No. 415-2017

In The
Supreme Court of the United States

DAVID R. TURNER,
Petitioner,

vs.

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

On Writ of Certiorari
To The United States Court of Appeals for the Fourteenth Circuit

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PETITIONER'S BRIEF

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Jurisdiction

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1257(a). The Court of Appeals of Tourovia entered its judgment on August 16, 2016. This Court granted writ of certiorari and has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Question Presented

This case presents two important questions:

(1) Whether the ministerial exception first announced in *Hosanna-Tabor* applies where a former minister does not seek reinstatement but rather only seeks damages for neutral, generally applicable breach of contract and retaliatory discharge claims?

(2) Whether the ministerial exception bars discovery and renders a case subject to a 12(b)(6) motion to dismiss for failure to state a claim where the only issues are whether the pastor's discharge was in breach of his valid contract and in retaliation to reporting the church's fraud?

Statement of the Case

On October 16, 2012, Dr. Roberta Jones fired Pastor David R. Turner from his position as pastor of St. Francis Church of Tourovia. R. 3. Six months before, the church had discovered that it would soon receive a hefty sum of $1,500,000 from Edward Thomas Trust. R. 4. To administer the bequest, the congregation chose Turner, a minister who prior to becoming a pastor had been a financial manager for IBM and the Chief Financial Officer of an office of the Tourovia Conference of Christian Churches. R. 4. The trust required that the bequest be split evenly – half for the general operation and maintenance of St. Francis, half for upkeep of the church's cemetery. R. 4. To his dismay, Turner quickly discovered that the Church had sold its cemetery. R. 4. Concerned, he approached the church's Board of Trustees and recommended that it notify Wells Fargo (the trustee) that it no longer owned the cemetery. R. 4. Turner further recommended that the Board contact the bank for advice. R. 4.

Unfortunately, the Board of Trustees was unresponsive, and instructed Turner to request the full amount. R. 4. Pastor Turner refused. R. 4. Instead, he approached Dr. Jones with his concerns. R. 4. She also declined to approach the bank. R. 4.

It was not until he had exhausted all other options that he approached the bank itself. R. 4. In addition, he contacted the Internal Revenue Service and inquired into any potential tax issues might arise if the church continued its current course and accepted the money. R. 4.

On October 16th, only days after he approached Wells Fargo and the IRS, Dr. Jones informed Pastor Turner that his pastorship would expire on October 31st. R. 4.

The following year, on September 12, Pastor Turner filed a complaint against the church, the Congregation of Christian Churches, and Dr. Roberta Jones herself. R. 3. In response, they filed a motion to dismiss, "claiming that the First Amendment's ministerial exception barred the

lawsuit for failure to state a cognizable claim." R. 4. In January 2015, the Honorable Michelle L. Hall presided over a hearing on the issue, and granted the motion to dismiss the following day. *Id.* Remarkably, the judge found that the claim that Pastor Turner raised was "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for the discharge, which is precluded by the ministerial exception." R. 5. On appeal to the Fourteenth Circuit, Pastor Turner presented two questions:

1. Did the trial 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?
2. Did the trial court err by granting defendants' Rule 12(b)(6) Motion to Dismiss without providing an opportunity for discovery?

In considering those questions, the Court of Appeals held that because a consideration of wrongful discharge claims would of necessity require the court to make a "determination about the church's reason for terminating" Pastor Turner, and because that determination would of necessity require considering whether the church had actually lost faith in his leadership, the ministerial exception barred any such matter. R. 8. Further, the court held that because "the complaint was sufficient on its face" to have the claims be precluded by the ministerial exception, the trial court was correct in granting the 12(b)(6) Motion to Dismiss without providing an opportunity for discovery. R. 9–10.

Summary of the Argument

This Court has never held that the ministerial exception bars all proceedings against a church. Churches, like other entities, are free to enter binding contracts. They participate in public life, and have legitimate interest in the social and moral development of the American citizenry. Neither the Establishment Clause nor the First Amendment require courts to

completely refrain from deciding cases involving churches. Churches, for example, are not free to commit fraud with impunity.

This case involves purely secular concerns that can have broad implications on American public life. Applying the ministerial exception to the conduct of the St. Francis Church of Tourovia would insulate churches nationwide from liability for their tortious activity and allow them to breech their contracts with impunity. When an employee is fired in retaliation for reporting the church's fraudulent activity, particularly when that termination is also a breach of a voluntarily entered contract, that employee should have a remedy.

