16-1271cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOANNE FRATELLO,

Plaintiff-Appellant,

v.

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

PETITION FOR PANEL REHEARING OR OR REHEARING *EN BANC*

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STATEMENT FOR PANEL REHEARING OR REHEARING *EN BANC*

Rehearing or *en banc* hearing is necessary both to maintain uniformity of the Court's decisions and because this case involves a question of exceptional importance. *See*, FRAP Rule 35(a)(1, 2).

A. **The Panel's decision threatens uniformity of decision**, as it conflicts with *Hosanna-Tabor*,[1] *Pierce v. Society of Sisters*,[2] *Lemon*,[3] *Rweyemamu*,[4], and *Cannata*.[5] For the first time in this Court's history (and perhaps in Anglo-American jurisprudence), the court has deemed an American citizen a religious minister even though her Church (the Roman Catholic Church) did not consider her a minister, did not appoint her to any ecclesiastical office, and did not allow her an ecclesial appeal. It thus deprived her of basic rights in connection with her employment at a 501(c)(3) "educational" entity.[6] The above cases preclude judicial interference in the internal operations of a Church, Church control of a priest or ecclesial officer, or the sanctity of a religious service. The Panel's opinion defines the term "minister" to include a clearly lay person, to deny her civil law protection for lay employment at a Church-

[1] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

[2] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[3] *Lemon v. Kurtzman*, 403 U.S. 602, 626-642 (1971).

[4] *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008).

[5] *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012).

[6] St. Anthony's School identified "educational," not "religious," as the exempt purpose for which it operates allowing exemption under IRS § 501(c)(3). *Appx.* 351 (¶ 35). As a private school authorized by the State to educate children, it must provide substantially equivalent instruction as received in the public Schools. *See*, N.Y.S. Education Law § 3204 (1). Thus, its primary purpose is secular—education.

affiliated elementary school—a school supervised by State officials, including State review of the curriculum taught. This private school, like a Church-affiliated hospital, nursing home, university or law school, is not a Church. Yet the panel treats the school as if it were.

B. **The appeal involves 5 questions of exceptional importance**, namely:

1) Did the Panel fundamentally misconstrue *Hosanna-Tabor*, by determining as a matter of law that a lay principal not hired by her employer as a minister, and not viewed as a minister (or any ecclesial official) by her Church, nor viewed as a minister by children, co-workers, parish members, the Parish Priest, or the "Manual," is nevertheless a minister for civil law proposes? Answer: Yes.

2) Will the Panel's opinion be a national precedent that will serve to deprive hundreds of thousands of employees of Church-affiliated entities of civil law protection, and adversely affect potentially millions of school children, because their teachers and principals will be chilled in protecting their wards? Answer, Yes.

3) Will the Panel's opinion serve as a national precedent deconstructing the Wall the historically separated Church and State in this Nation, notwithstanding the teachings of the Supreme Court, thereby imperiling our Nation's democracy? Answer, Yes.

4) Has the Panel trammeled upon Ms. Fratello's own First Amendment rights, by deeming her a minister, and depriving her of her civil rights, when she was hired into a "lay" position under a secular contract, and performed religious activities that any lay Catholic could perform, allowing the employer to unilaterally create a minister (and ministerial immunity for itself) by tasking her with a small amount of religious duties. Answer, Yes.

5) Has the Panel deprived Ms. Fratello of her right to a jury trial regarding the issue of whether she was a minister (of any type) of her Church? Answer, Yes.

Ms. Fratello's counsel views these issues of such importance to the First Amendment and the Nation's democracy that he will waive all attorney fees earned to date, in the hope that the Court will recognize the vital importance of this issue.

CORRECTION IS NECESSARY, FOR CIVIL RIGHTS, OUR CHILDREN, AND FOR AMERICAN DEMOCRACY

"Of all the animosities which have existed among mankind those which are caused by difference of sentiments in religion appear to be the most inveterate and distressing and ought most to be deprecated.
--George Washington

This case involves much more than whether a woman can sue for sex discrimination. Much much more. The lower court's and Panel's view is monumentally wrong, and can, if left uncorrected, imperil American democracy.

This is not hyperbole. It is absolutely foreseeable to anyone who studies world history and the science of the human mind. Simply put, religion creates tribal "us" versus "them" emotions that can readily divide a society. The "culture wars" in the United States today are a symptom.

The Founding Fathers understood history—that religious struggle can be disastrous for a society. Evolutionary psychology now helps explain why, and corroborates the Founders' vision and wisdom.

Yet the Panel has succumbed to the inherent human bias favoring religion.[7] It declared Ms. Fratello a "minister" even though her Church did not appoint her as a minister nor appoint her to any ecclesial office. This is astonishing. It is a judicial decree without precedent in American jurisprudence. This is a serious step

[7] *See*, E.O. WILSON, THE MEANING OF HUMAN EXISTENCE *(2016)*, chapter 13; R. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST (2017) 621-22; Y. HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND *(2011), chapter 12.*

toward abolishing any semblance of a wall separating Church and State, running contrary to the teachings of the Supreme Court in *Hosanna-Tabor*, *Lemon v. Kurtzmann, supra*,[8] and this Court's precedents.[9]

The Panel's opinion, left uncorrected, will be remembered as the *Dred Scott*[10] of religious liberty cases. Like *Dred Scott*, it will be correctly seen as the judiciary ignoring the rights of an individual for the sake of powerful interests, there slave owners and here, the Roman Catholic Church and Christian Right. And just as Southern law eventually deemed someone with a tiny fraction of African blood as a "Negro" whose rights could be diminished, the Panel's decision will allow greater and greater expansion of who a "minister" is, so that eventually a huge percentage of Church-affiliated or "religious" employees will be deemed ministers by the courts (even if not by their Churches), and virtually all employers immune from civil law. The Court must stop, and examine the big picture.

