Docket No. 415-2017

IN THE SUPREME COURT OF THE UNITED STATES

DAVID R. TURNER,

Petitioner,

v.

ST. FRANCIS CHURCH OF TOUROVIA, THE TOUROVIA CONFERENCE OF CHRISTIAN CHURCHES, AND REVEREND DR. ROBERTA JONES,

Respondent.

ON WRIT OF CERTIORARI

TO THE STATE OF TOUROVIA COURT OF APPEALS

Petitioner's Brief in Support of Reversing the Judgment of the Appellate Division, Second Department of the State of Tourovia Supreme Court

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Team No. 10

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QUESTIONS PRESENTED

1. Did the lower court err when it held that the ministerial exception of the First Amendment bars wrongful termination claims based upon breach of the employment contract and retaliatory discharge?

   Petitioner's Answer: Yes.

2. Did the lower court err by granting defendants' Motion to Dismiss without providing an opportunity for discovery?

   Petitioner's Answer: Yes.

JURISDICTIONAL STATEMENT

The judgment of the Appellate Division, Second Department of the State of Tourovia Supreme Court was entered on December 18, 2015, affirming the decision of the trial court. The Court of Appeals for the State of Tourovia rendered its decision on August 16, 2016. The petition for the writ of certiorari to the Tourovia Court of Appeals was filed and granted by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1994).

STATEMENT OF THE CASE

Factual History

Petitioner, David R. Turner ("Turner") served as pastor of the St. Francis Church of Tourovia ("St. Francis") for three years, until discovering St. Francis's mismanagement of trust funds. (R. at 4, 5). Turner was hired as pastor on July 1, 2009 by St. Francis for a one year term from July 1st to June 30th. (R. at 4). This contract was renewed each June for three years (2010, 2011, and 2012) during Turner's time as pastor. (R. at 4). Before becoming pastor, Turner served as an IBM Corporation financial manager for nearly twenty-five years. (R. at 5). Also, in addition to serving as pastor of St. Francis, Turner was also the Treasurer and Chief Financial Officer (CFO) of a regional office for the Tourovia Conference of Christian Churches ("the Conference"). (R. at 5).

St. Francis is a beneficiary of the Edward Thomas Trust ("the Trust"), managed by Wells Fargo Bank ("Wells Fargo") who serves as trustee (R. at 5). On May 16, 2012, St. Francis learned that it would receive a $1.5 million bequest from the Trust. (R. at 5). Pursuant to the Trust, one-half of the bequest was for general operation and maintenance of St. Francis and one-half was for maintenance of the St. Francis cemetery. (R. at 5). Because of his experience as a financial manager at IBM and as Treasurer and CFO for the Conference's regional office, Turner was chosen by the St. Francis congregation to administer the $1.5 million bequest. (R. at 5). Quickly discovering that St. Francis sold the cemetery in 2009, however, Turner determined that it would be a breach of trust to accept this portion the funds. (R. at 5).

Based upon his financial experience and knowing the cemetery sold and that St. Francis no longer maintained a cemetery fund, Turner knew accepting the $750,000 towards cemetery upkeep would not only be a breach of trust, but could also carry consequences as severe as fraud and tax

evasion. (R. at 5). Turner therefore advised the St. Francis Board of Trustees ("the Board") to notify Wells Fargo that St. Francis sold the cemetery and ask for guidance regarding the bequest. (R. at 5). Contrary to Turner's advice, however, the Board's Vice Chairman instructed Turner to request the full $1.5 million bequest and deposit it into St. Francis's general operating account. (R. at 5). Turner refused. (R. at 5).

In August 2012, Turner took his concerns about the cemetery portion of the bequest to Reverend Dr. Roberta Jones ("Dr. Jones"), the superintendent of the Conference. (R. at 4, 5). Seeing neither the St. Francis Board nor the Conference take action to inform Wells Fargo about the cemetery, Turner contacted Wells Fargo in early October 2012 himself to ask for guidance about the funds. (R. at 5). Turner left a message with the Wells Fargo representative he believed was handling the Trust. (R. at 5). Turner also attempted to reach the IRS to alert them to the situation and discuss possible tax consequences, but failed to reach an appropriate party to address his concerns. (R. at 5). Shortly thereafter, on October 16, 2012, Dr. Jones informed Turner that he was terminated effective October 31, 2012 because St. Francis was "transitioning" and had "lost faith" in him as a spiritual leader. (R. at 4, 5).

Procedural History

Turner filed his Complaint against St. Francis, the Conference, and Dr. Jones on September 12, 2013 alleging wrongful termination based upon breach of employment contract and retaliatory discharge, and requesting monetary damages. (R. at 5). The retaliatory discharge claim was based upon Turner's effort to report the questionable use of funds specifically dedicated to a cemetery and refusal to participate in the alleged fraud and tax evasion related to this use. (R. at 5).

The Conference and Dr. Jones filed a Motion to Dismiss the Complaint on March 31, 2014, claiming that the ministerial exception of the First Amendment barred Turner's action for failure

to state a claim. (R. at 5). A hearing on the Motion on to Dismiss was held on January 20, 2015 before the Honorable Michelle L. Hall. (R. at 6). By entry of an Order on January 21, 2015, the Motion to Dismiss was granted. (R. at 6). This Order was affirmed by the Tourovia Supreme Court Appellate Division on December 18, 2015, from which Turner now appeals (R. at 6).