Furthermore, because the ministerial exception is not a jurisdictional bar, but rather an affirmative defense, courts should be free to allow discovery. This discovery could be limited in scope so as to preclude any judicial decisions on ecclesiastical issues such as church doctrine or church ministerial requirements.

Argument

This matter arises out of respondent St. Francis Church of Tourovia's retaliatory firing of Pastor David Turner for informing the trustee of a trust of which the church was a beneficiary and the Internal Revenue Service of potential fraud on the part of the church, which is a violation of Tourovian law. By firing Pastor Turner, the church breached its year-long contract with him and acted contrary to the interests of the American people. This Court has taken the opportunity to consider the judiciary's constitutional authority to examine the inner workings of a church on several occasions, most recently in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2011). Early on, this Court recognized that "total separation is not possible in an absolute sense," and that "[s]ome relationship between government and religious organizations is inevitable." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

As far back as 1871, this Court held that churches, like other actors, could enter judicially enforceable contracts. *Watson v. Jones*, 80 U.S. 679, 714 (1871). Although as time went on, this Court developed stronger provisions to ensure that the government does not become too entangled in the inner workings and doctrinal decisions of churches, a clear distinction regarding these provisions remained. Whereas ecclesiastical decisions would typically be "accepted in litigation before the secular courts as conclusive," a church's fraudulent or collusive decisions would not be free from judicial scrutiny. *Gonzalez v. Roman Catholic Archbishop*. 280 U.S. 1, 16 (1929).

Courts must, for example, take as conclusive "the essential qualifications of a chaplain . . . and whether the candidate possesses them" *Id.* at 17. Likewise, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serb. Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). In *Milivojevich* too, like in *Gonzalez* almost fifty years prior, however, the Court left open the possibility of "marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes." *Id.*

In early 2012, the Supreme Court of the United States explicitly recognized the ministerial exception—that religious institutions can "select and control who will minister to the faithful"—for the first time. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 575 U.S. 171, 195 (2012). In that case, this Court was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Here, both parties readily concede that Turner was a minister at the time his position was terminated. R. 10.

The Court's ultimate holding in *Hosanna-Tabor* was quite narrow. The Court limited its holding to employment discrimination suits where the employee was a minister, and expressed

"no view on whether the exception bars other types of suits." *Hosanna-Tabor*, 575 U.S. at 196. It left open the possibility of courts deciding "actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* The case at bar addresses both of those issues. The question of whether a church can fire one of its ministers in breach of its contractual obligations and in retaliation for that minister bringing knowledge of fraudulent activity to a bank and the IRS falls squarely in this Court's earlier precedent in *Watson*, *Gonzalez*, and *Milivojevich* that (1) churches can enter enforceable contracts and (2) the First Amendment does not provide a shield for a church's fraudulent activity. Accordingly, this Court should find that the ministerial exception does not apply where, as here, a minister seeks "secular relief . . . for secular wrongs committed by his employer." (R. 12.)

This case presents the Court with the opportunity to examine a case wherein fraud led to the termination of a minister's employment with a church and to determine if the ministerial exception can be used to insulate churches from legal recourse for breaching their contracts and committing tortious activity. This Court should hold that the ministerial exception does not protect churches in such activity. Instead, because "[r]eligious institutions make contracts that they break, create risks for which they must be responsible, and conduct many activities in the larger society that impact the general public, beyond their members," the protections of the ministerial exception should be limited to reflect this reality. Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. Rev. 1089, 1089 (2003). For the reasons contained herein, this Court should hold that the lower courts erred in holding that the ministerial exception is so broad.

I. Hearing Pastor Turner's case would not implicate the purpose of the ministerial exception, which to prevent excessive government entanglement with religious affairs.

The First Amendment does not require courts to completely refrain from deciding cases involving churches. Churches, for example, should not, "under the cloak of religion," be able to "commit frauds upon the public…with impunity."

Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

The ministerial exception ensures that courts do not unduly entangle themselves with a religious organization's doctrine or internal affairs. This Court's "decisions . . . confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185. In contrast, however, "provisions of . . . law governing the manner in which churches own property, hire employees, or purchase goods" do not *per se* implicate the Establishment clause or "inhibit the Free Exercise of Religion." *Jones v. Wolf*, 443 U.S. 595, 606 (1979). Rather, "[j]ust as it is not an absolute that an investigation dealing with a secular employee would never involve church doctrine, it is likewise not an absolute that investigation of a minister-type employee's claim would necessarily put ecclesiastical law," or a church's decision on who can be one of its ministers, "at issue." Kerri A. Gildow, Combs v. Central Texas Annual Conference of the United Methodist Church: *Making It Difficult to Keep the Faith When the "Ministerial Exception" to Title VII Still Prevails*, 74 Tul. L. Rev. 1567, 1577 (2000). This Court should hold that the ministerial exception applies only when an actual issue of church doctrine or governance is at issue. While the Establishment Clause prohibits governmental interference with the "[f]reedom to select the clergy," *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952), this Court has not previously extended that prohibition to cases where, as in this case, the resolution of a claim would not require judicial determination of either church

doctrine, clergy selection, or overall church governance. Churches should remain liable under principles of tort and contract.

This is the understanding on many courts throughout the country. The Tenth Circuit, for example, has held that the exception "does not apply to purely secular decisions, even when made by churches." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002). This was also the approach taken by the Fourth Circuit, who reasoned that the initial inquiry must be "whether the dispute . . . is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law,' or whether it is a case in which we should hold religious organizations liable in civil courts for 'purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.'" *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997).

By its very nature, a church's choice of minister is clearly an ecclesiastical question. Neither a claim for retaliatory discharge nor a claim for breach of contract, however, can properly be classified as ecclesiastical questions—although a church is a party, the dispute itself is purely secular. Allowing courts to consider these questions for churches, just as they do for other parties, does not present any danger of excessive entanglement in the church's governance.

Circuit courts around the country have found legitimate entanglement issues where a judicial decision would involve the examination of a church's internal organization[1] or choice of leaders.[2] Where, as here, monetary damages are the only remedy sought by an employee, the concern of entanglement so central to the ministerial exception are mitigated.

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1 Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006).
2 Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

Prior to this Court's *Hosanna-Tabor* holding, the Ninth Circuit discussed the likelihood that a former church employee's discrimination claim under Title VII would lead to unconstitutional entanglement in *Bollard v. Cal. Province of the Soc'y of Jesus*. 196 F.3d 940, 949–50 (9th Cir. 1999). In that case, the employee did not seek "reinstatement nor any other equitable relief" that would require courts to invade the inner-workings of the church. *Id.* The court held that the damages that Bollard sought had a "limited and retrospective nature" that limited the likelihood that the courts would be overly "involved in future or ongoing monitoring of church activities." *Id.* at 950.

One of the specific problems that the teacher in *Hosanna-Tabor* faced in bringing her claim was that she sought to have her prior position reinstated. *Hosanna-Tabor*, 565 U.S. at 180. This was a remedy that the Court was unwilling to give because it would "infringe[] the Free Exercise Clause" and diminish "a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188.

In the case at bar, allowing courts to hear Pastor Turner's claim would not so implicate the First Amendment. Unlike in *Hosanna-Tabor*, where the petitioner sought reinstatement to her formal ministerial position, Pastor Turner is not seeking reinstatement. Rather, he seeks only monetary damages. Requiring the appellee to pay for their contractual breach would not interfere with their decision to fire Pastor Turner. It would still be able to move forward in picking Turner's replacement, and even take the full amount of the endowment. In addition to Turner having the opportunity to recover damages, thereby being made whole after the church's alleged breach of

contract, business at the church would move forward as usual. At no point in the litigation would the court have to decide, or even consider, the church's doctrine.

Generally, concerns of unconstitutional entanglement between the government and a religious body "are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." *Gen. Council on Fin. & Admin. of United Methodist Church v. Cal. Superior Court*, 439 U.S. 1369, 1373 (1978) (Rehnquist, Circuit Justice). The only issues that would need to be resolved by courts are (1) whether Pastor Turner had formed a contract with the church and (2) whether the church had breached that contract. Allowing courts to move forward in such cases would bypass any questions of church doctrine and governance and, for purposes of entanglement, would be as innocuous to the internal governance and ecclesiastical supremacy of a church as holding it liable for a person being injured on church grounds and suing the church for negligence.

Because allowing courts to consider these issues presents no risk of governmental entanglement with church affairs and would not require St. Francis to reinstate Pastor Turner's position, this Court should hold that the lower court erred in applying the ministerial exception to both of Pastor Turner's claims.

