# 16-1271

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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JOANNE FRATELLO,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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On Appeal from the United States District Court
for the Southern District of New York

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**BRIEF OF *AMICUS CURIAE* THE ORTHODOX CHURCH IN AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Orthodox Church in America states that it is a nonprofit corporation and that no parent or publicly-held corporation owns more than 10% of its stock or membership interests.

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## INTEREST OF *AMICUS CURIAE*[1]

The Orthodox Church in America was established in the Aleutian Islands and Alaska in the 1790s as a missionary initiative of the Russian Orthodox Church. Today the Church is the religious home of thousands of Orthodox Christians worshiping in temples across the country, and was granted independence from the Russian Church in 1970. The Orthodox Church in America rejoices in the strong value of religious freedom which is one of the hallmarks of American democracy, and it is committed to the effort to ensure full enjoyment of that fundamental freedom. It is the perspective of the Orthodox Church in America that the appointment and retention of all who serve the Church in a formal capacity should be made only at the discretion of the Church in order to ensure that these persons reflect the values and the religious beliefs of the Orthodox Church in America in their professional and personal lives. The Church is vitally concerned that religious liberty be protected in a way that allows any faith community to formulate and to follow the principles of its faith unmolested by governmental action or veto.

[1] Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored this brief in whole or in part. No party or party's counsel contributed to the funding of preparing or submitting this brief. And no person, other than counsel for amicus curiae, contributed to the funding of preparing or submitting this brief.

## SUMMARY OF ARGUMENT

The district court properly held that the ministerial exception bars Fratello's Title VII discrimination and retaliation claims, and this Court should affirm the lower court's thorough and thoughtful opinion. But because this is the first time the Court has considered the ministerial exception since the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012), it should take this opportunity to provide additional guidance about the proper scope and application of the exception. First, the Court should reiterate what the Supreme Court indicated in *Hosanna-Tabor*: the ministerial exception is a structural feature of the Free Exercise *and* Establishment Clauses of the First Amendment. Second, the Court should explain that, because the ministerial exception is a structural feature of our constitutional system that is designed to both protect the free exercise of religion *and* guard against governmental entanglement with religion, the employee's title cannot be dispositive. Finally, the Court should confirm that the ministerial exception and the Supreme Court's analysis in *Hosanna-Tabor* permit religious institutions to select their leaders without state interference, regardless of the leader's formal title or education.

## ARGUMENT

### I. The ministerial exception is based on constitutional principles and a necessary limitation on the power of civil courts.

The ministerial exception to employment-based actions is well established. State and federal courts have faithfully applied it for decades, and a unanimous Supreme Court affirmed the doctrine four years ago in *Hosanna-Tabor*. The exception has not posed the threat to law and order that Fratello warns of. *See* Appellant Br. at 55–56. Nor has it put us on the path "to becoming a theocracy." *Id.* at 27. The doctrine instead is a necessary byproduct of the First Amendment and has protected religions of all stripes from government overreach. It is a recognition that some employment decisions are so intertwined with religion that they cannot be subject to state control.

#### A. A religious institution's right to control its internal affairs is a structural feature of our constitutional system.

History teaches—and our Constitution recognizes—that religious freedom demands a government that does not involve itself with the internal affairs of religious institutions. *See Watson v. Jones*, 80 U.S. 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority."). The development of this principle, and its necessary and inevitable application to ministerial positions, can be traced from a long line of Supreme Court cases.

The first of these is *Watson*, where the Court stated that religious groups have the right to form associations or institutions, to decide for themselves the doctrinal positions of those institutions, and to create a system of church government with methods of discipline to enforce and maintain those beliefs among their members. *Id.* at 729. These rights, the Court reasoned, would be meaningless if "any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.*

The Supreme Court reaffirmed this reasoning more than 80 years later in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952). In that case, the lower courts had involved themselves with the appointment of an Archbishop, claiming that, while matters of church administration and government were generally subject to ecclesiastical control, the exercise of that control was not free from government interference. *Id.* at 117. The Supreme Court rejected that view, reminding everyone that matters of church government were strictly religious and that civil government lacked the power to interfere with them. *Id.* at 118.