SUMMARY OF ARGUMENT

The First Amendment in the United States Constitution exists to protect free expression in the form of speech, press, assembly, and religion. This provision sets forth that:

> "Congress shall make no law **respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *(Emphasis added.)*

In the spirit of these clauses – the establishment clause and the free exercise clause – a doctrine exists to protect a religious organization's sanctity in choosing who will carry forth its message. This doctrine is the ministerial exception which *excepts* religious organizations from prohibitions on religious discrimination so that they may exercise their religion how they choose.

The free exercise clause and establishment clause have competing interests. The free exercise clause ensures that individuals may not be discriminated against based on their religion (or anti-religion). The establishment clause ensures that religious organizations will not suffer undue interference by the government in how to practice their religions. These clauses conflict where laws are created to protect free exercise for individuals, but at the same time circumscribe religious entities in who and how they may choose to carry out their religious endeavors. One such area is employment where this conflict is resolved using the ministerial exception.

If an employee of a religious organization compromises the spiritual goals or religious purpose and message of its employer (the religious organization), the religious employer may properly remove the employee on this religious basis – without running afoul of the anti-discrimination principles the free exercise clause in the First Amendment protects. For this ministerial exception to apply, however, such an employee *must* be employed in a religious capacity – such as a reverend, priest, or religious education teacher – that is integral to the religious

organization carrying out its religious mission. The ministerial exception does not apply and cannot be used to discriminate against employees that are not in religious roles and certainly cannot be used to justify a breach of contract or hide potential fraud and tax evasion.

David R. Turner – while a pastor in name – was a pastor in name *only* and served no ministerial function while employed by St. Francis Church. Hired for experience in financial management, Turner's primary role was to manage St. Francis's finances, in particular a $1.5 million bequest the church was set to receive from the Thomas Trust. One-half of this sum was dedicated for a cemetery managed by St. Francis, but which cemetery had long-ago been sold.

Realizing that taking money to maintain a cemetery that no longer existed was at a minimum, unethical, and carried with it consequences of fraudulent activity and tax evasion, Turner spoke out. Consulting his superiors at St. Francis, he provided the church an opportunity to correct is misguided decision to accept the funds, but no action was taken. Only when Turner determined that it was his responsibility to alert the trustee, Wells Fargo, about the potential fraud, and notify the IRS of the potential tax evasion, did St. Francis act. But this act, was retaliation.

Turner was not a ministerial employee and to permit St. Francis to hide behind the ministerial exception to avoid responsibility for its wrongful decision about accepting funds designated for the cemetery would be an abomination of the purpose of the ministerial exception and spirit of the First Amendment. Permitting St. Francis to terminate Turner – breaching his employment contract – with no explanation for the fraud or tax evasion Turner alleged, does little to ensure individuals the right to freely exercise their religions and protect religious institutions from undue government interference. To hold otherwise would create precedent rewarding institutional fraud and deceit, at the cost of an individual's livelihood, morality and spirit.

ARGUMENT

I. The trial court erred when it held that the ministerial exception of the First Amendment bars Turner's wrongful termination claim because Turner is not a minister for purposes of the ministerial exception.

There are two approaches to analyzing whether application of the ministerial exception is appropriate to bar a plaintiff's claim against a religious institution. First, there must be an employment relationship between a religious institution and the plaintiff. Second, the plaintiff's duties must be sufficiently ministerial to warrant application of the ministerial exception in the spirit of the First Amendment and permitting religious organizations to freely exercise their religions.

A. The ministerial exception does not apply to Turner because while St. Francis is a religious institution, Turner is a minister in name only.

The ministerial exception of the First Amendment does not apply to Turner. The Supreme Court established in Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 180-81, 188 (2012), that to apply the exception to a claim against an institution, two factors must be present: (1) the defendant is a church and (2) the plaintiff is a minister. Application of the ministerial exception is only proper within the relationship between a religious institution and its ministers. Id. at 188. The exception does not apply to Turner because his role at St. Francis was not sufficiently ministerial to establish this relationship.

The Court in Hosanna-Tabor held that a music teacher, Ms. Perich, was subject to the ministerial exception because her job duties "reflected a role in conveying the church's message." Id. at 192. Ms. Perich spread a religious message through her teachings and played an important role "transmitting the Lutheran faith." Id.

However, the Court went on to say that "such a title, by itself, does not automatically ensure coverage," although it may be relevant. Id. at 193. The fact that other secular people within the school performed similar religious duties did not negate Ms. Perich's primarily religious role, nor secular functions she also performed. See id. at 204. The Court stated that secular duties cannot be "considered in isolation" from other considerations. Id. at 194. Ms. Perich was a "called" teacher, whose vocation was to spread the message of her faith through her employment role and spreading the faith was her *primary* role. Id. at 178.