II. It would violate public policy to allow a church to fire a minister in retaliation to a report of the church's fraudulent activity or to breach its voluntarily entered contracts with impunity.

a. The Ministerial Exception does not exempt churches from generally applicable principles of contract law.

In the United States, there are around 350,000 religious congregations. Fast Facts About American Religion, Hartford Institute for Religious Research, http://hirr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Feb. 28, 2017). Although the

exact number is impossible to know, estimates say that those congregations employ about 600,000 members of the clergy. *Id.* (internal citation omitted). Regardless of the exact number, churches and their ministers represent a large part of the American lifestyle. The number of congregations, coupled with a staggering number of ministers, presents particularly important reasons for courts to find that the ministerial exception does not apply to claims of breach of contract.

In the United States, parties contract freely. No governmental body is free to force two parties to contract together. Although this prohibition against governmental interference in contract is not absolute, and legislatures are free to impose reasonable limitations on contractual terms, the right of mentally competent adults to enter contracts freely remains sacrosanct.

Along with the right to freely contract, however, comes the responsibility, incumbent upon both parties, to follow those contracts to avoid liability for their breach. As contracts bind parties in other contexts, so too must they bind ministers and churches. As other courts have previously held, this Court should hold that churches, "[l]ike any other person or organization, . . . may be held liable . . . upon their valid contracts." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

The ultimate result of an expansive understanding of the ministerial exception is one of inequity. Churches would be able to sue former ministers who have breached their contracts, but the ministerial exception would bar ministers from the same remedy. Under its protective umbrella, churches would be free to bind others without similarly being bound themselves. *See Watson v. Jones*, 80 U.S. 679, 714 (1871) (holding that a religious organization's "rights of property, or of contract" are protected by the law and that parishioners are "subject to [the law's] restraints").

Rather than allowing churches the ability to enter contracts and subsequently violate them with impunity, there is another way. While this Court has yet to explicitly rule on the applicability

of the ministerial exception to contract law, courts throughout the country have held that the voluntary nature of contract law make it different from Title VII claims, as discussed in *Hosanna-Tabor*, and other facets of state tort law. *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006). Contract law is not a "government-imposed limit" on a church's right to govern its affairs and "select its ministers"—rather, "contractually obligations are entirely voluntary." *Id.* The Establishment Clause should neither preclude churches from entering into contracts nor exempt them after they have freely burdened "their activities voluntarily through contract." *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990).

For these reasons, this Court should hold that the ministerial exception does not apply in contractual disputes, and that voluntary contracts between churches and their ministers are "fully enforceable in civil court." *Id.*

b. Protecting churches in their tortious activity or for breach of contract violates the Establishment Clause.

Although "[t]he values enshrined in the First Amendment plainly rank high in the scale of our national values," it, like other constitutional rights, is not absolute. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979); *see e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

Indeed, this Court has regularly held that the purpose of the Establishment Clause is to neither hurt religion nor help it. "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

If the Establishment Clause is to remain truly neutral, then the ministerial exception should not exempt churches from laws providing a remedy to employees whose positions are terminated in retaliation of reporting fraudulent activity. Indeed, "[f]reeing religious organizations from

regulation provides a relative benefit for religion over nonreligion" which raises legitimate "establishment concerns." William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 Ohio St. L.J. 293, 324–26 (1986).

In its attempts to protect religious organizations, this Court should take pains to avoid placing them above the law. No other employer in Tourovia is exempt from firing its employees in retaliation "because that employee discloses or threatens to disclose information to a public entity or objects to or refuses to participate in an action that violates law, rule, or regulation, which violation creates and presents a substantial and specific danger to public health or safety." Tourovia Labor Law, § 740(1)(A). If churches were granted this immunity under the banner of the ministerial exception, they would be given a privileged position in society—a position that the First Amendment neither requires nor allows. *Everson*, 330 U.S. at 18 (holding that the wall between church and state must be "high and impregnable"). Allowing the St. Francis Church of Tourovia to violate either Tourovian statutory law or the common law of contract would forever damage that "high and impregnable" wall, providing a constitutionally protected defense and court protection of a church's tortious conduct.

