16-1271-cv

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
No. 12-CV-7359-CS

BRIEF FOR DOUGLAS LAYCOCK, MICHAEL W. MCCONNELL, THOMAS C. BERG, CARL H. ESBECK, RICHARD W. GARNETT, PAUL HORWITZ, AND JOHN D. INAZU AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Professors Douglas Laycock, of University of Virginia School of Law; Michael W. McConnell, of Stanford Law School; Thomas C. Berg, of St. Thomas School of Law; Carl H. Esbeck, of University of Missouri School of Law; Richard W. Garnett, of Notre Dame Law School; Paul Horwitz, of University of Alabama School of Law; and John D. Inazu, of Washington University School of Law, each hold a named endowed chair at their respective universities. Amici teach and write about the Religion Clauses of the First Amendment, and all have written about the ministerial exception in particular. They also represent parties and/or amici in litigation raising issues regarding the Religion Clauses. Amici are further described in the Appendix.

Amici's interest is to provide the Court with a historical perspective of the "ministerial exception" as it applies in this context, a broader doctrinal analysis of the exception, and a response to amicus briefs submitted in support of the appellant.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Local Rule 29.1(b), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person or entity, other than *amici* and their counsel, contributed money intended to fund the preparation or submission of this brief. All parties have consented to this brief's submission. *See* Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012), the Supreme Court unanimously affirmed that there is a "ministerial exception" grounded in the Religion Clauses of the First Amendment. The exception forbids the government from "interfer[ing] with the internal governance of the church" and "depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 706. As such, the term "ministerial" is too narrow, as the exception is "not limited" to decisions involving "the head of a religious congregation." *Id.* at 707. Rather, it prohibits the government from interfering with any "internal church decision that affects the faith and mission of the church itself." *Id.* As explained below, history and precedent confirm that this constitutional principle of religious autonomy means that the government cannot interfere with the selection of a religious organization's employees who perform significant religious functions and especially its leaders, including in the parochial schools' context.

These principles require affirmance here. The district court's analysis of the responsibilities of a principal in a Catholic school, such as Fratello, amply confirms that the position entails significant religious functions and, indeed, leadership responsibilities, which makes it an easier case than *Hosanna-Tabor*, where the teacher's duties included "conveying the Church's message and carrying

out its mission," *Hosanna-Tabor*, 132 S. Ct. at 708. For *Hosanna-Tabor*'s decision to apply as a general rule and not be limited to its facts, and to treat all faiths equally, the "ministerial exception" must cover all teachers (regardless of title) with significant religious responsibilities, even if their title does not reflect the substance of their role. And if all teachers with significant religious duties are covered, then the principal who hires and supervises these teachers, oversees the school's overall religious mission, and leads the whole institution, is necessarily within the exception.

The Catholic Lay Groups' Amicus Brief ("CLG Brief") seeks to confine *Hosanna-Tabor* to its facts, to relitigate issues the Supreme Court has decided, and to invalidate forty years of law affirming the functional view of the exception. Contrary to *Hosanna-Tabor*, the brief would make titles and ordination or commissioning the primary focus of the exception. The brief disregards Fratello's duties, asserting that under the district court's interpretation, all lay practicing Catholics would be within the exception. But that is simply not the case, because the exception does not apply unless individuals are tasked with significant religious responsibilities and are being evaluated on their effectiveness in performing them. This parade of horribles ignores the rationale for and history of the ministerial exception, most of the bases for the ruling below, and Fratello's actual functions.

ARGUMENT

I. RELIGIOUS ORGANIZATIONS HAVE AUTONOMY TO SELECT THOSE WHO PERFORM SIGNIFICANT RELIGIOUS FUNCTIONS, AND ESPECIALLY THEIR LEADERS

A. As The Supreme Court Has Explicitly Recognized In *Hosanna-Tabor*, The First Amendment Protects The Autonomy Of Religious Organizations

In *Hosanna-Tabor*, the Supreme Court confirmed the forty years of precedent in lower courts, which have recognized a ministerial exception giving religious organizations autonomy to evaluate and select their leaders and freedom from certain legal liability in connection with those decisions. 132 S. Ct. at 705-06. That is because a religious organization's selection of its ministers is an inherently religious decision. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 850-51 (2012). Indeed, as the Supreme Court has held, "[t]he exception . . . ensures that the authority to select and control who will minister to the faithful – a matter strictly ecclesiastical – is the church's alone." *Hosanna-Tabor*, 132 S. Ct. at 709 (citation omitted). The Supreme Court has clarified that this exception arises from both the Establishment Clause and the Free Exercise Clause: "[b]y 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. Thus, these two clauses form "a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 834 (2012). *See also* Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 Va. L. Rev. 1049, 1058 (2013) ("Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience. And it sees church autonomy as involving a *structural* as well as an individual component, one that recognizes the limits of the state and the separate existence of the church.").

