No. 16-1271

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOANNE FRATELLO

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal From a Judgment of the United States District Court for the Southern District of New York

OPPOSITION TO APPELLANT'S MOTIONS FOR LEAVE TO FILE UNTIMELY AND OVERLENGTH PETITION FOR REHEARING

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This Court should deny Fratello's motion to file an untimely petition for rehearing because she does not come close to meeting the standard necessary to excuse her untimely filing, and because this Court should not lower that standard to accept her frivolous, abusive petition.[1]

First, Fratello has not met the standard for excusing an untimely filing. Her petition was due on July 28, *see* Fed. R. App. Proc. 35(c), 40(a)(1), a deadline she missed by 14 days. Under this Court's rules, even a normal "motion for an extension of time" is "disfavored and subject to a showing of extraordinary circumstances." *In re Immigration Petitions*, 702 F.3d 160, 162 (2d Cir. 2012) (citing Local Rule 27.1(f)(1)). Qualifying circumstances are those such as "serious personal illness or death in counsel's immediate family." Local Rule 27.1(f)(1).

Here, Fratello is not asking for a prospective extension of time, which is already disfavored, but for post hoc absolution for failing to keep the deadline at all. And her counsel's only reasons for failing to keep the

[1] Appellees also oppose Fratello's motion to file a grossly overlength petition. A short frivolous petition is better than a long frivolous petition. Nor does Fratello offer any "extraordinary" reason for her request to file an oversized petition. *Cf.* Local Rule 27.1(e).

deadline are that he took a vacation and incorrectly calendared the due date.

Neither excuse comes close to meeting the high extraordinary-circumstances standard. *Beckles v. The City of New York*, No. 08-Civ-3687, 2010 WL 1841714, at *3-5 (S.D.N.Y. May 10, 2010) (noting that courts have not excused untimeliness based on counsel's vacation schedule, and even for illness, have only regarded it as "valid grounds . . . where the illness is so physically and mentally disabling that counsel is unable to file"). This Court "rigorously enforce[s]" its "time limitations"—where a party simply "fail[s] to follow the clear dictates of a court rule," as Fratello has here, that party must, "in the ordinary course, lose[.]" *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366-68 (2d Cir. 2003) (alteration in original; citation omitted). That should be especially true in this situation, where counsel for Fratello failed to file a notice of unavailability or respond quickly once he returned from his vacation.

Second, this Court should not dilute the meaning of "extraordinary" to accept an untimely petition that is both frivolous and abusive. *See* Local Rule 35.1(e), 40.1(d) (allowing sanctions for frivolous rehearing petitions). The core of Fratello's petition merely repeats her "novel two-

prong test" for deciding ministerial exception cases, a test rightly rejected by the unanimous panel "because it finds no basis in law" and "directly contravenes *Hosanna-Tabor*." *Compare Fratello v. Archdiocese of New York*, 863 F.3d 190, 205 n.29 (2d Cir. 2017) *with* ECF No. 140-3 ("Pet.") at 32-35. And when Fratello's counsel is not making frivolous arguments, he is making abusive ones that ought to be beneath the dignity of the bar:

- comparing Appellees to "slave owners" and the panel opinion to "*Dred Scott*," Pet. at 9;
- stating that millions of parochial school children "will immediately be placed at risk" of "child abuse" by "fringe, radical, fundamentalist" religious schools as result of "the Panel's ruling," *id.* at 39;
- warning that "the Opinion" enables "religious leaders" "to propagandize and brainwash impressionable children" in a manner that renders the children "intolerant, xenophobic, [and] hateful toward others," *id.* at 40;
- insinuating that, given "the insular nature of certain ultra-Orthodox sects of Judaism in the New York metropolitan area,"

the "Panel's view" could lead to "children . . . being neglected or abused (educationally or otherwise)," *id.* at 42-43; and

- threatening to disregard this Court's ruling and drag Appellees through more vexatious litigation in state court "because the N.Y.S. Court of Appeals will undoubtedly agree" with Fratello's position that the panel opinion threatens "the Bill of Rights and our Democracy," *id.* at 45.

Enough is enough. Counsel for Fratello's scurrilous attacks do not come without cost to Appellees, which should not have to expend the time and effort to respond both in this Court and with their stakeholders. This Court does not need to allow itself to continue to be a forum for this abuse, and should not allow Fratello's counsel further opportunity to attack Appellees, the panel, or other religious groups.

Respectfully submitted,

/s/ Eric C. Rassbach

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 27(d); it contains 711 words.

/s/ *Eric Rassbach*
Eric Rassbach
Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I had the foregoing electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 14, 2017.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system.

/s/ *Eric Rassbach*
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