No one, including churches, should be above the law. *See Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). This Court has previously held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp't Div.*, 494 U.S. at 879. The same should be true for the establishment of religion. Shielding churches from liability for their tortious acts or breaches of contract does not ensure that the government does not become entangled in their affairs. Rather, churches would be a law unto themselves, completely untouchable by reason of their position in the First Amendment. U.S. Const, amend. I.

To ensure that churches remain neutral in their place in our society, in situations where they are not being tasked by the state with picking their ministers, such as in a Title VII discrimination case, neutral laws of general applicability, such as state tort or contract law, should apply. The ministerial exception should not be so broad in application.

III. The trial court erred by granting defendants' Rule 12(b)(6) Motion to Dismiss without providing an opportunity for discovery.

Summary judgment is appropriate when the pleadings, discovery, disclosures, and affidavits establish that there is no genuine issue of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Herzog,* 884 F. Supp.2d at 672; *Winsley v. Cook Cnty.*, 563 F.3d 598, 602-03 (7th Cir. 2009). A genuine issue of material fact exists when, based on the evidence, a reasonable jury could find in favor of the nonmoving party. *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653, 656 (7th Cir. 2010). In considering a motion for summary judgment, a court construes all facts and draws all reasonable inferences in favor of the non-moving party. *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009).

The lower court stated that the two reasons for dismissing the case were that the petitioner conceded he was a minister and that the Church had told him that their decision to terminate him were motivated entirely by reasons of faith. However, accepting the fact that the Church gave this reason for terminating the petitioner is not the same as accepting this reason given as fact. The court is required to construe all facts and draw all reasonable inferences in favor of the non-moving party. It would be reasonable to construe that the Church would give religious reasons for terminating petitioner, when in reality their motivation was retaliatory because of petitioner's threat to report and refusal to participate in certain tortious acts, including alleged fraud and tax evasion. The Church is not free to cry "religion," so to speak, and forever have dismissed any

tortious claims made against them simply because they claim a certain motivation, when in fact it might not be true. In this case a reasonable juror could find that the motivation was as petitioner asserted, rather than the religious reasons the respondent asserted. In this scenario, the ministerial exception no longer applies and discovery is permissible.

Through the ministerial exception, courts are mandated to allow religious organizations to operate independent from secular control or manipulation, but this does not mean that they have been shielded from all claims. The court should have allowed for limited discovery to address the central dispute regarding why the petitioner's employment was terminated. A genuine dispute of material fact was raised in the complaint when the petitioner made allegations of tortious conduct by his former employer that were directly connected with his wrongful termination and breach of contract claims. Dismissal should only be appropriate under Federal Rules of Civil Procedure 12(b)(6) when the factual allegations in the complaint accepted as true do not state a facially plausible claim for relief. *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016). Therefore the lower court erred in affirming the dismissal based on the mere presence of a potential affirmative defense that should not have rendered the claim for relief invalid. *Collette v. Archdiocese of Chi.*, 2016 WL 4063167 (N.D. III., July 29, 2016). This court should remand the case for discovery unless and until through such discovery it becomes apparent that the termination was indeed motivated solely by church doctrine and governance concerns, in which case the court will be free to grant summary judgment to respondent because of the ministerial exception.

This broad use of the ministerial exception has been rejected by the political branches of the government, as evidenced through statutory exemptions and legislative history. The ministerial exception was a judge-made exception to civil rights laws. There is no ministerial exception written into Rule 12(b)(6) or the employment laws which these claims were brought

under. This is clearly not because Congress is unwilling to enact legislation in support of religious freedom when it sees fit. Congress enacted the "co-religionist" exceptions to Title VII and the ADA to accommodate religious exercise. It enacted a "religious tenets" exemption to the ADA's antidiscrimination prohibition. It has also established broad and general protections for religion like the passing of the Religious Freedom Restoration Act of 1993 (RFRA), but despite all this action, it has never codified the judge-made "ministerial exception."

Furthermore, the remedy sought in the case would not be a reinstatement of petitioner to his former ministerial position, but rather damages for the retaliatory nature of his dismissal, so this does not create an Establishment Clause issue. The Establishment Clause would be at issue if the court attempted to reinstate, and essentially appoint, who ministers in a church.