As a result of the Panel's ruling, in "religious" schools and colleges,

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[8] In denying Ms. Fratello's rights, the Panel disregarded the "Lemon Test" as it took action that advances religion, by entangling itself with religion where there is absolutely no need (the Archdiocese did not identify Ms. Fratello as its minister, of any type, and thus this Court should not).

[9] *E.g.*, *Peck ex rel. Peck v. Baldwinsville Cent. Sch.Dist.*, 426 F.3d 617, 634-35 (2d Cir. 2005); *Bronx Household of Faith v. Board of Education*, 650 F.3d 30, 41 (2d Cir. 2011)(cautioning that the Supreme Court teaches that the Establishment Clause prohibits government from appearing to take a position on questions of religious belief. The Panel did so, by ascribing a religious purpose and "ministerial" status to a secularly contracted "lay principal" job), *reaffirmed*, 750 F.3d 184 (2014).

[10] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

teachers, principals, department chairs, deans and basically any manager, after being assigned some "religious leadership tasks," will not have legal protection if they seek to protect their colleagues against unlawful discrimination or harassment, or protect their students from harm or educational neglect. The State may require a basic secular education until age 17, yet the teachers and principals of schools seeking to abide by State law will be deterred from whistle-blowing, because as "ministers," the courts will not protect them. Thus, "religious" elementary schools and high schools will be able to ignore State law with impunity, teaching only what they want taught, and not teaching the history, the science and the civics that the students need to grow into good citizens.[11] This is a death knell for our democracy, as proselytizing, propagandizing and prostituting children into conformity with the "religious beliefs" of an authoritarian or procrustean Church[12] will result in intolerance, sectarianism, insularity, and if enough religious groups follow suit, the end of a pluralistic democracy fostering civil discourse and community involvement. Our democracy could fail as a result.

The Panel's rational will apply to far more than just schools and colleges. Church-affiliated hospitals, nursing homes and media companies will be able to assert ministerial immunity just as easily as the Archdiocese did here. Simply

[11] *Cf.*, *Yoder*, *infra*, and *Pierce*, *supra.*

[12] E.g., of radical or fundamentalist religions. The Archdiocese's schools have policies against proselytizing, and non-discrimination policies, even as to creed. To its credit, it teaches evolution in its schools.

identify the employee as a "spiritual leader," direct a small amount of religious activities for the employee to perform, draft a Personnel Manual that justifies giving workers a spiritual role, and presto!, ministerial immunity.

Besides civil rights lost, employees will be chilled by their "religious organization," deterring employees from reporting illegality toward others, such as reporting race discrimination, sexual harassment or abuse of children. And if Congress repeals the Russell Amendment, allowing churches to become PACs, the religious employee will be forced to pick political sides.

Thus, the Panel's Opinion is a precedent that is unprecedented and unprincipled. It trammels individual rights, and demolishes any semblance of a wall between church and state. It will leave employees and school children unprotected, and will deter employer-designated "spiritual leaders" in Church-affiliated entities from complying with civil law and doing what is right, such as opposing racism, xenophobia, ageism, disability or whistleblowing unlawful discrimination or wage abuses. The Panel's Opinion is a huge win for the Religious Right, siding with its political viewpoint in America's culture wars. The Panel should have recognized this. The Court *en banc* must, and correct the error, for the sake of the First Amendment and American democracy.

In sum, the Panel's Opinion is a breathtaking departure from our jurisprudence, labeling a lay person as a minister to deprive her of her civil rights

on the purported altar of religious liberty of a 501(c)(3) educational entity, the St. Anthony's School. This deprived not only Ms. Fratello of her civil rights, but will almost immediately diminish the rights of hundreds of thousands or more Americans employed by Church-affiliated entities throughout the country. The Panel's abrogation of the First Amendment (and Eighth Amendment), unless corrected, does irreparable harm not only to the First Amendment, but to our democracy. The Founders intended to keep religion out of governance, not merely protect individual liberty, but to protect the Republic and its democracy, knowing that religion tears peoples apart.

FACTS FOR EN BANC REVIEW

[to be cut if over-sized brief not allowed]

The Panel is, of course, familiar with the facts. This recitation is for potential *en banc* review.

Ms. Fratello was hired as a lay employee by the Appellee School, an Archdiocese parochial school that provides a secular education with Christian and Catholic values. Approximately one-quarter of the students at the Archdiocese's schools are non-Catholic. *Appx. 184*. Ms. Fratello was hired as an educator, and was never told that she would be considered to be a "minister" or a person with ministerial or pastoral duties. *Appx.* 415-420. Her contract of employment

expressly stated that her job was "lay."[13] *Appx.* 84. The Archdiocese has a different form contract for a religious principal.[14]

Ms. Fratello's personal religious belief, supported by her canon law expert, is that the Roman Catholic religion prohibits a lay person from having a pastoral or spiritual role. *Appx.* 419 (¶¶ 15, 17). This view is supported by the Archdiocese's Manual, which expressly states that the parish pastor (the priest) is the "spiritual leader" and provides the "religious ministry," and that the pastor provides leadership to the school principal. *Appx.* 128. The principal acts as "direct administrator of the school on a day to day basis," *Appx.* 128, 132, 133 & 141, and is the "Catholic leader and the administrative head"[15] of the school but not its spiritual leader (the pastor's role). *Appx.* 132 & 415-420.

