16-1271

United States Court of Appeals
for the
Second Circuit

JOANNE FRATELLO,

Plaintiff-Appellant,

vs.

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

BRIEF OF *AMICUS CURIAE* NELA/NY IN SUPPORT OF PLAINTIFF-APPELLANT AND OF REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure 29(c), Amicus Curiae National Employment Lawyers Association/New York states that it is a non-profit corporation with no parent corporation and no publicly-held corporation owns more than 10% of its stock or membership interests.

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NELA/NY is the New York affiliate of the National Employment Lawyers Association, a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits and other issues arising out of the employment relationship. With approximately 400 members, NELA/NY is NELA's second largest affiliate.[1]

NELA/NY advances and encourages the professional development of its members through networking, educational programs, publications and technical support. NELA/NY also promotes the workplace rights of individual employees through legislation, a legal referral service, filing briefs as amicus curiae and other activities, with an emphasis on the special challenges presented by New York's employment laws.

NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation.

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[1] Pursuant to the Second Circuit Rule 29(c)(5), no party's counsel authored this brief in whole or in part. No party or party's counsel contributed to funding the preparation or the submission of this brief. Amicus is solely responsible for this brief.

Our members advance these goals through representation of employees who have been discriminated and retaliated against, including employees with claims under Title VII of the Civil Rights Act of 1964.

NELA/NY has filed numerous amicus briefs in this Court and the New York State Court of Appeals in cases that raise important questions of anti-discrimination law. The aim of this participation has been to highlight the practical effects of legal decisions on the lives of working people.

ARGUMENT

NELA/NY asks this Court to narrowly apply the ministerial exception in light of Title VII's broad mandate to eliminate and punish discrimination. To ensure that meritorious claim are not foreclosed under a potentially sweeping defense, this Court should apply the totality of the circumstances test, bearing in mind that the ministerial exception "operates as an affirmative defense" for which the employer has the burden of proof. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 709 n. 4 (2012). The Supreme Court adopted this approach in *Hosanna-Tabor*, carefully examining (1) how the employer characterized the plaintiff's employment, (2) how the plaintiff held herself out to the public and (3) the plaintiff's actual job duties. *Id.* at 707-08. The totality inquiry that the Supreme

Court endorsed in *Hosanna-Tabor*, narrowly tailored, compels the finding that the ministerial exception should not apply to plaintiff Fratello as a matter of law.

POINT I

THE SCOPE OF THE MINISTERIAL EXCEPTION

In *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court for the first time set forth a legal framework for determining when a ministerial exception applies to employment discrimination claims brought under Title VII of the Civil Rights Act of 1964. In that case, Cheryl Perich was a "called teacher" who taught at a school operated by the Hosanna-Tabor Evangelical Lutheran Church. In addition to teaching math, language arts and other general subjects, Perich taught religion four days a week and led the students in prayer and devotional exercises each day. She also led the chapel service about twice a year. *Id.* at 700. After Perich became ill, she was unable to work. When Perich was able to return to work, the school asked her to resign as a called teacher. When Perich refused to do so and advised that she had consulted an attorney, the school terminated her employment for "insubordination and disruptive behavior." *Id.*

After noting that "[b]oth Religion Clauses [of the First Amendment] bar the government from interfering with the decision of a religious group to fire one of its ministers," *id.* at 702, the Court concluded, "Requiring a church to accept or retain

an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 706.

Declining to "adopt a rigid formula for deciding when an employee qualifies as a minister," *id.* at 707, the Court considered "all the circumstances of [the plaintiff's] employment." *Id.* In holding that Perich was a "minister" under the ministerial exception, the Court noted that the church-employer had held her out as a minister. *Id.* In addition, Perich "held herself out as a minister of the Church," according her the title of Minister of Religion, Commissioned, a title that "reflected a significant degree of religious training followed by a formal process of commissioning." *Id.* Perich also held herself out as a minister of the Church "by accepting the formal call to religious service" and claiming a special housing tax allowance that was only available to employees earning their compensation "in the

exercise of the ministry." *Id.* at 707-08. Her job duties also "reflected a role in conveying the Church's message and carrying out its mission," as she was charged with "lead[ing] others toward Christian maturity" and, *inter alia*, "teach[ing] faithfully the Word of God." *Id.* at 708. "In light of these considerations – the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church – we conclude that Perich was a minister covered by the ministerial exception." *Id.*