The cause of action arose in Hosanna-Tabor when Ms. Perich fell ill, leaving her on disability leave for approximately one year, which led to her termination. Id. at 178-79. In terms of Ms. Perich's role as primarily religious, she was reviewed periodically to ensure her teaching aligned with the religious mission and "according to the Word of God." Id. at 191. Further, it took Ms. Perich six years to become a commissioned minister with checks on her transcripts recommendation and endorsements by a Synod district that allowed her to preach. Id. at 177. She claimed a special housing tax allowance per her ministerial position and expressed her role as teacher to be "God's call." Id. at 191-92. She was responsible for "leading others toward Christian maturity." Id. at 192.

While St. Francis is a religious institution, Turner is a minister in name only. For the ministerial exception to apply, a plaintiff must be a minister in both title and duties. Comparing Turner's duties to those duties of ministers where the Court has previously applied the exception, Turner's role does not warrant application of the ministerial exception. An analysis of Turner's daily tasks and his termination reveals that although he is a minister by title, his duties do not fit those of minister for proper application of the ministerial exception to his claim.

B. Turner is a minister in name only because none of his duties are ministerial and his role is not "primarily religious in nature."

The Michigan Court of Appeals in Weishuhn v. Catholic Diocese of Lansing, 787 N.W.2d 513, 516-17 (Mich. Ct. App. 2010), laid out a four-part test to determine if the duties of an employee are "primarily religious in nature." This involves a total analysis of the employee's duties per the four factors, asking:

(1) Did the duties consist of teaching or spreading the faith?

(2) Did the duties have a religious significance?

(3) Was the employee's job primarily/exclusively religious?

(4) Were the employee's duties essentially liturgical?

Id. at 517.

The Weishuhn Court found that although the plaintiff, Ms. Weishuhn, was a mathematics teacher, the ministerial exception applied to bar her claim because her duties held a "spiritual function." Id. at 516, 521. Ms. Weishuhn never separated religious teachings from math lessons and taught religion classes. Id. at 515-16, 518. She assisted in liturgies and ran the penance and other sacramental programs for the students. Id. at 515. The trial court in Weishuhn emphasized the word "primary" when defining an employee's duties as religious. Id. at 516, 518. Finding the totality of Ms. Weishuhn's duties as religious, the primary effect of her employment was religious, and thus the ministerial exception properly barred her wrongful termination claim. Id. at 519.

Turner, although a minister by title, did not spread the message of St. Francis or function in a primarily religious position. His daily employment tasks did not, unlike Ms. Weishuhn, reflect a role in the church's message. Applying these four factors and heeding the Weishuhn Court's

emphasis on the employee's "primary role" having a "spiritual effect," Turner is not subject to the ministerial exception. First, Turner's duties did not consist of teaching or spreading the faith. Second, Turner's duties did not have a religious significance. Third, Turner's job was not primarily or exclusively religious. Fourth, Turner's duties were not essentially liturgical.

Turner was a "pastor" and his primary duty was to administer the Trust bequest, hired based on his financial experience. Prior to serving as pastor, Turner was a financial manager at IBM Corporation for twenty-five years and Treasurer and CFO for the Conference. There are no facts about Turner conducting liturgies or spreading a religious message.

Only when Turner's role as a financial advisor to St. Francis conflicted with their financial plans, was Turner terminated. There are no facts to support that Turner was failing in any liturgical capacity, as no liturgical responsibility was placed upon him. Turner was terminated when he alerted Dr. Jones that St. Francis no longer owned the cemetery - the subject of one-half of $1.5 million bequest it was set to receive. Turner determined from a financial standpoint that since St. Francis no longer owned the cemetery, it would be unethical for St. Francis to accept the portion of the bequest allotted for the cemetery. Upon Dr. Jones' refusal to notify the Wells Fargo, the trustee, Turner contacted Wells Fargo himself for guidance.

Another illustration comes from Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 329 (4th Cir. 1997), where the Court of Appeals asserted that an ordained minister, serving as executive director of an outreach program, who was fired due to budget cuts, was subject to the ministerial exception. Because the Church was deciding how to spend its funds for religious purposes in firing plaintiff, the Court held that it could not interfere. Id. at 332-33. The Court emphasized the termination as "ecclesiastical," and thereby barred by the ministerial exception because it was a decision about "the nature, extent, administration, and termination of a religious ministry." Id. at

333. Civil courts may not intercede when a church makes an ecclesiastical decision about how to spend its funds. Id. As a minister directing the outreach program, Bell's role involved "promoting a public policy that reflects Jewish-Christian values" and advocating laws that promote these same religious principles. Id. at 329. Further, Bell had a salary for housing allowance that enabled him to claim a tax exemption and a contribution for receipt of continued pension and health benefits from the church. Id. at 330.

The ministerial exception does not apply to Turner as it did to the Bell because Turner does not qualify as a member of the religion's clergy based upon the definition set forth in Bell. Quoting Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985), the Fourth Circuit in Bell established that, "a person is a member of a religion's clergy 'if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" Bell, 126 F.3d at 332. Furthermore, while the Fourth Circuit held in Bell that civil courts cannot interfere in decisions regarding the ecclesiastical choice of how a parish wishes to spend funds on religious purposes, Turner was not fired for funding or non-funding of a religious purpose. Id. at 333. Turner was fired for blowing the whistle on fraud and possible tax evasion.