Ms. Fratello's job was not to evangelize the students (who are of many creeds), but to educate them. *Appx.* 416. The Roman Catholic Church (Ms. Fratello's Church) did not place Ms. Fratello into any "minister" or otherwise ecclesiastical position, nor did it remove her from any. Her lay employment

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

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

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

contract was simply not renewed, and not renewed in violation of the anti-discrimination provisions of Title VII.

1. Lay Principal's Employment Contract and Hiring Criteria

Ms. Fratello was originally hired in the Archdiocese, at another school, as a lay teacher. *Appx. 344 (*Pl.56.1 Smt at ¶ 1).[16] The Archdiocese does not require that its parochial school teachers be Roman Catholic. *Id*. (¶ 2). In applying for employment with the Archdiocese, Ms. Fratello was applying for an educational position. *Id*. (¶ 3). Her academic credentials are in education, and she has no academic credentials whatsoever in religion or theology. *Id*.(¶ 4). In being promoted to (lay) elementary school principal, she reasonably believed that she was being advanced as an educator. *Id*. (¶ 5).

a. *Interview process*

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

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

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

b. *Lay Principal contract terms*

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

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

As to "Termination," the Contract states that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. State Education Law and other regulatory compliance

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

5. Religious versus Educational Missions of Roman Catholic Church

The Archdiocese's home page on its website (http://archny.org/) has separate heading for "Pastoral" and "Education." *Appx.* 352 (¶ 41). The "pastoral" activities of the Archdiocese are its (especially in-church) spiritual activities, and its "educational" activities involve a private school secular education of children in a principally non-denominational Christian environment, in a Catholic setting. *Id*.

In the Archdiocese's Catholic Schools, 23 percent of the students are non-Catholic. *Id*. (¶ 42); *see also*, http://buildboldfutures.org/about-us . The

Archdiocese sells its brand—the "Catholic Schools"—to the public with its potential customers (school-aged children and their parents) being any and all faiths. *Id*. (¶ 43). Even non-believers are welcome. *Id.* (¶ 44). The current "Catholic Schools" webpage of the Archdiocese has a "careers" site which solicits job applicants. *Appx.* 353 (¶ 45). It reads as follows:

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

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

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

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

> "The principal is the Catholic leader and the administrative head of the school and is responsible for the effective operation of the school as an educational institution within the total parish educational program. Ordinarily, in order to devote full time to the administration and supervision of the school program, the principal does not assume any teaching responsibilities. ***

> Effective school administration is achieved by cooperation and mutual understanding between the pastor and the principal. Each shares the responsibility for providing the leadership which will ensure that the school atmosphere is one of mutual respect and cooperation among clergy, principal, teachers, students, parents, other members of the school staff, and the community." *Id*. at § 320 (*emphasis added*)

Appx. 132 (§ 320). This is clearly not a pastoral or spiritual role; it is an administrative and private school education role. The parish priest has the pastoral role. *Appx.* 285 (¶ 16).[17] Ms. Fratello did not supervise the teaching of religion, nor did she teach religion. *Appx.* 364 (¶ 120).

The differences between Ms. Fratello's employment and that of *Hosanna-Tabor*'s Ms. Perich are detailed in Ms. Fratello's declaration and Rule 56.1 statements, *e.g*., *Appx.* 359 – 365, with a side-by-side comparison found in the Amended Complaint, *Appx.* 31 – 36 (¶¶ 101). An itemization of Ms. Fratello's duties and responsibilities as lay principal is found at ¶¶ 128 - 146 of the Amended Complaint. *Appx.* 40 – 44.

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

The canon law of the Catholic Church is the system of laws and legal principles made and enforced by the hierarchical authorities of the Church to

[17] See also footnote 5 and accompanying text.

regulate its internal and external organization and government. Canon law serves as the Roman Catholic Church's bylaws.[18] *Appx.* 355 (¶59).

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

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

As to preaching the Gospel of God, this is done by "Bishops, with priests as coworkers." *Appx.* 355 (¶ 63). Canon 230, §1 indicates that Lay men can be admitted "…through the prescribed liturgical rite to the ministries of lector and acolyte." A woman cannot. *Appx.* 356 (¶ 65)(*emphasis added*).

The Roman Catholic Church sponsors ministries of service**,** which include education, literacy, social justice, health care and economic development. *Appx. 356* (¶ 66). These ministries include catholic schools, and are not pastoral

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

(spiritual). *Id* (¶ 67). The pastoral ministry is through ordained ministers. *Id*. (¶¶ 68 – 69). As stated at Canon 515 - §1, "the pastoral care of the parish is entrusted to a pastor as its own shepherd under the authority of the diocesan bishop." *Id*. (¶ 68). All this is the ecclesiastical, and none of this, or any other ecclesial action, was taken by the Church regarding Ms. Fratello.

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

Appellees could, and did, require Ms. Fratello to be a practicing Roman Catholic to be hired for the lay principal job. *Appx.* 366 (¶ 128). Title VII allows employers to use religion as a bona fide occupational qualification ("BFOQ") whenever "reasonably necessary to the normal operation of that particular business or enterprise."[19] *Id*. (¶ 129). The School could have required a clergyman or nun. (The Archdiocese has a "religious" employee form agreement for this. *Appx.* 166.) It did not.

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

EN BANC ARGUMENT

POINT I
THE PANEL MISCONSTRUES *HOSANNA-TABOR AS* ESTABLISHING MINISTERS, RATHER THAN ESTABLISHING WHEN MINISTERIAL IMMUNITY APPLIES TO THE EMPLOYMENT OF A CHURCH'S *BONA FIDE* ECCLESIAL OFFICEHOLDER (MINISTER)
(A MATTER OF EXCEPTIONAL IMPORTANCE)

Hosanna-Tabor's Rev. Perich was indisputably a minister. Ms. Fratello clearly is not—it's a ridiculous notion and no Catholic or Catholic Bishop would agree. Yet the Panel labeled her a minister, so that it could then grant ministerial immunity to Ms. Fratello's 501(c)(3)("educational") school. In so doing, the Panel turns *Hosanna-Tabor* on its head, at the expense of intellectual honesty, the First Amendment and American democracy. A pillar of American democracy—the separation of church and state—may be irreparably harmed absent correction here.