In the instant case, the district court noted that post-*Hosanna-Tabor* rulings have not "considered whether a parochial-school principal is a 'minister' under the exception." *Fratello v. Roman Catholic Archdiocese of New York*, 2016 U.S. Dist. LEXIS 41483, at *29 (S.D.N.Y. Mar. 29, 2016). Judge Seibel ruled that defendants held plaintiff out as a minister, as, *inter alia*, she was required to be a practicing Catholic and was tasked with "achieving the Catholic mission and purpose of the school." *Id.* at *30-31. However, the district court held, plaintiff's title and the requisite education and training associated with that title militated against any finding that plaintiff was a "minister," as "there is nothing inherently religious about the title 'Lay Principal'" and "nothing in the record suggests the rigorous level of education, training, and certification attained by plaintiffs such as Perich or other 'called' teachers." *Id.* at *31-33. Similarly, plaintiff did not "h[o]ld herself out as a minister

of the Church by accepting the formal call to religious service." *Id.* at *33. "Plaintiff did not accept any such formal call, nor did she claim ministerial status for tax or other formal purposes, so this factor weighs against the exception. But it does not weigh strongly because Plaintiff undoubtedly knew she would be perceived as a religious leader." *Id.* Finally, the district court held, plaintiff's job responsibilities "reflected a role in conveying the Church's message and carrying out its mission." *Id.* at *34. In particular, plaintiff *inter alia* "lead prayers with the school body over the loudspeaker," "encouraged and supervised teachers' integration of Catholic saints and religious values in their lessons and classrooms" and "kept families connected to their students' religious and spiritual development through the school newsletter." *Id.* at *35. In sum, the district court held,

> Considering the factors discussed in *Hosanna-Tabor* and the totality of Plaintiff's circumstances of employment, I find on balance that the ministerial exception applies. While Plaintiff's title and attendant training and education weigh against application of the exception, and while Plaintiff's not claiming to be a minister weighs slightly against it as well, the other factors discussed above — the distinct ministerial role the Church assigns her and, most significantly, Plaintiff's job responsibilities — carry far more weight.

Id. at *37-38.

POINT II

THIS COURT SHOULD NARROWLY APPLY THE MINISTERIAL EXCEPTION IN LIGHT OF TITLE VII'S BROAD MANDATE TO ELIMINATE AND PUNISH EMPLOYMENT DISCRIMINATION

Title VII reflects a broad mandate to eradicate employment discrimination on the basis of, *inter alia*, race and gender. Other employment discrimination statutes, including the Americans with Disabilities Act and the Age Discrimination in Employment Act, carry the same anti-discrimination mandate.

> It is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly: "to fail… to hire or to discharge… or otherwise to discriminate… with respect to… compensation, terms, conditions, or privileges of employment," and "to limit, segregate, or classify… in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status." 42 U.S.C. § 2000e-2(a). ... [U]nder long-standing principles of statutory construction, the Act should "be given a liberal interpretation… [and] *exemptions from its sweep should be narrowed and limited to effect the remedy intended*."

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall, J., concurring and dissenting in part) (emphasis supplied). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the

implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise"); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 771 (1976) (Title VII's "central statutory purpose[]" is to eliminate employment discrimination); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 879-80 (2d Cir. 1982) ("The goal of Title VII is to eradicate employment discrimination on the basis of race, color, religion, sex, or national origin").

To our knowledge, this is the first case before the Second Circuit that will interpret and apply the holding in *Hosanna-Tabor*.[2] NELA/NY asks this Court to tread carefully in the understanding that the ministerial exception effectively deprives many workers of important protections, leaving them vulnerable to termination because of their age, race, gender, disability or membership in other protected classes or because they complained of unlawful discrimination.