As Professor Lund has observed, there are three components to the ministerial exception. First, the relational – "[o]rganizations founded on shared religious principles, simply to exist, must have freedom to choose those religious principles." Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 4 (2011); *see also Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (religious groups' "very existence is dedicated to the collective expression and propagation of shared religious ideals"). Second, conscience, which allows religious organizations to consider factors such as sex or religion in internal religious decisions, such as some groups' "divinely ordained" imperative to maintain an all-male clergy. Lund, *supra*, at 5. Third, autonomy, which bars

those with significant religious duties from bringing employment-based claims against their religious organizations. *Id.*

Here, the autonomy component is most prominently implicated as it "deals with the special importance of religious leaders in religious life. Choosing a minister is an important act of religious exercise," as religious leaders "play fundamental roles in peoples' lives." *Id.* at 35. As the Supreme Court has acknowledged in *Hosanna-Tabor*, "[t]he members of a religious group put their faith in the hands of their ministers." 132 S. Ct. at 706. Thus, "because selecting a minister is at the heart of religion, the heart of religious freedom lies in having free choice in making that selection." Lund, *supra*, at 35. At the same time, "imposing liability on people because of whom they want (or do not want) as their minister burdens that freedom." *Id.* Lund notes that the Supreme Court has held in the Free Speech Clause context that liability presumptively cannot attach to speech on matters of public concern. *Hosanna-Tabor* has gone even further to categorically preclude the imposition of liability, "bar[ring]" employment discrimination suits brought by those who teach a church's faith and carry out its mission because "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." 132 S. Ct. at 706, 710.

B. History Confirms That A Religious Organization's Ability To Select Those Who Perform Significant Religious Functions Or Hold Leadership Positions Is An Essential Part Of The Protection Of Religious Freedom From Governmental Interference

This understanding of the ministerial exception is firmly grounded in history. The broad principle that government has no authority to interfere with a church's internal affairs – espoused by philosophers and leaders such as John Locke, James Madison, and Thomas Jefferson – "has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). More specifically, this autonomy has included the church's right to "control . . . the selection of those who will personify its beliefs." *Hosanna-Tabor*, 132 S. Ct. at 707. A leader of a parochial school – a church-sponsored institution that serves as a "powerful vehicle for transmitting [a church's] faith to the next generation," *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) – exemplifies the church's values and is instrumental in promoting "the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. History confirms that ensuring the religious institution's autonomy over the selection of those with significant religious responsibilities, and especially, of its leaders, is an essential component of the religious freedoms ultimately enshrined in the First Amendment. Forcing a religious organization to retain an

unwanted employee with important religious duties or to be otherwise liable for terminating that employee is incompatible with those freedoms. *Id*. at 709.

The perils of state involvement with internal church affairs were manifest in seventeenth-century England, which was roiled by religious controversy. "A leading source of religious strife . . . involved clashes between Episcopal and Presbyterian views of 'church polity' – the church's internal governance structure." Brief for International Mission Board of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioner at 27-28, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) (citing sources). "Episcopal polity, associated with the Roman Catholic and Anglican churches, called for placing ecclesiastical authority principally in bishops." *Id.* "In contrast, Presbyterian polity, inspired by the Reformation and associated with the Puritans and many Protestant churches, called for governance by assemblies of elders – i.e., 'presbyters.'" *Id.* Favoring Episcopal policy, King James I attempted to impose it on Presbyterian Scotland, which sparked opposition from Parliament. *Id.* at 27-28. The conflict came to a head in 1640, when King Charles I dissolved Parliament and required all clergy to swear an oath upholding the church's Episcopal structure. *Id.* at 28. The Scots then invaded England, Parliament executed the King's chief minister, and years of civil war ensued. *Id.* at 28-29.