A. The Panel misapprehends Hosanna-Tabor, where the Supreme Court assessed whether ministerial immunity should apply to the indisputably *bona fide* minister

The Panel misapprehends the *Hosanna-Tabor* ministerial immunity inquiry. The inquiry is not whether the employee is a "civil law minister" (applying the *Hosanna-Tabor* factors as the Panel did to Ms. Fratello). Rather, the inquiry is, as to a *bona fide* Church minister (or rabbi, or Iman, or other ecclesial officer of the Church), whether the circumstances warrant granting ministerial immunity for the employment that the minister/employee holds.

As Chief Justice Roberts wrote in the unanimous *Hosanna-Tabor* opinion:

> "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. 565 U.S. at 196 (*emphasis added)*.

Thus, hypothetically, an ordained priest (or a rabbi or Iman) might be employed by a Church-affiliated school or hospital as either a Pastor or a Janitor. It is a given that the priest is a *bona fide* minister. In determining whether ministerial immunity applies, *Hosanna-Tabor* teaches that—as to the *bona fide* minister/ecclesial officer (Rev. Perich in *Hosanna-Tabor*, or the Priest in this hypothetical)—the Court should look at factors such as:

ORDAINED PRIEST

Formal Title:	**Pastor**	**Janitor**
Substance of Title:	religious minister	handyman/cleaning
Employee use of title:	"Call me Father"	"Hand me a broom"
Religious functions:	Pastoral care, spiritual	Few or none

If the Church decides (for any reason) to remove the priests (or rabbi's or Iman's) religious credential (this is the Church's exclusive ecclesial right[20]), then the Court must assess whether the employer is entitled to the grant of ministerial

[20] "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," [ ]—is the church's alone."). See, *Hosanna-Tabor*, 565 U.S. at 194-95 (*emphasis added, citation omitted*); *see also, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* , 344 U.S. 94, 113 (1952)("…whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final…."). This is ecclesial action. So too when a bishop removes a priest, as in *Rweyemamu, infra*, as that is ecclesial authority under canon law.

No ecclesial action was involved in Ms. Fratello's termination.

immunity. The above table indicates that ministerial immunity should be granted as to the Priest, if Church authorities, in their ecclesial capacity, want him removed from his Church-related employment.[21] The Court will not second guess the ecclesial decision. If the ecclesial decision sufficiently relates to the employment, as it would for the hypothetical priest performing the job of Pastor, but not for the job of Janitor, then ministerial immunity must be granted. To require the Church to retain an unwanted Priest as Pastor, would violate its First Amendment free exercise rights. *See*, *Hosanna-Tabor*. Nor could the courts prevent the Church from defrocking or disciplining the priest under its ecclesial power, as again, that is the Church's exclusive domain. But if the priest, working as a Janitor, was fired because his new boss is racist and fires the priest-as-janitor because he is Afro-American, ministerial immunity should not be granted to the employer in that instance.

Thus, if the priest's employment is unrelated to the ministerial role, such as the Priest working as a Janitor, then ministerial immunity should not apply.

Nor should ministerial immunity apply if the Church does not take ecclesial action such as by removing the Priest's credential. For example, if the Priest is working as a "religious counselor" at a manufacturing company, or working as a

[21] *See, e.g., Rweyemamu v. Cote,* 520 F.3d 198, 208 (2d Cir.2008).

pastor at a non-Church-affiliated hospital,[22] or working as a U.S. Army chaplain, then ministerial immunity should be granted to the employer only if the Priest's Church takes away his religious credential as ecclesial action. Ministerial immunity should not be granted if, say, a racist manufacturing company CEO, or racist hospital medical director, or racist infantry commander decides to terminate the priest's employment because of his race (or gender, national origin, or any other unlawful reason).

The above is a principled approach to ministerial immunity and fully consistent with the teachings of *Hosanna-Tabor* and other Supreme Court and Second Circuit cases dealing with religious liberty and the Establishment Clause. Limiting *Hosanna-Tabor* to what Justice Roberts stated was its narrow holding—barring a suit by "a minister, challenging her church's decision," is supported by the Supreme Court's instruction that the constitutional remedy should be narrow so avoid invalidating Title VII. *See, e.g., Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006).

Ministerial immunity, after all, essentially is an *ad hoc* judicial declaration that Title VII and similar statutes are unconstitutional as applied to a particular employee. Contrary to the teachings of the Supreme Court, the Panel did not try to limit the solution to a problem, *id*, but instead created a sweepingly broad solution

[22] *See*, e.g., *Penn v. New York Methodist Hospital, 158 F.Supp.3d 177 (2016)* currently pending before this Court, No. 16-474.

that, if adopted by other circuits, will nullify statutory protection for millions of Americans (e.g., Church affiliated employees and the people, including school children, whom they may wish to protect). For example, an Indiana federal court granted ministerial immunity to a principal with even less religious activities than Ms. Fratello. *See, Ginalski v. Diocese of Gary*, 2016 WL 7100558 (N.D. Ind. 2016).