Any exception to Title VII's broad mandate against employment discrimination should be narrowly-tailored to ensure that employers cannot invoke

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[2] While this Court in *Bronx Household of Faith v. Board of Educ.*, 750 F.3d 184 (2d Cir 2014), discussed *Hosanna-Tabor* at length, that non-employment Establishment Clause case was not brought under Title VII, and this Court analyzed the holding in the context of the district court's view that *Hosanna-Tabor* "emphasized the wide berth religious institutions are to be given with respect to their core activities, including worship." *Id.* at 200-01. Ultimately, this Court ruled in *Bronx Household of Faith* that *Hosanna-Tabor* did not apply to that dispute. *Id.* at 203-04.

that exception simply to prevent the plaintiff from resolving her case on the merits. Narrow-tailoring is essential, as the ministerial exception covers a variety of claims, locking countless plaintiffs out of the courthouse. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) ("Although the ministerial exception is often raised in response to employment discrimination claims under Title VII of the Civil Rights Act, which specifically bars discrimination on the basis of religion, it has also been applied to claims under the ADA and the Age Discrimination in Employment Act, as well as common law claims brought against a religious employer").

In *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), anticipating the Supreme Court's decision on *Hosanna-Tabor*, the Third Circuit noted that "a federal court's resolution of a minister's Title VII discrimination or retaliation claim would infringe upon First Amendment protections." *Id.* at 305. However, in adopting the ministerial exception, the *Petruska* Court emphasized its narrow application, noting that the Supreme Court has advocated in other contexts that "a narrow exception to prevent the unconstitutional enforcement of Title VII is the proper remedy." *Id.* at 305 n. 8 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)). In addition, in applying a "'finely drawn' remedy," the *Petruska* Court stated, "we agree with the implied findings of our sister

circuits that Congress would prefer a *tailored exception* to Title VII than a complete invalidation of the statute." *Id.* (emphasis supplied). *See also EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) ("the ministerial exception does not derogate the profound state interest in 'assuring equal employment opportunities for all, regardless of race, sex, or national origin'"). As "Circuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a 'minister,'" *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008), this Court should adopt the narrow approach advocated by the Third Circuit to ensure this "imprecise" exception to liability under Title VII does not extend any further than necessary. *See id.* at 206 ("It should be noted that the term 'ministerial exception' is judicial shorthand, but like any trope, while evocative, it is imprecise").

The Supreme Court also treaded carefully in fleshing out the ministerial exception. In ruling against the plaintiff in *Hosanna-Tabor*, the Court was careful not to paint its holding too broadly, stating, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise." 132 S. Ct. at 710. This language should compel this Court to

carefully apply the ministerial exception as well.

To ensure that meritorious claim are not foreclosed under a potentially sweeping defense, this Court should apply the totality of the circumstances test, bearing in mind that the ministerial exception "operates as an affirmative defense" for which the employer has the burden of proof. *Id.* at 709 n. 4. The Supreme Court adopted this approach in *Hosanna-Tabor*, carefully examining (1) how the employer characterized the plaintiff's employment, (2) how the plaintiff held herself out to the public and (3) the plaintiff's actual job duties. *Id.* at 707-08. However, these factors do not apply in every case. The Court did not devise a precise framework for resolving ministerial exception cases. Rather, it expressly declined to do so, stating, "We are reluctant ... to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 707. *See also Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate"). At the close of its opinion, the Court shed further light on how courts should resolve these disputes:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her

> termination was discriminatory, the First Amendment has struck the balance for us.

132 S. Ct. at 710.

The concurring opinions in *Hosanna-Tabor* also provide guidance on the narrow scope of the ministerial exception. Notably, the majority did not adopt Justice Thomas's view that a religious defendant's sincere belief that the plaintiff was a minister will by itself satisfy the exception. *Id.* at 711 (Thomas, J., concurring). That deferential approach would further insulate defendants from liability under Title VII. *See Hough v. Roman Catholic Diocese of Erie*, No. 12-253, 2014 U.S. Dist. LEXIS 27159, at *14 (W.D. Pa. Mar. 4, 2014) ("This 'sincere belief' by the employer was not enough for the majority, despite Justice Thomas' urging, and cannot be the sole basis for the application of the ministerial exception by this Court here").

