 (citing 565 U.S. at 193).

Second, Fitzgerald claims when religious issues "*did* arise" at Council meetings, the Council "referred them to the school's religion and ministry teams." Opp.1, 24. But this Court rejected the same argument when Starkey made it, *Starkey*, Dkt. 126 at 20, and for good reason. Neither this claim nor Fitzgerald's alleged subjective "understanding" of Roncalli's expectations (*cf.* SA.7) can as a matter of law override "*the school[']s]* definition and explanation of [the Council's] role[]," *Our Lady*, 140 S. Ct. at 2066 (emphasis added), which is reflected in meeting agendas and other contemporaneous documents—namely that the Council as a whole was "responsible for" ministry at Roncalli. App.19 ¶¶7-8; *see also* App.613 ("[T]he group needs your opinion as we try to make decisions that are best for our school."); App.615 (similar).

Nor is there any dispute that Fitzgerald herself in fact weighed in on ministry issues at Council meetings—including expressing "concern" over a draft transgender policy, App.229-31 at 88:18-90:14; App.491; *see also* App.20 ¶12, and encouraging a "prayer service" following the Parkland shooting, App.446-47; *see also* App.20 ¶13; App.205-06 at 64:8-65:12.[2] And there's no dispute the Council in fact informed

[2] Fitzgerald's new effort to recharacterize the "prayer service" discussion (SA.11 ¶67) is both

decisions affecting the entire school's religious life—like planning all-school liturgies, deciding whether to hold Eucharistic adoration, and discussing "chang[ing] the person responsible" for music at all-school Mass to increase student engagement. App.224-26 at 83:18-85:11; *see* Br.14 (cites; other examples). Indeed, given Seventh Circuit rulings that those responsible for music at Mass are ministers (*e.g.*, *Sterlinski*; *Tomic*), a case about the body who chooses those responsible for music is even easier.

At bottom, Fitzgerald's Administrative Council argument reduces to a semantic dispute over what constitutes an "issue[] of religion." *Cf.* Opp.1. But this Court already declined the invitation to thus "entangle[]" itself: "[I]t would be inappropriate for this court to draw a distinction between secular and religious guidance offered by a guidance counselor at a Catholic school." *Starkey*, 2021 WL 3669050, at *7.

Third, Fitzgerald states she doesn't "remember ever discussing a student's spiritual distress during an Administrative Council meeting." SA.10. But her selective memory loss can't erase the contemporaneous, written meeting agendas, which almost invariably begin with "Student/family issues" and raise various personal and spiritual struggles, like existential health concerns ("mom is in hospice," App.487), death in the family ("Father Passed away," App.493), and religious conversions ("parents raised in evangelical churches; whole family is going thru RCIA [*i.e.*, becoming Catholic]," App.491); *see* App.49-51, 446-48, 472-74, 487-97; *see also Starkey*, Dkt. 114-2 at 216-19, 483-518, 609-12. Fitzgerald's "assert[ion] … that [she] does not remember" discussing such issues doesn't "raise a genuine issue whether" it happened. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002). And even if she offered more than selective memory loss, "documents or objective evidence may" render testimony on summary judgment "so … implausible on its face that a reasonable

semantic and directly contradicted by her sworn deposition, and thus not credited as a dispute. App.205-07 at 64:12-66:11 ("Q. … And your suggestion … looks like it was a prayer service? A. That was one of my suggestions … ."); *see, e.g.*, *Hickey v. Protective Life Corp.*, 988 F.3d 380, 389 (7th Cir. 2021).

factfinder would not credit it," *Melton v. Tippecanoe County*, 838 F.3d 814, 819 (7th Cir. 2016) (cleaned up)—just so here.

In short, here, as in *Starkey*, "the record shows that the Co-Director of Guidance performed 'vital religious duties' at Roncalli." *Starkey*, 2021 WL 3669050, at *7 (quoting *Our Lady*, 140 S. Ct. at 2066).

B. Other considerations confirm Fitzgerald was a minister.

As explained—and as Fitzgerald doesn't dispute—religious function alone can trigger the ministerial exception, Br.27, and does so here, *supra*. *Hosanna-Tabor*'s other considerations only confirm the point.