Finally, in *Serbian E. Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976), the Supreme Court considered whether civil courts had the power to review the removal of an Archbishop for

arbitrariness.[2] The Court once again declined to intervene because any evaluation of arbitrariness would "inherently entail inquiry" into the procedures and substantive religious criteria by which the religious institution is supposedly to decide the religious question. *Id.* at 713.

The general rule derived from these cases is that civil courts must avoid cases that require an evaluation of religious matters, especially those intertwined with employment decisions regarding ministers. This rule, which is thoroughly affirmed in *Hosanna-Tabor*, does not balance the religious institution's right against the asserted interests of the parties or the state. Rather, it relies on an institutional interest in protecting the structural features expressed by the First Amendment. The principle at stake is one of autonomy—the freedom to decide "matters of church government, as well as those of faith and doctrine," without state interference. *Kedroff*, 344 U.S. at 116. Rightly understood, the First Amendment means that a religious institution alone has the power to control its internal affairs and that there are certain decisions over which the state has no say.

[2] Earlier cases had left open the question of whether fraud, collusion, or arbitrariness could open the door for at least "marginal civil court review of ecclesiastical determinations." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969).

### B. The ministerial exception is an application of the principles of religious institutional autonomy to the employment context.

In *Hosanna-Tabor*, the Supreme Court confirmed the viability and soundness of the ministerial exception. But it did not adopt a "rigid formula" for determining who constitutes a "minister." It instead identified four factors that, in effect, applied the principles of religious institutional autonomy to the facts of that case. *See* 132 S. Ct. at 707 (noting that the ministerial exception is "grounded in the Religion Clauses of the First Amendment"). Specifically, the Court noted that: (1) the religious institution held the employee out as one of its "ministers" by, among other things, giving her a formal religious title; (2) the title carried with it substantive educational requirements and procedural protections; (3) the employee accepted and used that title; and (4) the employee performed important religious functions, which reflected her role in conveying the religious institution's message and carrying out its mission. *Id.* at 708.

At bottom, these factors consider whether the nature of the employment relationship implicates the institutional interests protected by the First Amendment. First, the employee's formal title—and whether the institution held the employee out as one of its "ministers"—is constitutionally significant because it carries with it the right to speak or make decisions on behalf of the institution related to theological controversies, church discipline, or ecclesiastical government, just to name a few. The title signifies to those inside and outside of the institution that the person has

been chosen, at least in some measure, to embody the institution and "personify its beliefs." *Id.* at 706.

Second, the substance of the requirements for the title and the procedural protections granted by it likewise implicate the governance of religious institutions. Requiring an employee to have a certain degree of religious training, education, or background, for example, ensures that the employee is prepared to handle the uniquely religious issues that may arise as part of the job. Furthermore, any recommendations or evaluations concerning the employee's suitability for or performance on the job will necessarily be based, at least in part, on religious grounds. A secular court could not effectively evaluate them without delving into the procedures and substantive criteria of the religious institution. Any such endeavor is forbidden and bound to go poorly. *See Watson*, 80 U.S. at 732–34 (noting that civil courts are "incompetent judges" of "matters of faith, discipline, and doctrine").

Third, the employee's acceptance and use of his or her title indicates to the members and non-members of the religious institution that the employee embodies and personifies the religious institution in question, turning what would otherwise be personal beliefs and decisions into statements and examples of religious doctrine and practice. When an employee claims a title, he or she is invoking the authority that comes with that title.

Fourth, conveying the message of a religious institution or furthering its mission are, by definition, religious acts that can only be evaluated by theological standards. *See Watson*, 80 U.S. at 733. Those job duties and functions also reinforce the implication that the employee embodies and personifies the religious institution. Any act placing the government's imprimatur on a particular person fulfilling those job duties and functions raises serious entanglement concerns.