The discovery required in this case concerning the fraudulent activity of the respondents would not require any inquiry into church doctrine. In *Hosanna-Tabor*, part of the reasoning for avoiding entanglement was because the church and the teacher herself both agreed that threatening to sue was against the religious beliefs of the church. In this case, we have no such claims. We have no reason to believe that it is against the church's doctrine to report illegal crimes, which is the reason for the retaliatory discharge. Again, this would not require the courts to delve into a normative judgment on church doctrine because neither party has made the assertion of that type of entanglement here. The focus here should be on the nature of the plaintiff's claim, the employer's defenses, and the appropriateness of the remedy sought.

The cases of *Minker v. Baltimore* and *Galetti v. Reeve* stand for the proposition that claims like petitioner's should not be dismissed unless the court first permits a factual record to be developed and then determines based on that record, that the claims would substantially entangle the courts in religious doctrine. *Minker,* 894 F.2d at 1361; *Galetti v. Reeve,* 331 P.3d 997, 1001

(N.M. Ct. App. 2014). The trial judge would have had adequate discretion to control discovery so that if ecclesiastical matters overtook the litigation, the case could have been stopped on summary judgment or simply dismissed.

The ministerial exception does not serve as a jurisdictional bar; rather, it operates as an affirmative defense to an otherwise cognizable claim. *Hosanna-Tabor* 571 U.S. at 195 n.4. In this case, the claim brought by petitioner was dismissed not because it lacked plausibility, but because the courts have become overly quick to dismiss any claims that fall under the shadow of the religious exceptions that judges have carved into the First Amendment. The court said discovery was unnecessary solely because petitioner conceded in his complaint that he was a minister. In *Minker*, while the court cautioned that "any inquiry into the Church's reasons for asserting that Minker was not suited for a particular pastorship would constitute an excessive entanglement in its affairs," the court there found that it was indeed possible to continue with discovery without the excessive entanglement for which the ministerial exception was created.

Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). To survive a 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). This plausibility standard reasons that a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. 550 U.S. at 570. The Court set forth two principles: first, a court must accept as true all allegations contained in a complaint that would infer legal conclusions not just factual conclusions; and second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 551. The

plausibility standard is not the same as a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* at 556. Yet, despite these clear standards regarding dismissal under 12(b)(6), the lower court chose to prohibit petitioner's case from moving forward at all because of the mere possibility that entanglement with church governance exists. The lower court erroneously affirmed the motion to dismiss because it fails to acknowledge that it is secular relief being sought by petitioner for secular wrongs committed by his employer.

The court should have allowed for limited discovery to determine whether the ministerial exception applied. If at any time during the limited discovery it becomes apparent that the claims alleged will lead to entanglement with ecclesiastical matters, the court—in its discretion—would be free to stop all discovery and grant defendants a motion for summary judgment. However, in this case, the complaint on its face is a secularly-based tortious employment claim for which the court has a duty to adjudicate until the entanglement becomes so clear that any reasonable juror would make such a conclusion. The option for halting discovery immediately and granting a summary judgment ensures that the court can protect the individual as far as possible without crossing the guarded line into entanglement.

The government has a strong compelling interest in preventing fraud and retaliatory discharge practices among any employer. If the ministerial exception is applied at discovery, then that essentially bars the government from pursuing any interest on a neutral and generally applicable law, no matter how compelling the government interest is, which would counter First Amendment adjudicatory precedent. In *Weishuhn v. Catholic Diocese*, 787 N.W.2d 513, 517, 519-22 (Mich. Ct. App. 2010), the court "recognize[d] that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities."

Nevertheless, courts faced with the application of the ministerial exception function as if they are barred from any further pursuit. The secular claims brought by a person who is employed by a religious organization are turned away at the door, as if the court lacked subject matter jurisdiction to even hear the claim. Petitioners case joined the myriad of other cases where relief was denied after protection was sought. Petitioner's tortious conduct allegations were not addressed and he was turned away from our judicial system without a chance to confront the pretextual reasons provided by his former employer simply because he chose to be employed as a minister.

Hosanna-Tabor did not institute a test in deciding when the ministerial exception would apply and noted outright that the Hosanna-Tabor decision did not address actions being brought against employers for breach of contract or tortious conduct.

Conclusion

For the reasons herein presented, the lower court erred in holding that the ministerial exception applies both where the church breached its voluntary contract and where the church terminated a pastorship in retaliation for a minister reporting the church's illegal, fraudulent activity. Further, because information about how this happened will of necessity require discovery, in those cases wherein retaliation is claimed, discovery should be permitted.

Date: March 10, 2017

Respectfully submitted,

Team # 13
Counsel for Petitioner