Title. The title consideration asks whether the Archdiocese "held [Fitzgerald] out" as having "a role distinct from that of most of its members." *Hosanna-Tabor*, 565 U.S. at 191. Here, title points toward ministerial status for three reasons: (1) Fitzgerald was contractually designated a "minister"; (2) her "Co-Director" and "Administrative Council" titles reflect leadership authority; and (3) "Director of *Guidance* … suggests" a role of "guiding students as they mature and grow into adulthood," concomitant with the school's Catholic faith. *Starkey*, 2021 WL 3669050, at *7; *see* Br.27.

Rejecting *Starkey* and *Hosanna-Tabor* alike, Fitzgerald says title can't support the Archdiocese because the Director of Guidance at another school could be secular. Opp.28. But the same is true for "teacher"—yet *Our Lady* indicated that title could support ministerial status. 140 S. Ct. at 2067. The Court's understanding was informed by context: the plaintiffs were teachers *at Catholic schools*. *Id.* So too here. Whatever "guidance" conveys at a public school, at Roncalli, the "school would expect faith to play a role in that work." *Starkey*, 2021 WL 3669050, at *7.

Substance reflected in title. The substance reflected in Fitzgerald's titles likewise supports ministerial status, because (1) her performance criteria and job description show she was expected (and agreed) to convey the faith to her students; (2) she was elevated to her roles based on her Catholic background, faith, and "track record"

of faith formation at Roncalli; (3) her Administrative Council role required continued religious education via book studies on evangelization and faith formation; (4) her Co-Director of Guidance role was "recognized by faculty and staff as a key, visible leader of the school"; and (5) counselors participate in an annual ceremony in which they are publicly commissioned as "ministers of the faith." Br.7-8, 26-28.

Fitzgerald's primary response is an *ipse dixit* that her religious training "is simply insufficient to qualify as 'significant.'" Opp.29-30. But *Fratello* held this consideration met even though the plaintiff had "*no* formal training in religion," because—as here—her role "entail[ed] proficiency in religious leadership." 863 F.3d at 208 (emphasis added). In any event, *Our Lady* rejected attempts like Fitzgerald's to impose "credentialing requirements" on religious schools, explaining "[t]he significance of formal training must be evaluated in light of the" *employer's* "judgment … regarding" the training needed. 140 S. Ct. at 2067-68. Here, Principal Weisenbach testified without contradiction that Fitzgerald's training and background "was a critical factor in the school [promoting] her"—so this consideration "supports the application of the ministerial exception here." *Grussgott*, 882 F.3d at 659-60; *see* App.26-27 ¶43.

Fitzgerald also claims she skipped the commissioning ceremony, SA.23 ¶163—despite Weisenbach's testimony, corroborated by Maly (App.8 ¶¶44-45) that counselors are "required." App.22 ¶22. But even taking this is as true, it doesn't change what commissioning "conveyed" to others, *Grussgott*, 882 F.3d at 660—that Roncalli counselors were tasked with "bring[ing] Christ to others through [their] ministry." App.35.

Employee's use of title. Finally, use-of-title supports ministerial status, because (1) Fitzgerald signed a contract designating her a "minister"; (2) Fitzgerald and Starkey asserted to Roncalli leadership that they performed "Ministry" duties and therefore "qualif[ied] for a ministerial exception," App.138; and (3) Fitzgerald self-evaluated for CEAP as performing ministerial duties, App.43-44, 47; *see* Br.28-29.

Fitzgerald tries to diminish these facts but falls short. On the Fitzgerald–Starkey

letter, Fitzgerald reiterates her claim that Starkey unilaterally wrote and sent it over her name. Opp.29. But again, Fitzgerald didn't correct Principal Weisenbach's understanding that the letter was "written by Lynn and Shelly" and shows "why a guidance counselor qualifies for the … ministerial exemption," App.506; she thanked him for being "on our side" and accepted the benefits. App.507. She thus "understood that she would be perceived as a" minister, *Fratello*, 863 F.3d at 208, and in fact invited it.

On the CEAP evaluation, Fitzgerald's response is, again, that she "exaggerated" because she wanted a raise. Opp.12; *see* App.281-82 at 140:18-141:8. But even if true, that doesn't change the impression intended and given—that she was indeed "help[ing Roncalli] carry out [its] mission" of "[e]ducating and forming students in the Catholic faith." *Our Lady*, 140 S. Ct. at 2066. Fitzgerald was a minister.