Turner was not hired as part of a call like Ms. Perich in Hosanna-Tabor and did not have primary duties consisting of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship like the plaintiff in Bell – Turner simply managed money. Turner was hired specifically for his experience in finance and ability to manage the Trust funds St. Francis was set to receive. Turner's role was not primarily religious and he did not transmit a message of spirituality. Turner did not claim a tax exemption for his employment at St. Francis and there are no facts to indicate he attempted to benefit from

being minister after his termination. Turner was strictly a financial manager, termed "pastor" only because of the religious setting.

C. Even if Turner is considered a ministerial employee, the ministerial exception still does not apply because the Court's review of his wrongful termination claim does not serve the principles of the ministerial exception.

The Court in Hosana-Tabor laid out the principal goals of the ministerial exception: to ensure the separation of Church and State by protecting the both the Free Exercise Clause and Establishment Clause in the First Amendment. Hosanna-Tabor, 565 U.S. at 188. The Court articulated that the First Amendment grants religious institutions the right to be free from secular control. Id. The ministerial exception guarantees that religious institutions have "in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Id. at 199-200 (Alito, J. and Kagan, J., concurring).

Although the Court has applied the ministerial exception broadly to wrongful termination cases-hesitant to inquire into the legitimacy or internal choices as to the employees who will transmit a parish's message-the Court in Hosana-Tabor limited the exception: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. 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." Id. at 194-95 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952)).

The choice of who will administer the faith is "strictly ecclesiastical" that civil courts may not consider. Hosanna-Tabor, 565 U.S. at 195. Courts therefore may not interfere or review claims that force them to analyze the legitimacy of a church's decision as to who will spread their message. Id.

Elsewhere where courts have examined the application of the exception, they have refused to review a ministerial employee's termination because it would have to examine the internal governance of the parish, such as in DeBruin v. St. Patrick Congregation, 816 N.W.2d 878 (Wis. 2012). The Supreme Court of Wisconsin in DeBruin determined that it could not interpret Ms. DeBruin's contract because she was a ministerial employee, thereby applying the ministerial exception. Id. at 888.

Ms. DeBruin also failed to properly state a claim. Id. at 890. The Court emphasized church decisions regarding faith are "fundamental to the free exercise of religious liberty", thereby prohibiting courts from interference. Id. at 886. Justice Bradley alluded to the principles of the exception in her dissent, asserting that Ms. DeBruin's contract claims did not address free exercise concerns and were rightfully permitted into court. Id. at 902. She noted that the specific purpose of the exception was the "power of religious organizations 'to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine.'" Id. at 903. The exception is not to bar any claims brought by a ministerial employee, but to bar claims that interfere with ministry. The exception serves to assure churches that secular government will not impede their liberty to choose who will be their spiritual voice.

The Supreme Court, in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976) considered how far was too far in judicial interference with church authority in matters of "ecclesiastical cognizance and polity." The Court particularized the Illinois Supreme Court's error in hearing the plaintiff's claim as "an impermissible rejection of the decisions of the highest ecclesiastical tribunals. . . impermissibly substitut[ing] its own inquiry into church polity." Id. at 708. The Court again highlighted the purpose of the ministerial exception as ensuring that courts could not take control over a church's religious-based decisions. Id. The Court found it repugnant

that the Illinois Supreme Court would attempt to inject its own analysis or opinions into the internal governance of a religious matter dealing with the defrocking of a bishop for religious reasons. Id. at 608. The goal was to ensure that civil courts do not try to interpret religious law, procedures, and reasoning behind decisions regarding the "allocation of power" in a church. Id. at 709. In short, the ministerial exception is to prevent civil courts from interpreting and interceding in religious law. Id.

The holding in Serbian Eastern Orthodox is like the ruling in Hosanna-Tabor: the government may not intrude upon more than a "mere employment decision," interfering with church power over "who will personify its beliefs." Hosanna-Tabor, 565 U.S. at 188. Turner's wrongful termination claim was due to his refusal to participate in and allow the Church to participate in fraud, not a spiritual aspect of ministry. Consequently, Turner's wrongful termination claim based upon breach of contract and retaliatory discharge is not precluded by the ministerial exception.

The Court should not set precedent applying the ministerial exception to aid a parish hiding fraud, nor should the Court permit retaliation for exposure of fraud, under the guise of a "spiritual" motivation for terminating an employment contract. The Court is not required to examine the internal governance of St. Francis Church or how St. Francis chose to transmit its religious message, rather it is simply asked to consider Turner's wrongful termination claim based upon breach of contract and retaliatory discharge.

D. The ministerial exception does not apply to Turner because it does not apply to breach of contract claims. Churches are not "above the law" regarding tort liability and enforcing valid contracts.

The dissent in DeBruin noted that where the ministerial exception was properly applied, the claim was not for breach of contract. Id. at 904-05 (Bradley, J. dissenting). Looking towards both Hosanna-Tabor and Rayburn, the dissent states "that their reasoning, which is applicable to claims made under anti-discrimination statutes, does not necessarily extend to claims for breach of contract." Id. at 905. This observation is helpful to understanding the purpose of the ministerial exception in the eyes of the Supreme Court and Circuit Courts of Appeal. The dissent acknowledged that the Supreme Court of Wisconsin took the same approach in Coulee Catholic Schools v. Labor and Industry Review Commission, 768 N.W.2d 868 (Wis. 2009), in which it relied upon the Fourth Circuit's understanding and application of the ministerial exception in Rayburn. DeBruin, 816 N.W.2d at 905. Quoting Rayburn, the dissent in DeBruin took care to explain that churches are not "above the law" and may be held liable for torts and valid contracts "like any other person or organization." Id.