Clearly, unless the Second Circuit engages its constitutional duty to honor the First Amendment and safeguard our democracy, the Panel's mistakenly broad view of ministerial immunity will wreak great damage nationally, with little likelihood of Supreme Court correction any time soon.[23]

B. *Hosanna-Tabor* does not permit a court to transform a non-minister into a minister

Ms. Fratello situation involves a situation not contemplated by *Hosanna-Tabor*, which case involved a *bona fide* minister. Rev. Perich was a Church-credentialed "Minister of Religion, Commissioned" who, after years of training, theological study and examination, fulfilled her "call" to her religion and became one of its ministers, and part of the internal governance of her church.

Ms. Fratello, in contrast, is nothing of the sort. No religious training. No theological study. No examination. No call. No commission. No "minister of religion" title. Rather, she was a school teacher turned principal—an educational

[23] But perhaps eventually. *See, Point IV.*

professional. A lay employee, hired under a secular contract. She did not hold herself out as a minister. Her Church never identified her as a minister. Her religious belief, corroborated by her canon law expert (and not disputed by the Church) is that she cannot be a pastoral minister under Roman Catholic Church doctrine. No knowledgeable practicing Catholic would call her a minister, and certainly no priest or bishop would. Yet the Panel took the unprecedented and unjustified leap in labeling a lay person as a non-lay (religious) person.

In labeling Ms. Fratello as a "minister" when she is not, the Panel totally misapprehended what the *Hosanna-Tabor* analysis is all about. The Panel and the lower court misconstrued the analysis as being for the purpose of identifying a "minister for civil law purposes."[24] This is incorrect. The purpose of the analysis is to determine whether, as to a *bona fide* Church minister (or ecclesial officer), the law should bestow ministerial immunity, based upon the employment situation at hand. Thus, when examining the Church-affiliated employment of a *bona fide* minister such as *Hosanna-Tabor* 's Rev. Perich, the analysis is used to determine

[24] As District Court's Judge Seibel wrote:

> "But the issue here is one of U.S., not canon, law, and "minister" for purposes of the ministerial exception has a far broader meaning than it does for internal Church purposes." (*emphasis added*).

Appx. 448.

The panel engaged in a syllogism, finding that Ms. Fratello was a minister (when it is clear she was not), and then holding that ministerial immunity applies, because she is a minister.

whether the court should bestow ministerial immunity as to the particular employment scenario.

If no *bona fide* ecclesial office (no *bona fide* "minister") is involved, there simply is no issue of ministerial immunity. As Justice Thomas stated in his concurrence in *Hosanna-Tabor*, he would "defer to a religious organization's good-faith understanding of who qualifies as a minister."[25] Precisely. Ask the Roman Catholic Church (Ms. Fratello's Church) for its understanding of who qualifies as a pastoral minister in this religion. The clear answer will be "not Ms. Fratello." Give Ms. Fratello a jury trial on this issue. Even a jury of Catholic bishops would agree with Ms. Fratello's canon lawyer that Ms. Fratello, as a lay principal, was not and could not be a pastoral minister for any church purpose, as there is no such ecclesiastical office in the Roman Catholic Church. Terminating her lay employment was not, in any way, an ecclesial matter.

Thus, if the Church employs a person it knows to be a lay person with no ecclesial position or status in the church other than being a member of the Church, for example, it hires a handyman to help with some church activities, or a camp director and camp counselors to supervise Catholic children during summer vacation, or hires a lay educator at any level, law or medical school, college, high school or elementary school (Ms. Fratello's case), there simply is no internal

[25] *See*, 565 U.S. at 196 (Thomas, J., concurring).

church governance and no ecclesial interest at stake. As to these clearly non-minister employees, *Hosanna-Tabor* analysis is neither necessary nor appropriate.[26] Transforming these lay people into "ministers for civil law purposes" is the secular courts establishing a religious office. This offends both the Establishment Clause and the free exercise rights of the individuals affected (deeming them ministers when their beliefs, and their Church's tenets, regard them as the laity).

C. Proposed principled Two Prong approach

This Court has developed no principled approach to ministerial immunity. Its "the employee loses" approach may reduce the docket, but at a huge constitutional cost. Citizens losing respect for courts that ignore their rights; and a democracy will falter under sectarian and partisan division.

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[26] If an analysis were done, it would show a principal as not substantially different from a teacher (or a college department head and the professors, a hospital head and staff, or even a manufacturing plant supervisor, as long as the employer imposed religious activities as a job requirement, which the "religious employer" most certainly can and will):

LAY EDUCATOR:

Formal Title:	**Principal**	**Teacher**	**Hobby Lobby foreman**
Substance of Title:	school admin.	Classroom admin.	Managing workers
Employee use of title:	"Call me principal"	"Call me teacher"	Call me "Religious Joe"
Religious functions:	Some prayer/etc.	Some prayer/teaching religion	preaches God at work

If these factors apply to non-ecclesial employees, the employer can essentially engraft religious duties onto any title and turn almost any employee, except the most menial, into a "minister."

Ms. Fratello's counsel, who received the same amount of religious instruction (CCD) during elementary school as did Ms. Fratello, is confident that he could have performed all the "religious tasks" required of Ms. Fratello. Any good Catholic can do these basics, such as reciting the Lord's Prayer or a Hail Mary, and bringing children to religious services.

The Panel misconstrued Ms. Fratello's principled approach to analyzing ministerial immunity. It provides an approach the Supreme Court would approve.

First, as discussed above, *Hosanna-Tabor* requires that a ***bona fide*** minister (or ecclesial officer) be the employee and his or her Church the actor. In *Hosanna-Tabor* , the "Minister of Religion, Commissioned" Rev. Perich was the employee involved, and the Congregation/Synod the religious actor.