The worst of England's religious struggles were ultimately resolved by the

Glorious Revolution of 1688 and the Act of Toleration. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 355 & n.59 (1984). Writing to justify and secure the fruits of that Revolution, John Locke penned his influential *A Letter Concerning Toleration*, advocating church-state separation as the only path toward peace. *See City of Boerne v. Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part) (noting that Locke supplied "the background political philosophy of the age"). According to Locke, "it is utterly necessary that we draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." John Locke, *Toleration* at 3 (Jonathan Bennett ed. 2010) (1690), available at http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf. Otherwise, there will be "no end to the controversies arising between those who have . . . a concern for men's souls and those who have . . . a care for the commonwealth." *Id.*

Locke insisted that religious institutions must be free to control their leadership and internal affairs. In Locke's view, a church is a "free society of men who voluntarily come together to worship God in a way that they think is acceptable to Him and effective in saving their souls." *Id.* at 5. "[S]ince the members of this society . . . join[] it freely and without coercion, . . . it follows that the right of making its laws must belong to the society itself." *Id.* This right of

self-governance includes the society's authority to select its own members – particularly the right to disassociate with anyone who declines to follow the society's rules. *Id*. A church's power of excommunication is thus fundamental, as "the society would collapse" if its members could "break [its] laws with impunity." *Id.* at 7.

A "church's right to make its own religious laws and to expel members for nonconformance" applies, therefore, to appointing and removing individuals with significant religious responsibilities and especially those in positions of religious leadership. Laycock, *supra*, at 857. A church's ability to select its own teachers and messengers, and *a fortiori*, its leaders, is an even more vital component of self-governance than a church's right to control its membership. *Id.*

Ideas similar to Locke's found expression in the colonies. In *The Bloudy Tenet of Persecution for cause of Conscience*, the theologian Roger Williams made a two-part case for non-interference with religious affairs. "First, it was best for the state because conformity in religious matters was impossible due to its personal nature, and state attempts to compel conformity would lead only to repression and civil discord." Esbeck, *supra*, at 357-58. Second, it "was best for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived." *Id.* at 358. These ideas spread throughout the colonies during the Great Awakening of 1720-1750. *Id.* at 357. "The leaders of

the movement insisted that the Church should be exalted as a spiritual and not a political institution." *Id.* at 358.

"It was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 132 S. Ct. at 703. "Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church." *Id.* "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices." *Id.*

"This understanding of the Religion Clauses was reflected in two events involving James Madison, the leading architect of the religion clauses of the First Amendment." *Id.* In the wake of the Louisiana Purchase, John Carroll – the first Roman Catholic Bishop in the United States – asked then-Secretary of State Madison for advice on who should be appointed to head the Catholic Church in the city of New Orleans. McConnell, *supra*, at 830. "In his response to Carroll, Madison wrote that, the 'selection of religious functionaries is entirely ecclesiastical' and that the government should have nothing to do with such selections." *Id.* (alterations omitted) (quoting Letter from James Madison to John Carroll (Nov. 20, 1806), in 20 The Records of the American Catholic Historical Society 63, 63 (1909)). "He declined even to express an opinion on whom Carroll should select." *Id.*

Several years later, Congress passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. *Hosanna-Tabor*, 132 S. Ct. at 703. Then-President Madison vetoed the bill "on the ground that it 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'"" *Id.* at 703-04 (quoting 22 Annals of Cong. 982–983 (1811)). Madison explained:

> "The bill enacts into, and establishes by law, sundry *rules and proceedings relative purely to the organization and polity of the church incorporated*, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises."

Id. at 704 (emphasis altered) (quoting 22 Annals of Cong. 983 (1811)). This episode demonstrates that the First Amendment's principle of non-interference extends beyond the appointment of ordained clergy; it broadly forbids the government from interfering in matters relating "purely to the organization and polity of the church." *Id.*

"Thomas Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations – not just churches but religious schools as well." Berg, *supra*, at 182. In 1804, Jefferson wrote to the prioress of the Ursuline Sisters of New Orleans – a religious order that

operated a Catholic school for girls – to assure her that the Louisiana Purchase would not undermine the order's legal rights. *Id.* Jefferson explained that "the principles of the Constitution 'are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, *and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority*.'" *Id.* (quoting 1 Anson Phelps Stokes, Church and State in the United States 478, 678 (1950)). Jefferson's "statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders." *Id.* at 182-83. His letter "supports the proposition that religiously affiliated schools have important interests in the freedom and autonomy that goes with church-state separation." *Id.* at 183 (footnote omitted).