Another example is Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) where a pastor was fired and claimed age discrimination, as the church was hiring people younger than him for the same position. The D.C. Circuit Court determined there would be a First Amendment violation if it examined the claim because it required looking at the church's "Book of Discipline. Id. at 1356. This did not preclude the Minker court from considering the oral contract claim because of the principle in Watson v. Jones, 80 U.S. 679, 714 (1871) that a church's voluntary contracts are not above the law any more than those of a secular organization, holding that "such contracts are fully enforceable in civil court." Minker, 894 F.2d at 1359. The Minker court went further to say the church internal governance is not

endangered by requiring that the church not make "empty misleading promises to its clergy." Id. at 1360. A church is not given a free pass for breach of contract and must be held accountable.

This Court should not allow St. Francis to breach its contract with Turner with no consequences. To do so would be wholly inequitable. Turner is an employee whose employer breached its contract. St. Francis is not "above the law" because it is a church. St. Francis should be held responsible for this breach, as any other individual or organization. Holding otherwise would be detrimental precedent, signaling to others that anything is permissible – breach, fraud, tax evasion – if one claims allegiance to a higher power than governing law.

Courts are not barred from hearing breach of contract claims, including Turner's. Unlike the written contract claim in DeBruin, Turner's claim does not require looking at the written code or laws of St. Francis. The Court may analyze this claim the same way the DeBruin court analyzed the oral contract. This does not call for any inquiry into internal church governance, as in Minker, or its message of spirituality. Turner is entitled to have his claim heard.

E. The ministerial exception is an *exception*, not an *exemption* and public policy calls for Turner being able to proceed with his claim.

As Minker and DeBruin show, St. Francis should not be allowed to hide its tortious conduct and empty contracts simply because it is a church. The ministerial exception serves interests of justice, not deception.

In Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006), the Third Circuit adopted the approach of seven other circuit courts to application of the ministerial exception: "Today, we join seven of our sister circuits in adopting the exception and hold that it applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." This broad approach, however, did not bar the plaintiff's breach of contract

claim because it did not limit the religious institution's free exercise of religion and court analysis would not violate the establishment clause. Id.

Turner was not chosen by St. Francis to perform a particular spiritual function. Turner was hired to administer trust funds based upon his experience in finance. The Court's consideration of Turner's breach of contract claim therefore does not impinge upon St. Francis's free exercise of religion or pose an establishment clause entanglement issue. Turner's claim should be reviewed in the interests of public policy and justice.

Additionally, in Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 607 (Ky. 2014), the Supreme Court of Kentucky recognized the Supreme Court's approach to the ministerial exception. The Kirby court noted that Hosanna-Tabor concluded that "the exception operates as an affirmative defense to an otherwise cognizable claim" and is "not a jurisdictional bar," going further to say that, "It is an exception, not an exemption." Kirby, 426 S.W.3d at 607-08. This means, as Kirby properly stated, that "the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has power to hear [the] case.'" Id. at 607. Turner is entitled to proceed with his claim.

II. The Court erred granting the motion to dismiss because Turner does not qualify as a minster and his wrongful termination does not entangle St. Francis's ecclesiastical matters.

Even though Turner has the title of a pastor, his exercise of financial duties and experience as Treasurer and Chief Financial Officer of the Conference does not qualify him as a minister for the ministerial exception to apply. To overcome the Church's motion to dismiss, Turner's factual allegations within the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true even if doubtful in fact." Bell A. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Turner's complaint must contain more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id. As such, the complaint must state a claim for relief that is plausible on its face. Id. at 570. St. Francis's motion to dismiss cannot be granted based on "the mere presence of a potential affirmative defense." Hyson USA, Inc. v. Hyson 2U, Ltd., 821 F.3d 935, 939 (7th Cir. 2016). To review a motion to dismiss, the Court executes de novo review of the case. Id. at 938.

An affirmative defense is successful "only when the factual allegations in the complaint unambiguously establish all the elements of the defense." Id. Here, St. Francis raised the exception which operates "as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." Hosanna-Tabor, 565 U.S. at 194. For the exception to properly apply the "employer must be a religious institution and the employee must have been a ministerial employee." Conlon v. Intervarsity Christian Fellowship/USA, 777 F. 3d 829, 833 (6th Cr. 2015) (citing Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2014).

St. Francis chose Turner for his financial experience as Treasurer and Chief Financial Officer of the Conference and twenty-five years with IBM. Recognizing financial duties as secular, Turner does not qualify as a minister.

When the ministerial exception does not apply, the Court must consider "the character of the claim, the nature of the remedy, and the presence or absence of a 'direct conflict between the secular prohibition and the proffered religious doctrine." Petruska, 462 F.3d at 310. Since Turner's claim for wrongful termination is based upon a breach of employment contract and his retaliatory discharge is based upon his refusal to participate in alleged fraud and tax evasion, the Court should reverse the motion to dismiss because of the secular nature of these claims along with the government's interest in preserving the public's safety against fraud.