In sum, these four factors are helpful in identifying situations where court involvement may violate the First Amendment. They are part of a much broader analysis designed to preserve religious autonomy and prevent government entanglement with religion. The Supreme Court recognized this by refusing to adopt a rigid formula, and each factor is not necessarily required for the ministerial exception to apply. *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (applying ministerial exception when only two of the four factors—formal title and religious function—were present); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (applying ministerial exception to religious school teacher even though she was not a rabbi, was not a "called" teacher, and the record was silent as to the extent of her religious training).

## II. Because the ministerial exception is based on structural constitutional principles designed to prevent government entanglement with religion, the employee's title is not dispositive.

Both Fratello and her amici essentially argue that this case can be resolved by Fratello's title. In her amended complaint, for example, Fratello asserts that the employment contract defeats the ministerial exception because it describes her position as "lay principal." *See* Am. Compl. ¶¶ 189, 226, 243 (App. 49, 54, 56). She similarly argues on appeal that the Court should resolve the case by focusing on "what the parties mutually bargained" for. Appellant's Br. at 3. Fratello's amici likewise contend that the employment contract's description of her as a "lay" employee should control the outcome because a church may voluntarily burden itself with a contractual agreement. Catholic Lay Groups Amicus Br. at 10–11. Not only do these arguments misconstrue the nature of ministry within the Catholic Church, *see* Appellees' Br. at 52 (describing lay ministry), but they also fundamentally misunderstand the nature of the ministerial exception.

As explained above, *Hosanna-Tabor* and the religious freedom cases upon which it is based, establish that the refusal of civil courts to decide religious matters is a fundamental structural principle of our constitutional system. The Religion Clauses, the Supreme Court has explained, "*bar* the government from interfering with the decision of a religious group to fire one of its ministers," make it "*impermissible* to contradict a church's determination of who can act as its

ministers," and "*prohibit[]* government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 132 S. Ct. at 702, 704, 706 (emphases added); *see also Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008) ("[T]he ministerial exception cannot be ascribed solely to judicial self-abnegation. It is also *required* by the Constitution.") (emphasis added). Merely labeling someone as a "lay" employee in an employment contract, then, is not dispositive and does not resolve the critical question of whether that person is a "minister" for purposes of the ministerial exception. The principles underlying the exception show why this must be the case.

At its core, the First Amendment requires courts to remain neutral in matters concerning religious doctrine, beliefs, organization, and administration. So when a state requires "a church to accept or retain an unwanted minister," or "punish[es] a church for failing to do so," the state "intrudes upon more than a mere employment decision." *Id.* at 706. It unconstitutionally "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.*

Thus, when it comes to the ministerial exception, the employee's title cannot be dispositive. That is because allowing a single word—in this case, "lay"—to remove the shield of the ministerial exception would force courts to evaluate what remains quintessentially a religious employment relationship. The First Amendment forbids the inquiry, regardless of what the employee is called. *See, e.g.*, *Rweyemamu*,

502 F.3d at 206 ("[T]he term 'ministerial exception' is judicial shorthand, but like any trope, while evocative, it is imprecise. The ministerial exception protects more than just 'ministers.'"); *Conlon*, 777 F.3d at 836 ("This constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes.").

## III. The ministerial exception applies to Fratello because the First Amendment allows a religious institution to select its own leaders.

Like all entities, religious schools can only act through human agents. Personnel is policy, and there is perhaps no position more important to a school than a principal. State regulation of the principal position constitutes nothing less than state regulation or control of the school. While this governmental meddling may be expected for public schools, it is constitutionally prohibited for private, religious ones. The district court was right to conclude that Fratello was a "minister."