Consistent with Jefferson's view, the Supreme Court has recognized that church-supported schools play an important role in furthering the church's mission and message. "The various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." *Lemon*, 403 U.S. at 616. Accordingly, the leaders of parochial institutions "personify [the church's] beliefs" and are instrumental in promoting "the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 706-07. *See also NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (noting the "critical and unique role" of teachers in religious schools).

"What these and other events confirm is that many early American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011-2012 Cato Sup. Ct. Rev. 307, 313. "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*

Because the original Bill of Rights did not apply to the acts of state governments, roughly half of the states maintained established religions after ratification of the First Amendment. McConnell, *supra*, at 829. But "[d]isestablishment occurred on a state-by-state basis through adoption of state constitutional amendments—Massachusetts being the last to dismantle its localized establishment in 1833." *Id.* Importantly, "each of the states that first maintained an establishment and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—adopted at the same time an express provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." *Id.* This history shows that a church's freedom to choose those with significant religious functions and especially its leaders was "part and parcel of disestablishment." *Id.*

History thus confirms the constitutional basis for the rule giving religious bodies "independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). In declaring unconstitutional a New York law which "pass[ed] the control of matters strictly ecclesiastical from one church authority to another," the Supreme Court emphasized that the law "directly prohibited the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Kedroff*, 344 U.S. at 119). This independence from government interference includes the "religious group's right to shape its own faith and mission through its appointments." *Id*. at 706. Those who provide religious content to students and especially, those who lead the entire church-sponsored school, "personify its beliefs," *id.*, and the selection of such individuals must thus be free from such interference. Permitting employment discrimination suits against a religious organization – which, if successful, would end in reinstatement of an unwanted employee with important religious duties, or in potentially crushing liability for back pay, whether or not it results in the forced retention of an employee – "would . . . plainly violate[] the [organization's] freedom under the Religion Clauses to select its own ministers." *Id*. at 709.

II. THE "MINISTERIAL EXCEPTION" IS BEST UNDERSTOOD AS COVERING POSITIONS WITH SIGNIFICANT RELIGIOUS FUNCTIONS AND ESPECIALLY THE ORGANIZATION'S LEADERS

The Supreme Court has held, agreeing with every Court of Appeals to have considered the question, that the ministerial exception "is not limited to the head of a religious congregation." *Hosanna-Tabor*, 132 S. Ct. at 707. *See also, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008) ("The ministerial exception protects more than just 'ministers.'") (citation omitted). As Justice Alito explained in a concurring opinion, joined by Justice Kagan, even though lower courts have generally agreed on the functional contours of the "ministerial exception," the term "ministerial" is inapt because "most faiths do not employ the term 'minister,'" "some eschew the concept of formal ordination," and some "consider the ministry to consist of all or a very large percentage of their members." *Hosanna-Tabor*, 132 S. Ct. at 713-14 (Alito, J., concurring). Indeed, the Fourth Circuit, the first to use this term, "took pains to clarify that the label was a mere shorthand." *Id.* (citing *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (the exception's applicability "does not depend upon ordination but upon the function of the position")). Accordingly, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy." *Id.* at 711 (Alito, J. concurring). Instead, recognizing the diversity of religious beliefs and structures, the Supreme

Court emphasized that the "ministerial" exception more broadly vindicates the important societal "interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 710.