II. Fitzgerald's federal claims are barred by RFRA.

Even if she wasn't a minister, her Title VII claims would be barred by RFRA. Punishing the Archdiocese for separating from Fitzgerald would substantially burden its religious exercise and isn't the least restrictive means of furthering any compelling interest, 42 U.S.C. §§ 2000bb-1(a)-(b)—so the RFRA defense prevails, Br.30-31.

Fitzgerald refutes none of this. Instead, she merely notes (as the Archdiocese already did) that a Seventh Circuit panel has held that "RFRA does not apply when the 'government,' as defined in RFRA, is not a party to the action." *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015). As the Archdiocese explained, however, *Listecki*'s application to Title VII has been undermined by *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* itself involved a suit in which "the 'government,' as defined in RFRA" wasn't a party. And yet the Supreme Court recognized that "RFRA operates as a kind of super statute" and "might supersede Title VII's commands in appropriate cases." 140 S. Ct. at 1754. This is in accord with the multiple courts on the other side of the "split" from *Listecki*, which hold "RFRA *can* be claimed as a defense in citizen suits." Shruti Chaganti, *Why the Religious Freedom*

Restoration Act Provides a Defense in Suits by Private Plaintiffs, 99 Va. L. Rev. 343, 343-44 & n.7 (2013) (collecting cases). Because *Listecki* has been "undermined by" a Supreme Court decision, it doesn't govern. *See Woodring v. Jackson County*, 986 F.3d 979, 993 (7th Cir. 2021). Fitzgerald's claims are barred by RFRA.

III. Fitzgerald's Title VII claims are barred by Title VII.

Fitzgerald's Title VII claims also fail under Title VII itself, because (1) they're barred by Title VII's religious exemption; (2) Fitzgerald was dismissed for the legitimate, nondiscriminatory reason that she violated her contract; (3) the Archdiocese's actions were based on Fitzgerald's conduct (entering a same-sex union and rejecting Church teaching), not her sexual orientation; and (4) as to the retaliation claim, Fitzgerald failed to plead "but-for" causation. Br.31-34.

Fitzgerald's sole response is to say this Court already rejected these arguments. Opp.34. But with respect to the but-for-causation argument, this is simply mistaken; although the Archdiocese raised that argument in its motion for judgment on the pleadings, Dkt. 41 at 16-18, the resulting order didn't address it, *see generally* Dkt. 98, and the argument is the subject of a motion to alter or amend the judgment that the Court also hasn't yet addressed, *see* Dkt. 107, 113.

As for the other arguments, this Court has "sweeping authority" to reconsider interlocutory orders "at any time." *Galvan v. Norberg*, 678 F.3d 581, 587 n.3 (7th Cir. 2012). And that the Court's preliminary reading of the Title VII exemption has recently been considered and rejected by another court only underscores the propriety of doing so here. *See Bear Creek Bible Church v. EEOC*, No. 18-824, ___ F. Supp. 3d ____, 2021 WL 5449038, at *5-6 (N.D. Tex. Nov. 22, 2021). Briefly addressing the exemption, Fitzgerald endorses this Court's prior statement that the Archdiocese's reading "would allow a religious employer to convert any claim of discrimination on the basis of one protected class under Title VII to a case of religious discrimination, so long as there was a religious reason behind the employment decision." Opp.34

(quoting *Starkey*, Dkt. 93 at 11). But where conduct is at issue, that's the question the text asks—whether the challenged decision was based on the employee's "particular" "religious observance," "practice," or "belief." 42 U.S.C. §§ 2000e-1(a), 2000e. If so, *Congress* exempted it from Title VII's reach—and that "straightforward application of" plain text is "the end of the analysis." *Bostock*, 140 S. Ct. at 1743.

IV. Fitzgerald's claims are barred by the First Amendment.

Ministerial exception aside, Fitzgerald's claims are barred by multiple other aspects of the First Amendment—(1) religious autonomy; (2) non-entanglement; (3) freedom of association; and (4) constitutional avoidance. Br.34-35.