Prong One: Did the religious organization employer identify the job as requiring or preferring a Church minister for the position? In *Hosanna-Tabor* , the answer was yes (the school preferred a "called" minister/teacher). As to ambiguous titles that may or may not be ministerial, the 5th Circuit's "Starkman" test remains useful.[27] But only if there is ambiguity. With lay employee Ms. Fratello, there is no ambiguity. She was not a minister of the Church.

Prong Two: Did the Church revoke or suspend the minister's ministerial credential (i.e., engage in ecclesial decision-making)? Contrary to what the Panel write it its footnote 29 dismissing this two prong approach out of hand, the test

[27] *See, Cannata, supra,* 700 F.3d at 175-76 ("… Second, to constitute a minister for purposes of the "ministerial exception," the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church .... Third, and probably most important, is whether [the employee] engaged in activities traditionally considered ecclesiastical or religious….")(*emphasis added*). In *Cannnata*, unlike here, a Priest (who was also a canon law expert and thus a legitimate religious authority of this Church) gave an affidavit that Cannata was a "worship leader in the church" and an integral part of mass, *id*., 177, 180 and note 5. Appellees here gave no such evidence that Ms. Fratello was any kind of minister or ecclesial officer.

While *Cannata* also extends ministerial immunity too far, the Panel extends it much further as to Ms. Fratello, who had no ecclesial function whatsoever.

does not involve intrusion into any ecclesial decision. If the Church defrocks the priest, he is defrocked. If his job is that of Pastor (not Janitor) and thus the religious credential is (per Prong One) a *bona fide* requirement of the job (a BFOQ), then the employer can permissibly fire the employee because the religious authorities of the Church have taken away the required (ministerial) credential. In *Hosanna-Tabor*, the Church revoked Rev. Perich's credential, and the next day fired her (as no longer unqualified).

This two Prong approach is simple, principled, allows transparency (the employee is informed going into the job that it is ministerial), provides a means for the courts to avoid entanglement in religions matters, and protects the statutory and constitutional rights of the individual (while preserving religious groups' and individual's religious liberty). It is an approach is fully consistent with *Hosanna-Tabor*. It also allows for clear standards by which courts and religious employers can structure their actions. *Hosanna-Tabor , 132 S.Ct. at 711; Cannata, supra, 700 F.3d at 176.*

The Panel's rejection of Ms. Fratello's proposed approach mistook the approach, because the Panel misconceives *Hosanna-Tabor* 's holding. The proposed two prong approach is merely a different analytical approach to ministerial immunity, while in full conformity with both the letter and spirit of *Hosanna-Tabor:* 1) Establish that there is a *bona fide* Church-appointed minister

(or ecclesial officer) as the employee. 2) Decide if ministerial immunity is appropriate as to the particular employment of that minister (ecclesial official). Only if there is a *bona fide* Church-Minister employment relationship can ministerial immunity be applied. Simple. Fair for employers. Fair for employee. All Churches are protected in their religious liberty, as are all workers. And our democracy flourishes.

POINT II
THE PANEL'S DECISION WILL BE A PERNICIOUS NATIONAL PRECEDENT, AND BRING DISCREDIT UPON THIS HONORABLE COURT
(THREATENING THE UNIFORMITY OF THIS COURT'S AND IGNORING SUPREME COURT PRECEDENT)

This Court is in the position to either take the lead in safeguarding the First Amendment and individual liberties (including civil rights and free exercise of religion), or to yield to the Archdiocese's and Religious Right's argument that "religious employers" should possess absolute discretion over who they employ. This Court should support the People, not the powerful. Favor democracy over religion.

A. The Panel ignores the vital "Wall between Church and State"

The Panel ignores a tenet central to the Republic,[28] namely, that we keep Church and State separate. *Hosanna-Tabor* assures this regarding Church

[28] This dates back to Thomas Jefferson's January 1, 1802, letter to the Danbury Baptist Association, and repeatedly cited thereafter. *See, e.g.*, *Reynolds v. United States*, 98 U.S. (8 Otto.) 145, 164 (1879)(Jefferson's metaphor "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment."]"; *Everson v. Board of Education*,

selection of its ministers. The Panel abandons the tenet by giving a religious status ("minister for civil law purposes) to a lay employee of a 501(c)(3) "educational" entity (the parochial/private school).

Actually, the Panel moves the Wall far outside the church house, to include the private school. In this much larger space in the secular world, the Panel denies the State's civil law authority. As observed by the District Court in *Penn*, *supra*, now before this Court:

> "for purposes of the ministerial exception—religiously affiliated schools, hospitals and corporations can qualify as "religious institutions."

See also, Shukla v. Sharma, 2009 U.S. Dist. LEXIS 90044, *14–15 (E.D.N.Y. Aug. 14, 2009); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 461 (D.C.Cir.1996).

As long as the employer's decision-making rests with a *bona fide* Church's *bona fide* appointment or discharge of a *bona fide* minister, ministerial immunity can be properly applied. This decision-making is for the Church's not the State. But allowing lay managers of a primarily secular activity (hospitals, law or medical school, an elementary school) *carte blanche* to act unlawfully toward an employee of the activity, by labeling such employee as a "minister" (without the employee's or the Church's consent), is simply not right. It takes civil authority away from the State, even though no ecclesial right is at stake. Taking away the State's authority

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330 U.S. 1, 16 (1947)("the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'").

through the device of a court labeling a person a minister when the person is not, involves the establishment of religion. This violates the First Amendment.

As church-state scholar Professor Marci Hamilton commented in her article commenting upon this case, she was astonished that this Court seems to have forgotten vitally important First Amendment jurisprudence.[29]

B. Will Impair the Civil Rights of 100,000+ Catholics almost overnight

This Court is the only court that can reasonably hold back the devastation that the Panel's sweeping view of ministerial immunity will entail. The *Hosanna-Tabor* decision is narrow: As to *bona fide* ministers, provide the employer with ministerial immunity if the employment relates to the learned professional's pastoral expertise. The Panel's opinion is so broad that virtually any employer, even a *Hobby Lobby*-style[30] religious corporation, will be able to create "ministers for civil law purposes.