As the concurring opinion and lower courts have explained before and after *Hosanna-Tabor*, the "focus [is] on the *function* performed by persons who work for religious bodies." *Id.* at 711 (emphasis added). *See also Rweyemamu*, 520 F.3d at 208 ("we agree that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination"). The First Amendment "protects the freedom of religious groups to engage in certain key religious activities . . . as well as the critical process of communicating the faith . . . in its own voice, both to its own members and to the outside world." *Hosanna-Tabor*, 132 S. Ct. at 711, 713 (Alito, J., concurring). As courts have recognized, "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses," and thus, "a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful.'" *Id*. at 713 (quoting *Petruska v. Gannon Univ*., 462 F.3d 294, 306 (3d Cir. 2006)). And so "[i]f a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to

remove the employee from his or her position." *Id*. at 712. That means that the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.*

Yet, as the appellant's brief and the amicus briefs in her support illustrate, the term "ministerial" can create confusion, particularly when interpreted narrowly as these briefs do. That narrow focus on the inapt name of the doctrine is contrary to *Hosanna-Tabor*, to the long history giving rise to this exception, and to both the forty years of lower courts' precedents and the decisions following *Hosanna-Tabor*. Accordingly, we would urge the Court to re-affirm that the doctrine "protects more than just 'ministers,'" *Rweyemamu*, 520 F.3d at 206-07, and that the exception created by the doctrine applies to all those with "significant religious responsibilities." That corresponds more closely to the historical origins of this doctrine, the Supreme Court's opinion in *Hosanna-Tabor*, and the lower court precedent that gave rise to the doctrine.

The district court's analysis comports with this proper understanding of the scope of the "ministerial" exception, as applicable to those in a position with significant religious responsibilities. The court's analysis of Fratello's responsibilities as a principal in a Catholic school amply confirms that Fratello performed important religious functions and indeed had a leadership role.

The Administrative Manual for the school is explicit that a school principal performs significant religious functions, and indeed occupies a position of religious leadership:

> [T]he 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 oversees the areas of religious education . . . .

Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 157 (S.D.N.Y. 2016). Moreover, the Manual spells out that as part of providing "*Catholic leadership*," "the principal cooperates with the pastor in recruiting and maintaining the staff committed to the goals of a Catholic school; cooperates with the pastor in his religious ministry to the students; [and, among other things,] ensures adherence to the curriculum guidelines" in conformance with the "Guidelines for Catechists." *Id*. (emphasis added). A principal's performance of these duties is part of his or her evaluation, such as whether she "fosters a Christian atmosphere which enables students to achieve their potential," "reviews school philosophy and goals with her staff in accordance with current Church documents," and "gives priority to a comprehensive religious education." *Id*. at 158.

Fratello's actual performance of her duties confirms that she provided religious leadership by conveying the Church's message and carrying out its mission. For example, she instituted a new system of daily prayer, planned and

facilitated special religious services; encouraged and supervised teachers' integration of Catholic saints and religious values in their lessons and classrooms; and provided graduating students with a religion-infused commencement speech and yearbook message. *Id*. at 159-60.

That Fratello also had secular duties does not make the ministerial exception inapplicable. As Professor Lund points out, the clear-cut distinction between religious and secular duties is a fallacy. Indeed, "the higher one goes up in the church, the more one's duties become administrative in character and less obviously religious." Lund, *supra*, at 71. *Cf.* Transcript of Oral Argument at 47, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) (Roberts, C.J., remarking that "The Pope is a head of state carrying out secular functions; right? . . . Those are important. . . . So, he is not a minister?"). In the context of a teacher, for instance, her secular duties may complement and heighten her religious instruction. Lund, *supra*, at 67-68. *Cf. Hosanna-Tabor*, 132 S. Ct. at 709-10 ("[T]he Sixth Circuit placed too much emphasis on Perich's performance of secular duties. . . . The heads of congregations themselves often have a mix of duties, including secular ones . . . .").

Indeed, compared to Perich in *Hosanna-Tabor*, the applicability of the exception to Fratello is even more clear. While Perich's job duties included "conveying the Church's message and carrying out its mission," *Hosanna-Tabor*,

132 S. Ct. at 708, Fratello actually held a position of religious *leadership*. She was "overseeing the areas of religious education" and had a responsibility independent of other teachers to promote Catholic mission. Moreover, Fratello hired, fired, and supervised all the teachers with duties equivalent to Perich's in her school. Thus, per *Hosanna-Tabor*'s holding that a Missouri Synod teacher with religious responsibilities is "a minister" within the meaning of the exception, others, whether teachers or principals, with the same or greater religious responsibilities in other denominations must also fall within the exception. A contrary conclusion based on the fact that Perich, unlike Fratello, was a "commissioned minister" would accord too much weight to a mere title, which negates the functional nature of the inquiry and disregards that the Missouri Synod system of commissioned ministers is not replicated in many other denominations. Indeed, reading *Hosanna-Tabor* to depend on the title of "commissioned minister" would largely confine the case to one denomination and discriminate, in effect, against most others. While the Supreme Court addressed the case before it, it did not limit the decision to its facts, recognizing that the raison d'être for this exception is to protect the autonomy of religious organizations, whichever titles or tiers of leadership they use, as all faiths must be treated equally.[2]