A. Turner does not qualify as a minister because although his title was a pastor, the use of his title while with the church was secular in nature due to his financial duties related to the Trust.

Although the Court has denied a rigid formula in determining the legal question of who may be considered a minister, the Court has identified four qualifying factors. Hosanna-Tabor, 565 U.S. at 190. First, the Court considers the formal title provided by the church, which alone does not immediately apply the exception; second, the Court considers the substance reflected in the title; third, the Court evaluates the employee's use of the title; and fourth, the Court reviews the religious functions performed for the church." Id. at 190, 192. When both factors of title and religious function are present, the Court has held that the employee is a minister but has remained silent on whether the factors alone would constitute the ministerial exception's application. Conlon, 777 F. 3d at 835.

However, a church cannot place a title as "a mere 'subterfuge' to avoid statutory obligations. Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1291 (9th Cir. 2010). Additionally, an employee may be considered a minister if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. Guinan v. Roman Catholic

Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998). Ultimately, the Supreme Court in Hosanna-Tabor expressed that the purpose of the ministerial exception "is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful-a matter 'strictly ecclesiastical.'" 565 U.S at 194.

When the Court determines that the employee's use of her title is more secular in nature and her duties were more related to secular subjects, the Court has held an employee is not a minister. Guinan, 42 F. Supp. 2d at 852. In Guinan, the employee was employed by the Roman Catholic Archdiocese of Indianapolis, where she was employed for eleven years as an elementary school teacher at the All Saints Elementary School. Id. at 850. As a teacher, the employee taught secular courses and a religious course but at times, the employee would teach more than one religious course because the non-Catholic teachers were not permitted to teach the subject. Id. Furthermore, the employee organized Mass once a month, where she would select music and Biblical passages, and an Image of God program, which acted as a sexual education course. Id. When the Roman Catholic Archdiocese opted not to renew the employee's teaching contract, the employee brought a claim under the Age Discrimination in Employment Act, which the Archdiocese responded with a motion for summary judgment under the ministerial exception. Id. Denying the ministerial exception's application, the Court determined that although the employee participated in some religious activities as a teacher, the majority of the teacher's duties were secular in nature. Id. at 852. As a result, the Court held that the ministerial exception did not apply because the employee's use of her title as a teacher were secular in nature. Id.

When the Court determines that an employee's title and function are religious, the Court will qualify an employee as a minister under the ministerial exception. Conlon, 777 F. 3d at 835.

In Conlon, the Intervarsity Christian Fellowship/USA was an evangelical campus mission with the purpose to "establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord." Id. at 829. As an equal opportunity employer and faith based religious organization, the employee was hired as a spiritual director with her duties including "assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines." Id. at 831. During her employment, the employee took a paid leave of absence from her position to address repairing her marriage, which was permitted under the employer's policy. Id. However, per her complaint, the employee's requests to return to work were denied and the IVCF terminated the employee, who alleged the termination was "for 'failing to reconcile her marriage.'" Id. The employee filed a complaint alleging violations to Title VII but the IVCF moved to dismiss the employee's claims under the ministerial exception. Id. at 832. Granting the motion to dismiss, the Court, determined (by utilizing the four factors in Hosanna-Tabor) that the employee was a minister under the ministerial exception because her title as spiritual director was sufficient to be considered a spiritual leader and her duties were important religious functions performed for the IVCF. Id. at 834. Although the Court held that when title and religious function qualify an employee as a minister, the Court remained silent on whether each of the four factors from Hosanna- Tabor alone would permit the Court to qualify an employee as a minister. Id. at 835.

When the complaint lacks enough information for the Court to examine the employee per the four factors in Hosanna-Tabor, the Court has denied the church's motion to dismiss and permitted a limited discovery. Collette v. Archdiocese of Chicago, 200 F. Supp. 3d 730 (N.D. Ill. 2016).

In Collette, the employee held Director of Worship and Director of Music while employed with the Holy Family Parish. Id. Per the employee's complaint, the Parish discovered that the employee "was engaged to and intended to marry his same-sex partner,' and after receiving this information, Defendants asked for Collette's resignation.' Collette allegedly 'refused to resign and was terminated shortly thereafter.'" Id. Considering that the employee's complaint described what a Director of Worship and Music Director would not do, the Court could not determine the employee's functional role. Id. Since the Court could not evaluate the employee's duties or religious conduct, the Court allowed limited discovery. Id.

Turner does not qualify as a minster for the ministerial exception because St. Francis chose his duties to administer the Trust. First, like in Guinan, where the employee's conduct was more secular than religious in nature, Turner's duties and responsibilities in administrating the Trust are more secular than religious. Before becoming a pastor, Turner was a financial manager for IBM Corporation and later, Treasurer and Chief Financial Officer of another regional office of the CCC, which led St. Francis to choose him to administer the Trust.