[29] *Marci Hamilton, So When Will Religious Organizations Choose Not to Discriminate?*, JUSTIA VERDICT, July 20, 2017, available at *https://verdict.justia.com/author/hamilton*. As Prof. Hamilton writes in another piece, by accepting the anti-First Amendment arguments of the Religious Right, the courts will diminish or even strip America of what "makes us truly great: true religious liberty, mutual support across religious boundaries, and the humility to coexist in peaceful diversity." *See, Marci Hamilton, The Real Religious Liberty Deficits Right in Front of Us*, JUSTIA VERDICT, Feb. 23, 2017, available *id*.

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

In the Roman Catholic elementary and high schools alone, both teachers[31] and principals will be faced with both the actual or the threatened loss of their civil rights and their own First Amendment freedom. This may include around 100,000 parochial school teachers and principals, and because these educators educationally and physical supervise their wards, the Panel's ruling also imperils the over 2.3 million parochial school children who are educated today in these schools. Then double that number for all non-Catholic school, and then add all other Church-affiliated workers, and we have a huge number of Americans who will soon discover that the federal courts, let by the Second Circuit, have taken away their civil rights on the altar of Organized Religion.

By constitutionally establishing Religion's primacy in American society and secular activities, the Panel's decision starts America down the road toward religious intolerance, insular religious sects and Church-taught intolerance—the things that the Founders sought to keep out of our Democracy.

Humans are innately (subconsciously) biased toward religion.[32] The Panel's decision appears to be a post hoc rationalization to favor religion. "The road to hell is paved with rationalizations."[33] Governing law and common sense do

[31] Especially at the elementary school level, parochial school teachers have a more direct, and much more influential, role in the school children's development, including spiritual development. Thus, if a lay principal is a minister, so too must all lay teachers.

[32] *See, supra,* note 7.

[33] BEHAVE, *supra*, at 674.

not support the Panel's holding. *En banc* review is needed here, so that this Court can develop and articulate a principled approach to ministerial immunity.

C. Will place all children attending religious schools at risk

As mentioned above, parochial school children will immediately be placed at risk by the Panel's ruling, because their teachers and principals will have no civil law protection if they seek to protect the children by, for example, reporting suspected child abuse (mandatory reporting under New York law). In New York State, the Catholic Schools are generally highly regarded. However, the Panel's ruling, as a nationwide precedent, will apply to schools run by fringe, radical, fundamentalist and insular "religious organizations," and the children in these schools, who may be most in need of a teacher's or principal's whistle-blowing, may find no help because the employee may fear losing his or her job.

D. Will lead America down the Road to Religious sectarianism, and a lost Republic

The Panel's Opinion devotes much ink to the "religious purposes" of the Catholic Schools. Its primary test for its "civil law minister" is that the employee spends some time on things religious, and has a leadership role of some sort. That's it, and that's a recipe for disaster. Any strongly sectarian, insular group is enabled by the Opinion to propagandize and brainwash impressionable children. The risk is real. An authoritarian parenting style tends to produce an "obedient"

adult,[34] and there is no reason to believe that an authoritarian religious education will not do likewise. History informs us that religious leaders are often blindly followed by their flock. The Panel's Opinion makes it more likely, not less, that children will be educated (especially in non-Catholic Schools) in a manner destructive to our democracy—intolerant, xenophobic, hateful toward others.

POINT III
THE "PARADE OF HORRIBLES" HAS BEGUN, STARTING WITH MS. FRATELLO AND 100,000+ PAROCHIAL SCHOOL EDUCATORS

As discussed in Points I and II above, the Panel's Opinion throws a much wider net of immunity than *Hosanna-Tabor* envisioned. Ms. Fratello has been engulfed. The Supreme Court would undoubtedly not have granted *certiorari* in *Hosanna-Tabor* if the facts were Ms. Fratello's, not Rev. Perich's.

It is indisputable that a large number of Catholic School lay employees will be prejudiced by the Panel's Opinion. For example, no competent attorney with an eye on his or her law office's bottom line would take a case involving a Catholic School principal, in light of the Panel's holding here and the Indiana U.S. District Court's ruling in *Ginalski, supra.* None. Nor will attorneys likely take cases involving parochial school teachers, for the same reason. Ministerial immunity means a litigation before the litigation.

[34] BEHAVE, *supra*, at 202.

The result is a domino effect depriving citizens employed by "religious organizations" of their constitutional and statutory rights. "Religious" employers can place up a sign: "Exempt from Title VII and other federal civil rights law," and "No Minorities need apply." This Court can endorse judicial nullification of federal statutes (for the sake of the dockets) or correct the Panel (for the sake of the First Amendment and democracy).

Hypotheticals:

If the Panel's opinion is not corrected, here are some hypotheticals that are almost certain to occur in the not too distant future. The Court should consider these when analyzing whether the Panel's expansive view of ministerial immunity is appropriate, or whether the reasonable, narrow approach argued in Point I, together with the statutory exemptions of Title VII, are sufficient to protect both the employer's and the employee's legitimate rights.

1. Fundamentalist Christian school

Unlike the Appellee's Catholic Schools, which have policies against proselytizing and discrimination (even on the basis of creed) and which teach science fairly, including evolution, it is likely that some Christian Fundamentalist churches would not share such views. Ms. Fratello has no dispute with ministers of any faith preaching whatever they like in the church house pulpit.