[2] *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) ("Applying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the

For the Supreme Court's decision to be treated as a rule of general applicability, the doctrine must be applied to cover all teachers with significant religious responsibilities. And if all teachers with significant religious responsibilities are covered, then all employees with significant religious responsibilities are covered as well—the labels of "minister," "principal," or "teacher" are not dispositive; the functions underlying these positions are. *Cf.* Part I(B), pp. 12-13 (Jefferson's letter assuring Ursuline Sisters of New Orleans that the Louisiana Purchase would not undermine the order's rights). This Court does not need to reach that far to resolve this case, because it is enough to conclude that the leader of the whole institution, who hires and supervises the teachers with religious responsibilities and is responsible for the school's overall mission, is within the exception.[3] *See Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) ("it is . . .

(continued…)

autonomy of any religious group, regardless of its beliefs."). *See generally, e.g., McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens."); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[3] Indeed, pre-*Hosanna-Tabor* cases addressing parochial school principals, including of Catholic schools, have held that they fall within the exception because the principals had a duty and did provide spiritual leadership, supervised curriculum and religion teachers, and advanced the mission of the Church. *See, e.g.*, *Pardue v. Ctr. City Consortium Schs. of Archdiocese of Washington, Inc.*, 875

possible to identify a general category of 'employees' whose functions are essential to the independence of practically all religious groups," including "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation").

III. APPELLANT AND THE AMICUS BRIEF OF CATHOLIC LAY GROUPS SEEK TO CONFINE *HOSANNA-TABOR* TO ITS FACTS AND TO RELITIGATE ISSUES THE SUPREME COURT HAS ALREADY DECIDED

First, the briefs would make titles and ordination or commissioning the primary focus of the exception. Despite *Hosanna-Tabor*'s broad validation of forty years of law affirming the *functional* view of the exception, these briefs construe *Hosanna-Tabor* as repudiating the consensus that one does not have to be a pastor or an ordained minister to be a minister for purposes of the exception. Indeed, plaintiff concedes that the supposed flaws in the district court's opinion were apparent in "much of the pre-*Hosanna-Tabor* case law" – law that the Supreme Court embraced. Pl.'s Br. at 56. The CLG Amicus Brief also reads *Hosanna-*

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A.2d 669, 675 (D.C. 2005); *Sabatino v. Saint Aloysius Parish*, 288 N.J. Super. 233, 237 (1996) ("[b]ecause religious authority necessarily pervades a church operated school, personnel decisions affecting the school may involve ecclesiastical issues as much as decisions affecting other church employees"); Defendants-Appellees' Br. at 34-35 (collecting cases).

Tabor as if much of the earlier forty years of cases were decided wrongly. Yet, this is directly at odds with the Supreme Court's decision, which held that the exception is not limited to the head of a congregation. *Hosanna-Tabor*, 132 S. Ct. at 707.

Second, the CLG Brief misreads the district court decision. The brief asserts that the district court misapplied the four-part test of *Hosanna-Tabor* because of Fratello's title ("lay principal") and because she never held herself out as a minister, or claimed tax benefits, or had training in ministry/theology/religious studies as did Perich. In so concluding, the brief cites two cases about lay *teachers*, which do not speak to the essential spiritual role assumed by the *principal* of a church-sponsored school. CLG Br. at 8-9. The brief further claims that the district court transformed Fratello into a minister and disregarded Fratello's religious identity and beliefs. *Id*. at 11. This ignores the decision below and the record establishing a principal's duties and what Fratello did in a Catholic school, which was to provide religious leadership by conveying the Church's message and carrying out its mission. *See* Part II. Her designated and actual duties render the exception directly applicable to Fratello. Indeed, the author of the Amicus Brief has observed in scholarship that under *Hosanna-Tabor*, "[a]ny employee 'conveying the Church's message and carrying out its mission' is *presumed to be a minister*." Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 Ind. L.J. 981, 1009 (2013) (quoting *Hosanna-Tabor*, 132 S.