In addition, Turner's reaction when he discovered that the cemetery was no longer maintained illustrates his role as a financial officer rather than a minister executing his religious functioning. Turner advised the St. Francis Board of Trustees to notify the Wells Fargo Bank that it no longer maintained the cemetery in question, which resulted in the Board instructing him to request the funds and commit fraud on the bank. Afterwards, Turner then when to his supervisor, who told him to follow the Board's orders. Turner, reluctant to commit a white-collar crime, went to the Wells Fargo Bank representative and the IRS, which provided no assistance to the alleged fraud. From his experience and his reaction discovering the alleged fraud, Turner executed his duties as a financial officer rather than a minister's management of a mass or ritual service.

Furthermore, as in Conlon, where the Court was silent on how each of the four factors alone would affect the Court's evaluation of an employee, Turner's title as a pastor alone is not sufficient to be considered a minister. Although the term "pastor" may have a spiritual connotation, Turner's conduct and duties reflect the responsibilities of a financial manager. Turner has not plead to any religious functions as a pastor but has illustrated through his conduct his duties as a financial manager.

Lastly, like in Collette where the Court remanded the case for limited discovery as to the employee's duties as a Director of Worship and Director of Music, Turner's complaint is void of any explanation of his religious functions as a pastor, which must result in a limited discovery due to the ambiguous nature of Turner's complaint. Therefore, the Court must reverse St. Francis's motion to dismiss because Turner does not qualify as a minster for the ministerial exception and limited discovery must be allowed.

B. The Court should allow a limited discovery because Turner's wrongful termination and retaliatory claims do not entangle ecclesiastical matters and involve the government's interest in protecting the public from fraud.

In connection to the ministerial exception analysis, the Supreme Court in Hosanna-Tabor has remained open to whether the ministerial exception bars breach of contract or other tortious claims. 565 U.S. at 195. For instance, the church is limited to not "subject its clergy to corporal punishment or require them to commit criminal acts." Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006). In relation to the contractual obligations, a church "is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1359 (D.C. Cir. 1990). In Jones v. Wolf, the Supreme Court clarified that "courts may always

resolve contracts governing 'the manner in which churches own property, hire employees, or purchase goods." 443 U.S. 595, 606 (1979).

To proceed with civil interpretation, the court may "interpret provisions of religious documents involving property rights and other nondoctrinal maters if the analysis can be done in purely secular terms." Id. at 600-01. For example, when the Court evaluates a statute's applicability against the ministerial exception, the statute first, must "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster 'an excessive government entanglement with religion." Petruska, 462 F. 3d at 311. In relation to claims, the Court must consider "the character of the claim, the nature of the remedy, and the presence or absence of a 'direct conflict between the secular prohibition and the proffered religious doctrine.'" Id. at 310. As such, the Court will not look at the "label placed on the action but at the actual issues the court has been asked to decide." Second Episcopal Dis. African Methodist Episcopal Church v. Prioleau, 49 A.3d 812, 816 (D.C. Cir. 2012).

Determining a claim does not entangle ecclesiastical matters, the Court has held the ministerial exception does not bar the action. Id. at 816. In Second Episcopal, the employee, a reverend who is a Class A pastor, was paid by the Church pursuant to a yearly contract; however, due to financial difficulties, the employee decided to receive her salary through a payment plan. Id. at 812. When the church gave the employee a chance to operate as a pastor in a difference church, the employee refused and she did not receive any further payments from the church. Id. The employee sought a breach of contract claim against the Second Episcopal District African Methodist Episcopal Church, while the church moved to dismiss pursuant to the ministerial exception. Id. at 812. Reasoning that the ministerial exception did not apply to a breach of contract

claim that does not entangle church doctrine, the Court reversed the motion to dismiss. Id. at 816. The court stated that the breach of contract claim did not entangle church doctrines because the contract was a year-long contract for the employee to serve as a pastor of the church, she completed her obligations, and the church did not uphold its promise to pay her. Id.

In instances where an employee's claim presents a possible inquiry into the rights of the free exercise clause, the Court has illustrated that the First Amendment does not immunize the church from all claims against it. Minker, 894 F.2d at 1360. In Minker, the employee, a pastor who was employed with the Baltimore Annual Conference of the United Methodist Church, was denied a promotion in comparison to what a pastor with his qualifications and experience would allow. Id. at 1354. Consequently, the employee sought an Age Discrimination in Employment Act (ADEA) violation against the church and two breach of contract claims, where one derived from the Book of Disciple and the other derived from an oral contract, which was opposed by the church with a motion to dismiss the action pursuant to the First Amendment's protections. Id. at 1356. Although the ADEA claim and the Book of Discipline claim were barred by the First Amendment, the Court held that the breach of contract claim relating to the oral contract was not subject to dismissal by the First Amendment. Id. at 1358, 1359. The employee's claim threatened the possibility of inquiring into the rights protected by the Free Exercise Clause, but the Court reasoned that the employee should be allowed to proceed with proving his breach of contract claim without delving into the church's doctrine. Id. Lastly, the employee's remedy for money damages "will not necessarily create an excessive entanglement." Id. at 1360.