Justice Alito's concurrence emphasized that *Hosanna-Tabor* "had the right to decide for itself whether [plaintiff] was religiously qualified to remain in her office." 132 S. Ct. at 715. From this broad angle, Justice Alito wrote, the plaintiff could not prevail because she had threatened to sue the church in civil court, contravening the Lutheran doctrine that disputes among Christians should be resolved without litigation. *Id.* However, the majority did not adopt Justice Alito's approach, which would prohibit plaintiffs from exploring whether the religious employer's

articulated reason for the plaintiff's termination was a pretext. *Id.* at 715-16.

The totality inquiry that the Supreme Court endorsed in *Hosanna-Tabor*, and the narrow-tailoring that NELA/NY advocates, should compel the finding that the ministerial exception should not apply to plaintiff Fratello as a matter of law. As Judge Seibel noted, two of the four factors weigh *against* application of the ministerial exception, as plaintiff's title ("Lay Principal") and requisite education and training "are ... different from some other employees who fell within the ministerial exception." 2016 U.S. Dist. LEXIS 41483, at *32. Nor did plaintiff hold herself out as a minister or accept the formal call to religious service. *Id.* at *33. While the district court held that plaintiff's job duties "reflected a role in conveying the Church's message and carrying out its mission," *id.* at *34, that factor is not dispositive. In *Cannata v. Catholic Diocese of Austin*, the Fifth Circuit noted that, under *Hosanna-Tabor*, "courts may not emphasize any one factor at the expense of other factors." 700 F.3d at 176. Accordingly, prior Fifth Circuit precedent, which emphasized "whether the plaintiff 'engaged in activities traditionally considered ecclesiastical or religious,'" is no longer controlling. That factor "may no longer serve as the gravamen of a ministerial exception case." *Id.*

While the district court in granting defendants' summary judgment motion ruled that plaintiff promoted the school's religious mission in a supervisory role, 2016

U.S. Dist. LEXIS 41483, at *35, that is not enough to invoke the ministerial exception, either. After thoroughly reviewing the *Hosanna-Tabor* ruling, the Northern District of Indiana rejected a similar argument that defendants raise here. *See Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014) ("Labeling Mrs. Herx a 'minister' based on her attendance and participation in prayer and religious services with her students, which was done in a supervisory capacity, would greatly expand the scope of the ministerial exception and ultimately would qualify all of the Diocese's teachers as ministers, a position rejected by the *Hosanna-Tabor* Court. Deeming Mrs. Herx a 'minister' of the Catholic Church would expand the scope of the ministerial exception too far and, in fact, would moot the religious exemptions of Title VII and the ADA").

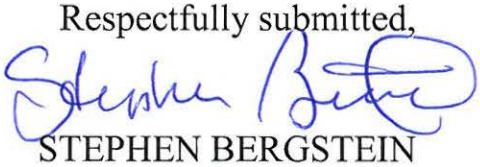
In sum, NELA/NY asks this Court to narrowly apply the ministerial exception, consistent with Title VII's broad mandate against employment discrimination. This Court should further hold that defendants have not proven their affirmative defense as a matter of law and that plaintiff is not a "minister" as defined by the Supreme Court in *Hosanna-Tabor*.

CONCLUSION

Consistent with Title VII's broad mandate against employment discrimination, this Court should narrowly apply the ministerial exception. NELA/NY further asks this Court to reverse the judgment of the district court and hold that defendant has not established as a matter of law that plaintiff is a "minister" under this exception.

Dated: August 10, 2016

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as it contains 3,275 words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6), as it has been prepared in a proportionally spaced typeface in 14-point, Times New Roman font.

STEPHEN BERGSTEIN