To be sure, the relevant employment contract lists Fratello as a "lay" principal. And there is little doubt that she performed some "secular" duties as part of her job. But that does not preclude her from being a "minister." Indeed, the Supreme Court has made clear that "the ministerial exception is not limited to the head of a religious congregation" and that an employee's religious functions need not be to the exclusion of all secular duties. *Hosanna-Tabor*, 132 S. Ct. at 707, 708. Nor does Fratello's assertion that "any practicing" or "intelligent" Catholic could perform her "religious" duties affect the analysis. Appellant's Br. at 36, 47 n.40.

What matters is that Fratello, as the leader of a religious school, was given important religious duties and was responsible for developing and preserving the religious mission of the school. The examples of this are plentiful, and the district court's opinion properly highlights many of them. Suffice it to say, the record shows that Fratello was "the Catholic leader and the administrative head of the school," App. at 132, and that she was expected to "select[] staff members who are committed to a Christian atmosphere and support Catholic teachings," "review[] school philosophy and goals with the staff in accordance with current Church documents," "give[] priority to a comprehensive religious education program," "ensure[] that religion classes are taught by knowledgeable and committed Catholics," "uphold[] and strengthen[] the Catholic identity of the school," and "encourage[] and support[] a strong program of evangelization." App. at 198; Supp. App. 173. That alone is enough to show that Fratello was a "minister," and the Court need not look any further to affirm the district court.

Fratello and her amici advocate for an interpretation and application of the ministerial exception that has not been adopted by any other court. In so doing, they essentially argue that all four factors identified in *Hosanna-Tabor* must be treated as prerequisites, not guides. *See, e.g.*, NELA/NY Amicus Br. at 13 (claiming that ministerial exception should not apply as a matter of law when the employee's title and education and training weigh against application). But the Supreme Court

eschewed a "rigid formula." *Hosanna-Tabor*, 132 S. Ct. at 707. And courts have refused to dogmatically follow the *Hosanna-Tabor* factors without regard to the underlying constitutional principles. *See, e.g.*, *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 621 (Ky. 2014) ("[W]hen faced with making a determination of whether ministerial exception should apply, trial courts should focus on the purpose of the ministerial exception: to allow a religious institution, free of government intervention, to exercise its right to choose who will play an integral role in the presentation of its tenets.").

Indeed, the district court's interpretation and application of the ministerial exception is consistent with courts nationwide that have broadly construed the exception to cover employees with important religious or leadership functions. "Ministerial" employees have included a spiritual director of a university campus ministry,[3] a spiritual and addictions counselor,[4] a non-ordained Director of Youth Ministry,[5] a non-ordained chaplain,[6] a non-ordained associate of pastoral care,[7] a

[3] *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015).

[4] *Rogers v. Salvation Army*, No. 14-12656, 2015 WL 2186007, at *7 (E.D. Mich. May 11, 2015).

[5] *Preece v. Covenant Presbyterian Church*, No. 8:13-CV-188, 2015 WL 1826231, at *4–5 (D. Neb. Apr. 22, 2015).

[6] *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006).

[7] *Rayburn v. Gen Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

non-ordained pastoral resident at a religiously affiliated hospital,[8] a Catholic seminarian,[9] a director of pastoral studies,[10] an administrator of a rehabilitation clinic,[11] a professor of canon law,[12] a press secretary,[13] a Kosher food supervisor,[14] music directors and teachers,[15] a choir director,[16] an organist,[17] school teachers,[18] and, not surprisingly, school principals.[19]

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[8] *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007), *abrogated on other grounds by Hosanna-Tabor*, 132 S. Ct. 694.

[9] *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc).

[10] *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243–45 (10th Cir. 2010).

[11] *Schleicher v. Salvation Army*, 518 F.3d 472, 474–76 (7th Cir. 2008).

[12] *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 461–65 (D.C. Cir. 1996).

[13] *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003).

[14] *Shaliehsabou v. Hebrew Home, Inc.*, 363 F.3d 299, 309 (4th Cir. 2004).