In relation to an employee's claim for fraud, the Court has illustrated that it is not barred by the ministerial exception when it does not impede upon the church's free exercise rights. Petruska, 462 F. 3d at 299, 309, 310. In Petruska, the employee was hired by Gannon University,

a private Catholic diocesan college, as the University's Director of Social Concern. Id. at 299. When the University chaplain left the university to study abroad in Rome, the University hired an interim chaplain, who resigned shortly thereafter. Id. Thus, the President Monsignor promoted the employee to a permanent University Chaplain position, where there was an agreement that her position would not be terminated when the previous University Chaplain returned or for another qualified male. Id. After her appointment, there was a sexual harassment affair regarding the President, who was fired, which led to the University attempting to cover up the sexual affair and the employee's objection to the University's response. Id. Because of her objections to the University's response, the University attempted to remove the employee, restructured the position of University Chaplain, and ultimately, fearing that her position would be terminated, the employee filed her resignation for two weeks' notice, which was accepted immediately. Id. at 300-01. Based on the University's conduct, the employee filed breach of contract, fraudulent misrepresentation, and other related claims, which was responded by the University's motion to dismiss based upon the ministerial exception. Id. at 301. Even though the employee failed to plead with particularity, the court determined that since the state's "prohibition against fraud does not infringe upon Gannon's freedom to select its ministers, resolution of Petruska's fraudulent misrepresentation claim would not violate the Free Exercise clause." Id. at 309. Furthermore, the Court held that the employee's "breach of contract claim 'do[es] not inevitably or even necessarily lead to government inquiry into [Gannon's] religious mission or doctrines." Id. at 311. If the claim's discovery does result in "excessive entanglement, the claims may be dismissed on that basis on summary judgment." Id.

Turner's wrongful termination and retaliatory discharge claims based on the breach of his employment contract and alleged fraud committed by St. Francis should survive a motion to

dismiss because it does not entangle with St. Francis ecclesiastical doctrine. Like in Tomic, where the Court restricted the church's ability to require its employees to commit a crime, Turner was ordered by the St. Francis Board of Trustees, specifically the Vice Chairman of the Board of Trustees, to request the Trust funds, where the cemetery was no longer maintained. Turner refused to follow the instructions and asked his supervisor's advice, which further reinforced the Board's instruction to commit fraud against Wells Fargo. Turner further attempted to alleviate the potential harm of the alleged fraud by contacting the Wells Fargo representative and the IRS.

In relation, the Tourovia Labor Law states that an "employer may not discharge, suspend, demote, or take other retaliatory adverse employment action against an employee because the employee discloses or threatens to disclose information to a public entity or object to or refuses to participate in an action that violates law.... which violation creates and presents a substantial and specific danger to public health or safety."

First, the Tourovia Labor Law has a legislative purpose to protect the public from the threat of fraud and retaliatory actions against employees who refuse to participate in a crime. Second, the statute does not infringe upon the free exercise of religion because it is not within the Church's protection to commit fraud against third parties and retaliate against both its public and private employees. Third, the statute contains no language to suggest that the government would be entangled with religious doctrine. Turner reported the alleged fraud to his supervisor, Dr. Jones, and after receiving Dr. Jones's reinforcement of the Board's instruction to commit fraud, Turner waited from August to October for a correction, which qualifies as a reasonable opportunity for his supervisor to correct.

Furthermore, like in Petruska, where the Court expressed that a claim alleging fraud would not lead the government to inquire into the church's religious mission or doctrines, Turner's

wrongful termination and retaliatory claims would not lead the government into the church's religious mission or doctrine. Even though St. Francis used the language "lost faith in his spiritual leadership", Turner's claim does not require the Court to investigate the related religious doctrines. Turner's claims are intrinsically linked to the alleged fraud and the wrongful termination after Turner refused to participate in the fraud and the monetary damages requested do not entangle the court with the religious doctrines. Based upon the protections provided by the Tourovia Labor Law statute, Turner cannot receive retaliatory actions for not participating in an alleged fraud, which is presumed to be true because of the standard in Bell Atlantic.

Lastly, like in Minker, where the court allowed the employee's breach of contract claim despite the possible threat of an inquiry into the First Amendment, Turner's breach of contract claim is based upon an employment contract. The presumed employment contract is not present in the complaint, which leads the court to allow discovery into the terms of the contract. It is not known if St. Francis hired Turner as an at will employee or for long term employment. The Court should allow a limited discovery into the terms of the employment contract and if the contract leads the Court into ecclesiastical matters, then summary judgment would be appropriate, but not at the pleading stage. If the Court allows the motion to dismiss to be granted, then the Court is setting a precedent for religious entities to commit crimes and terminate any employee who complies with the state law for the protection of innocent third parties. Therefore, since Turner's claims are not requesting the Court to entangle St. Francis's religious doctrines and because of the government's overwhelming state interest in protecting the public, the Court should reverse St. Francis's motion to dismiss and permit discovery.

CONCLUSION

Because Petitioner, David R. Turner, is a "pastor" in name only, primarily employed for his experience and abilities with regard to financial management, the ministerial exception does not and should not apply to bar Petitioner's wrongful termination claim based on breach of employment contract and retaliatory discharge as a result of Petitioner's failure to participate in tortious conduct. The decision of the State of Tourovia Court of Appeals should be reversed.

Respectfully submitted,

Team #10

Team No. 10
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Dated: March 10, 2017