However, when a religious group is involved in matters of legitimate concern to the society, such as patients receiving sound medical care in hospitals or

clinics, or students receiving a sound education in elementary school and high school, the State has a legitimate interest.

However, the Panel's view will leave principals (and teachers) unprotected if, for example, they report education neglect[35] by a Church-affiliated 501(c)(3)(educational) school, or report unlawful discrimination. The Panel constitutionalizes the religious groups ability to ignore laws that the State may fairly put in place to protect children, and to ensure that children receive the education they need to become good citizens (which State interest the Supreme Court has recognized[36]).

2. Radical Islam madras

Ms. Fratello will decline to create a hypothetical relating to people whose faith is Islam. Some people on the Christian Right seems intent on stigmatizing others based upon their religion. Thus, if in the Fundamentalist Christian 501(c)(3) elementary school hypothesized above teaches hatred toward Muslims, instructs that it is Godly to discriminate against Muslims, and advocates political action against Muslims, what if a teacher or principal opposes this? Under the Panel's

[35] See, N.Y.S. Education Law § 3204 (1), which requires that education of a minor be "substantially equivalent" to that given in the public schools where the minor resides. See e.g., *Matter of Franz*, 55 A.D.2d 424 (2d Dept. 1977).

[36] *See, Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

holding, the principal (and likely any teacher) who expresses opposition to such hatred would be left unprotected, even though the State likely has a legitimate interest in regulating and prohibiting such bias in an elementary school. (And yes, a radical Muslim school also has ministerial immunity over its employees.)

3. Orthodox Yeshiva

The Court can take judicial notice of the insular nature of certain ultra-Orthodox sects of Judaism in the New York metropolitan area. The children in these schools are entitled to an adequate education, so that they can become good citizens. This is the children's right. They parents do not have a right superior to their children's regarding their receiving an adequate education.

The Panel's view constitutionalizes the Yeshiva's ministerial immunity over any and all teachers whose religious role is significant. In other words, all teachers and principals. State statutes attempt to prevent children from being neglected or abused (educationally or otherwise). However, as to any statute seeking to provide legal protection for school educators who report neglect or abuse, the Panel's ruling will make such a whistleblowing statute meaningless. Ministerial immunity protects the Yeshiva from suit by the whistleblower seeking to protect the school children.

4. Secular Humanist school

Secular humanist can express similar values as theistic religions, and the federal courts have allowed them a status equal to religious groups. *See*, *e .g.*,

Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869, 874-85 (7th Cir. 2014). If a group professing secular humanist values were to start run a school, college, hospital or summer camp, it could great a manual expressing its secular humanist beliefs, and designate "principals" and other leaders of such beliefs, and further identify these individuals as "ministers for civil law purposes."

It could also form for-profit companies, like Hobby Lobby, Inc., focused on such beliefs.

The secular humanist management could then claim ministerial immunity over its employees, allowing the group to discriminate on the basis of race, gender, national origin, etc., as can the "religious" entities described above. It could be that eventually most Americans find themselves in either a religious or a secular humanist camp of belief. Employees of their "Church-related" entities could likely number in the millions, all unprotected by civil rights law. This is the logical end result of the Panel's view. Loss of civil law protection for a huge number of American workers.

5. Hobby Lobby-style company

A private company with "religious beliefs" such as Hobby Lobby, Inc.[37] or even a hospital with ostensibly no Church affiliation, such as is found in the *Penn* case pending before this court, will be able to claim that they employ "ministers for

[37] *E.g., Hobby Lobby, supra.*

civil law purposes" under the Panel's view, even when the employment decision-making is not by a Church or otherwise "ecclesial" in nature. This is a view that defies many cases distinguishing between ecclesial matters (where the courts do not interfere) and cases where the government has a legitimate interest in regulation over the protestations of a religious group.[38]

POINT IV
MS. FRATELLO WILL FIGHT ON IN THE NEW YORK STATE COURTS, USING HER *PRO BONO* ATTORNEY, BECAUSE THE BILL OF RIGHTS AND OUR DEMOCRACY MUST BE PRESERVED, AND THE N.Y.S. COURT OF APPEALS WILL UNDOUBTEDLY AGREE

The undersigned humbly requests that the Court seriously and thoughtfully consider this Petition. This is a tremendously important case. In the big picture, it is more important than a death penalty case or a billion dollar antitrust case, because what is at stake is our democracy.

The undersigned is handling this case now *pro bono publico*. He waives all fees to date if the Court agrees to reconsider the Panel's Opinion.

The question is important enough, and the Ms. Fratello's counsel is sufficiently convinced that the negative effects of the Panel's decision will be soon enough seen, that Ms. Fratello will pursue her State claims in State court, where she will request the New York State courts to respectfully disagree with this Court. If in a year or two the New York State Court of Appeals agrees that the Second

[38] *E.g., Reynolds, supra.*

Circuit's view is erroneous, the issue might then be considered by the U.S. Supreme Court. The issue needs review, because the jurisprudence is currently in a mess.

Please spare Ms. Fratello and her counsel the State court effort, by fairly reconsidering this matter!

CONCLUSION

Rehearing and reconsideration is necessary for the sake of the First Amendment and our democracy. The Panel's Opinion, if left intact, will be the a blemish on the level of *Dred Scott* on this Court's otherwise illustrious history. The Panel is humbly requested to re-examine and correct its decision, and if not, the Court *en banc* must intercede, as this is a rare case where the civil rights of a huge number of Americans is at risk, and the future of American democracy at stake.

Dated: Stony Point, New York
August 11, 2017

Respectfully submitted,

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

This brief complies with the type-volume limitations of FRAP 32(a)(7)(B) because it contains 9,953 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

Anti-Virus Certification

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

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