[15] *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012); *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 803 (4th Cir. 2000); *Sterlinksi v. Catholic Bishop of Chicago*, No. 16 C 00596, 2016 WL 4439949, at *4 (N.D. Ill. Aug. 23, 2016); *Curl v. Beltsville Adventist School*, No. GJH-15-3133, 2016 WL 4382686, at *10 (D. Md. Aug. 15, 2016).

[16] *Starkman v. Evans*, 198 F.3d 173, 176–77 (5th Cir. 1999).

[17] *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006).

[18] *Hosanna-Tabor*, 132 S. Ct. at 707–08; *Ciurleo v. St. Regis Parish*, No. 16-CV-10566, 2016 WL 5870049, at *3–5 (E.D. Mich. Oct. 7, 2016).

[19] *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1205 (Conn. 2011); *Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 677 (D.C. 2005).

These cases confirm that, when considered in light of the principles underlying the ministerial exception, the primary focus should be the employee's job duties and functions. *See, e.g.*, *Ciurleo*, 2016 WL 5870049, at *5 (stating that "religious function" was the "paramount factor" that "provides the decisional pathway"); *Preece*, 2015 WL 1826231, at *3 ("Courts evaluating the propriety of the ministerial exception for employees explore the individual's functional role in the work setting and within the church."); *see also Rweyemamu*, 520 F.3d at 209 (focusing on "the nature of [the employee's] duties" in applying ministerial exception). This makes sense when one remembers that the ministerial exception is a legal doctrine designed to effectuate the purposes of the First Amendment. So while a church's view of who constitutes a minister for *religious* purposes may be relevant, it does not necessarily answer the question about who constitutes a "minister" for *civil law* purposes. That is why Fratello's amici are wrong to suggest that the district court somehow "transformed" Fratello into an ordained minister or that it "completely erased the distinction between lay and ordained Catholics." Catholic Lay Groups Amicus Br. at 4, 12.[20] The district court did no such thing—nor could it. It simply applied the ministerial exception to a specific set of facts.

[20] Also unfounded is the concern that religious groups are seeking "new means to redescribe their employees as ministers" simply to avoid nondiscrimination laws. *See* Catholic Lay Groups Amicus Br. at 16. Religious and non-religious employers alike take steps to ensure compliance with, and proper application of, the law to their employment practices. Courts are capable of separating honest efforts from

If the employee's functions or job duties lie within any of the zones of activity protected from state interference—that is, religious worship, teaching, governance, or administration—then the ministerial exception must apply. *See Kedroff*, 344 U.S. at 116–17 (explaining that the First Amendment protects the rights of churches and religious institutions "to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine*," and that this autonomy applies with equal force to church disputes over "*church administration* and *polity*.") (emphases added). The district court recognized this, and correctly held that the exception barred Fratello's claims.

## CONCLUSION

Because religious instruction and teaching—especially as it pertains to children—is crucial to the preservation of the faith, a religious school must be free to choose its governing spiritual and administrative leaders. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) ("Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction …."); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (noting that parochial schools constitute "an integral part of the religious mission of the Catholic Church" and are

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dishonest ones. *See, e.g.*, *Alcazar*, 627 F.3d at 1292 ("[I]f a church labels a person a religious official as a mere 'subterfuge' to avoid statutory obligations, the ministerial exception does not apply.").

"a powerful vehicle for transmitting the Catholic faith to the next generation"). To conclude otherwise would amount to state control of a religious school, which is precisely the type of scenario the ministerial exception was designed to avoid. The Court should affirm the district court's ruling.

Dated: November 14, 2016.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Certificate of Compliance With Type-Volume Limitation,
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,850 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Times New Roman.

/s/ Jeremiah Galus
Jeremiah Galus

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2016, I electronically filed the foregoing 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 and will be served by the appellate CM/ECF system.

/s/ Jeremiah Galus
Jeremiah Galus