Fitzgerald offers no substantive response to these arguments. On autonomy and entanglement, Fitzgerald notes this Court previously found these arguments "premature," Opp.34-35, but neglects to mention *why*—because the Court thought it needed more evidence about "Fitzgerald's role at Roncalli." Dkt. 98 at 5. The Court now has such evidence, so there's no obstacle to reaching the arguments now.

Turning to religious autonomy, Fitzgerald adopts, but doesn't actually defend, this Court's earlier-stated concern that the Archdiocese's understanding of that doctrine "'would render the ministerial exception superfluous.'" Opp.34. But the Archdiocese's brief confronts this point head on, identifying precisely how the doctrines overlap and differ. Br.34. Fitzgerald supplies the Court with no reason to conclude—contrary to widespread precedent—that the two doctrines are coterminous.

Finally, Fitzgerald claims she needs "discovery" before the Court can consider some or all of these defenses. Opp.35 n.9. But "a 'protracted legal process pitting church and state as adversaries'" would only exacerbate the First Amendment harms already attendant to this lawsuit. *Demkovich*, 3 F.4th at 982. As for religious autonomy, there's never been any dispute that the "personnel decision" at issue here was "based on religious doctrine," *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002)—the relevant fact for that defense. And the

entanglement defense is based on Fitzgerald's own allegation that she intends to prove her discrimination case by showing she was treated worse than other employees in "marriages that allegedly violate [Church] teaching," Dkt. 1 ¶¶81-82, 87—a comparison the Court simply cannot draw. Dkt. 42 at 28-30.

And as for freedom of association, the parallel between this case and *Boy Scouts v. Dale*, 530 U.S. 640 (2000), couldn't be clearer, based solely on the record already before the Court. *Dale* didn't rely on discovery materials to rule for the Scouts; rather, it said courts must "give deference to an association's view of what would impair its expression," *id.* at 653, and found such impairment the logical result of forcing the Scouts to retain as scoutmaster an individual who, "by his own admission," was "a gay rights activist" and "leader[] in th[e] community," *id.*

Fitzgerald, too, by her own admission, is "dedicated to LGBTQ+ activism and advocacy." App.320-21 at 179:17-180:1. Her complaint states she has "taken an active role in opposing" the Archdiocese's employment policies with respect to same-sex marriage. Dkt. 1 ¶69. She "mentor[s]" an LGBTQ advocacy group named after her, Br.16, which was formed during her employment and consists of Roncalli students, App.456-57. One of those students—who is one of Fitzgerald's declarants and a group spokesperson—acknowledges the group is aimed at "chang[ing] this church."[3] If freedom of association means anything, it means the Catholic Church doesn't have to retain in senior leadership an employee who not only rejects its teachings in her personal life but is dedicated to opposing those teachings in public and changing those teachings from within. *Dale*, 530 U.S. at 653.

CONCLUSION

Judgment should be rendered for the Archdiocese.

[3] Susan Salaz, *When Their Teacher Was Fired, These Teens Turned to Faith*, U.S. Catholic (Oct. 22, 2019), https://perma.cc/MM85-PVNH (interview with Dominic Conover); *see* SA.75-78 (declaration of Dominic Conover).

Respectfully submitted.

/s/ Luke W. Goodrich
Luke W. Goodrich (DC # 977736)
Daniel H. Blomberg (DC # 1032624)
Joseph C. Davis (DC # 1047629)
Christopher C. Pagliarella (DC # 273493)
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
(202) 955-0095
(202) 955-0090 fax

Attorneys for Defendants

John S. (Jay) Mercer, #11260-49
Wooton Hoy, LLC
13 North State Street, #2A
Greenfield, IN 46140
(317) 439-0541

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following on February 22, 2022, by this Court's electronic filing system:

David T. Page
1634 W. Smith Valley Road, Suite B
Greenwood, IN 46142
(317) 885-0041

Mark W. Sniderman
Findling Park Conyers Woody & Sniderman, P.C.
151 N. Delaware St., Suite 1520
Indianapolis, IN 46204
(317) 231-1100

Richard B. Katskee
Bradley Girard
Adrianne M. Spoto
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

By: /s/ Luke W. Goodrich
Luke W. Goodrich
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
(202) 955-0095
(202) 955-0090 fax