Ct. at 708) (emphasis added). *See also id*. at 998, 1016 (acknowledging that under *Hosanna-Tabor*, the ministerial rule always favors employers and that purely secular law disputes are covered).

Third, the brief shifts focus from Fratello, a principal in a Catholic school tasked with significant religious responsibilities, to other groups which may fall outside the exception. The brief first points out that lay teachers are not the same as ministers. CLG Br. at 13-14. Regardless of whether that is accurate, it is beside the point here. Not every teacher in a religious school would be a "minister" for purposes of the exception, as courts have recognized.[4] But when teaching religion or leading worship and prayer *are* a significant part of their job, they hold a position of significant religious importance and therefore are well within the exception. *See generally* Laycock, *supra*, at 860 nn. 105-06.

The brief goes even further, asserting that under the district court's interpretation, all lay practicing Catholics should be treated as within the exception. CLG Br. at 15. But, again, unless these lay practicing Catholics are tasked with achieving the Catholic mission in those institutions and are evaluated on their

[4] *See, e.g.*, *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1114 (N.D. Cal. 2015) (exception does not apply to a biology teacher whose role in campus ministry was to "assist[] with the logistics of student trips and help[] facilitate the programs") (cited in CLG Br. at 9); *Grotke v. Canisius High Sch. of Buffalo*, No. CIV-90-1057S, 1992 WL 535400 (W.D.N.Y. Apr. 13, 1992) (permitting suit by lay teacher of Latin against a parochial school).

effectiveness in performing their religious functions, they do not fall within the exception under *Fratello*. This parade of horribles ignores the *functional* nature of the doctrine.

In effect, by drawing the line at ordination and commissioning, the brief implies that if not drawn there, there is no line at all, and therefore lay teachers and practicing Catholics qualify for the exception. But that is not how the line is drawn in applying the doctrine; its applicability turns on whether the employee has significant religious duties, not on formal titles. *See Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring). So too, this case is about the leader of a religious institution, responsible for the school's achievement of both its religious and its educational mission. *See* Part II. The facts of this case make it fit comfortably within the scope of the exception, without expanding the Supreme Court's doctrine in any manner. The endless expansion of the exception that the CLG Brief and appellant warn about did not happen for forty years before *Hosanna-Tabor*, and there is no reason to think it will happen in the future, with a proper focus on whether the individuals are tasked with religious functions.[5]

[5] Both pre- and post-*Hosanna-Tabor* courts have appropriately applied the exception to those with significant religious functions, even though they did not hold a "pastor"-type position. *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 831, 834 (6th Cir. 2015) ("spiritual director" for the InterVarsity Christian Fellowship, whose purpose is to advance Christianity in colleges and universities); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (Music Director at Catholic Church because "the person who

Fourth, the brief quarrels with the district court's analysis that "the issue here is one of US, not canon, law and 'minister' for purposes of the ministerial exception has a far broader meaning than it does for internal Church purposes." *Fratello*, 175 F. Supp. 3d at 168; CLG Br. at 12-14. The court's statement is consistent with *Hosanna-Tabor*, which recognized that the exception extends beyond ordained ministers, and is supported by the concurrence precisely on this

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leads the music during Mass is an integral part of Mass and a lay liturgical minister actively participating in the sacrament of the Eucharist"); *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1240 (10th Cir. 2010) (director of the Department of Religious Formation with supervisory functions and teaching religious courses); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003) (Hispanic Communications Director who was "integral in shaping the message that the Church presented to the Hispanic community"); *EEOC v. Catholic University*, 83 F.3d 455, 464 (D.C. Cir. 1996) (professor of canon law "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life"); *Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 894 (Wis. 2009) (teacher responsible for "teaching [and] spreading the faith . . . [and] supervis[ing] [and] participat[ing] in religious ritual and worship").

Courts have also properly held that the exception does not apply to those who do not perform significant religious functions. *See, e.g.*, *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (synagogue's facilities manager); *Morgan v. Cent. Baptist Church of Oak Ridge*, No. 3:11-CV-124-TAV-CCS, 2013 WL 12043468, at *20 (E.D. Tenn. Dec. 5, 2013) (pastor's secretary, whom the Church never charged "with teaching the faith"); *Smith v. Raleigh Dist. of N.C. Methodist Church*, 63 F. Supp. 2d 694, 697, 705-06 (E.D.N.C. 1999) (church receptionist or pastor's secretary performing "non-religious, administrative tasks"); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 60 (E.D. Pa. 1991) (director of plant operations at a religiously affiliated hospital).

issue. 132 S. Ct. at 711 (Alito, J., concurring). *See also* Griffin, *supra*, at 1008-09 (recognizing that under *Hosanna-Tabor*, the definition of "ministerial" is broader than that for the religious organization).

Fifth, the brief claims the district court interpreted the ministerial exception to swallow the free exercise rule of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See* CLG Br. at 17-18. The NELA-NY amicus brief (at 7-14), arguing that a constitutional right should be narrowly construed in deference to a statutory right, makes a similar point. But *Hosanna-Tabor* already rejected this interpretation, explaining that *Smith* is not relevant to the ministerial exception. 132 S. Ct. at 707 ("*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.") (citation omitted). Thus, this attack is merely an assertion that *Hosanna-Tabor* was wrongly decided. *Cf.* Griffin, *supra*, at 993-94 (claiming that *Hosanna-Tabor* misread history and wrongly focused on institutional protection, including wrongly distinguishing *Smith* in that individuals must obey generally applicable laws, but not institutions).

CONCLUSION

For the reasons stated here and in Appellees' brief, this Court should affirm the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B)-(C), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation for an *amicus* brief under Fed. R. App. P. 32(a)(7)(B) (setting the maximum length for a party's principal brief at 14,000 words) and Fed. R. App. P. 29(d) (setting the maximum length of an *amicus* brief at one-half the maximum length for a party's principal brief) because this brief contains, according to the word count of the word processing system used to prepare this brief, 6,877 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

s/Victoria Dorfman
Victoria Dorfman

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of November, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ Victoria Dorfman
Victoria Dorfman

APPENDIX

Identifying the Amici

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for four decades at the University of Chicago, the University of Texas, the University of Michigan, and now Virginia. He has testified frequently before Congress and has argued many religious freedom cases in the courts, including the U.S. Supreme Court; he was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012). His many writings on religious liberty are being published in a five-volume collection.

Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. He has served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit and has held chaired professorships at the University of Chicago and the University of Utah. He has published widely in the fields of constitutional law and theory, especially church and state, equal protection, and the founding. In the past decade, his work has been cited in opinions of the Supreme Court second most often of any legal scholar. He is a co-editor of three books: *Religion and the Law*, *Christian Perspectives on Legal*

Thought, and *The Constitution of the United States*. He has argued fifteen cases in the Supreme Court.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law. He teaches constitutional law, law and religion, and the religious liberty appellate clinic, where he supervises students writing briefs in major religious liberty cases. Professor Berg is among the nation's leading scholars of law and religion, having written several books, including *Religion and the Constitution* and *The State and Religion*, and approximately 50 book chapters and journal articles on the topic.

Carl H. Esbeck is the R.B. Price Professor Emeritus of Law and the Isabelle Wade & Paul C. Lyda Professor Emeritus of Law at the University of Missouri School of Law. He has published widely in the area of religious liberty and church-state relations, and has taken the lead in recognizing that the modern Supreme Court has applied the Establishment Clause not as a right, but as a structural limit on the government's authority in specifically religious matters. Professor Esbeck previously directed the Center for Law & Religious Freedom and served as Senior Counsel to the Deputy Attorney General at the U.S. Department of Justice.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech,

association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's new Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Paul Horwitz is the Gordon Rosen Professor of Law at the University of Alabama School of Law. He teaches courses on law and religion and constitutional law. A leading figure in First Amendment scholarship, he is the author of dozens of articles and of two books, *The Agnostic Age: Law, Religion, and the Constitution*, and *First Amendment Institutions*. He has also written for many general-readership publications, such as the New York Times.

John D. Inazu is the Sally D. Danforth Distinguished Professor of Law & Religion and Professor of Political Science at Washington University School of Law. His scholarship focuses on the First Amendment freedoms of speech, assembly, and religion, and related questions of legal and political theory. He is the special editor of a volume on law and theology, and his articles have appeared in a number of law reviews and specialty journals.