No. 415-2017

In the

Supreme Court of the United States

David R. Turner
Petitioner,

-against-

St. Francis Church of Tourovia, The Tourovia Conference of Christian Churches, and Dr. Roberta Jones
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

Brief for the Respondents

TEAM # 17

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QUESTIONS PRESENTED

1) Whether the ministerial exception of the First Amendment protects a church from wrongful termination claims based on breach of contract and retaliatory discharge brought by their employees.
2) Whether a church should be subjected to needless discovery when the ministerial exception is applicable in a 12(b)(6) motion.

JURISDICTIONAL STATEMENT

The judgment of the Tourovia Court of Appeals was entered on August 16, 2016. A petition was filed with the United States Supreme Court. This Court granted that petition. This Court has jurisdiction under 28 U.S.C. §1257(a) (2012).

OPINIONS BELOW

The opinion of the State of Tourovia Supreme Court is reported at Turner v. St. Francis Church of Tourovia, No. 13-C-041511 (T.O. Sup. Ct. Jan. 20, 2015) (indicated in the R. at 2). The opinion of the Appellate Division, Second Department of the State of Tourovia Supreme Court is reported at Turner v. St. Francis Church of Tourovia, No. 13-C-041511 (T.O. App. Div. Dec. 18, 2015) (indicated in the R. at 3). The opinion of the State of Tourovia Court of Appeals is reported at Turner v. St. Francis Church of Tourovia, No. 13-C-041511 (T.O. Aug. 16, 2016) (indicated in the R. at 4-14).

STATEMENT OF THE CASE

Statement of Facts

Petitioner-Appellant David R. Turner ("Petitioner") was a pastor of Respondent-Appellee St. Francis Church of Tourovia ("St. Francis") which is affiliated with the Tourovia Conference of Christian Churches ("CCC"). R. at 4. Petitioner acted as St. Francis's pastor from 2009 to 2012. R. at 4. On October 16, 2012, St. Francis and the CCC informed Petitioner that it had "lost faith in his spiritual leadership" and that its transition would require a different pastor. R. at 4. St. Francis terminated Petitioner's ministerial employment on October 31, 2012. R.

at 4.

Shortly thereafter, Petitioner sued and alleged a completely different reason for his firing. R. at 5. In his complaint, he asserts that in May 2012, St. Francis was granted a bequest from the Edward Thomas Trust (the "Trust") for $1,500,000.00. R. at 5. The Trust allocated half for the maintenance of the church's cemetery, which was sold in 2009, and half for St. Francis's general fund. R. at 5. Petitioner was chosen to handle the bequest. R. at 5. The Vice Chairman of the Board of Trustees for St. Francis instructed Petitioner to deposit the full amount of the Trust's donation into St. Francis's general operating account. R. at 5. Petitioner refused. R. at 5. Since St. Francis had sold its cemetery, Petitioner believed depositing the full amount would constitute a breach of trust, fraud and tax evasion. R. at 5. He advised the Board against it. R. at 5. Thereafter, Petitioner spoke with Dr. Jones, superintendent of the CCC, regarding his belief. R. at 5. Believing Dr. Jones would not act, Petitioner contacted Wells Fargo Bank, the trustee of the Trust, and the IRS to inform them of his concerns. R. at 5. Petitioner alleges that after he contacted the bank and the IRS, St. Francis terminated his ministerial employment. R. at 5.

Procedural History

Petitioner's complaint pleaded claims of common law breach of contract and retaliatory discharge under Tourovia Labor Law Section 740 against St. Francis, the CCC and Dr. Jones. R. at 5. St. Francis moved to dismiss the complaint under Rule 12(b)(6)[1] in the Tourovia Supreme Court.[2] R. at 5. The trial court granted the motion

[1] Tourovia's 12(b)(6) motion to dismiss mirrors the language of Fed. R. Civ. P. 12(b)(6).
[2] Supreme Court is the trial court in the State of Tourovia.

because the ministerial exception applied. R. at 5. Petitioner appealed. R. at 6. The Appellate Division, Second Department of the State of Tourovia Supreme Court affirmed, concluding that the ministerial exception applied to all of Petitioner's claims. R. at 3. Petitioner then appealed that decision and the Tourovia Court of Appeals affirmed. R. at 4. In its written opinion, Tourovia's highest court concluded that the ministerial exception barred Petitioner's breach of contract and retaliatory discharge claims and prevented discovery on these issues because it would require "an inquiry that would entangle the court with the Church's affairs." R. at 7. Petitioner petitioned for certiorari to the United States Supreme Court, which this Court granted. R. at 15.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Tourovia Court of Appeals because the ministerial exception applies to Petitioner's breach of contract and retaliatory discharge claims and because discovery is barred under the ministerial exception and the Religion Clauses of the First Amendment. The ministerial exception is an affirmative defense that protects the exclusive right of churches to select those who epitomize their faith as well as their message. St. Francis has successfully satisfied the essential elements of the ministerial exception.

The ministerial exception precludes Petitioner's breach of contract and retaliatory discharge claims. It bars Petitioner's retaliatory discharge claim because it improperly requires the court to delve into religious matters. Questioning the

validity of Petitioner's termination would undermine the church's rationale for termination. Such an inquiry is prohibited under the First Amendment.

Furthermore, the relationship between a church and a minister touches upon a matter of ecclesiastical concern making the relationship subject to the ministerial exception. Specifically, a contract between a church and its minister is a religious text that falls outside the ken of the courts. The First Amendment compels civil courts to defer resolution of issues relating to religious doctrine to the highest court of the ecclesiastical organization. If this Court permits such governmental interference by litigating Petitioner's claims, the autonomy of a church will be dangerously undermined.

Additionally, this Court should affirm the Tourovia Court of Appeal's decision to deny discovery. Petitioner pleaded all facts necessary for St. Francis to assert the ministerial exception. When an affirmative defense is asserted in a 12(b)(6) motion, a court should dismiss the claim. Since the ministerial exception is an affirmative defense, this Court should conclude that the ministerial exception bars all discovery when applicable in a 12(b)(6) motion.

Alternatively, the Court should deny discovery under the First Amendment's Establishment and Free Exercise Clauses because granting discovery would undermine freedom of religion. Allowing discovery will influence how a church hires and fires its ministers, thus contravening the Establishment Clause. Additionally, the Free Exercise Clause prevents secular courts from finding a violation of a

religious belief, thus barring discovery. Accordingly, this Court should affirm the decision of the Tourovia Court of Appeals.

ARGUMENT

This Court should affirm the Tourovia Court of Appeals and conclude that the ministerial exception bars Petitioner's claims and discovery. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I, cl. 1–2. The Establishment Clause demands a separation of church and state, while the Free Exercise Clause requires the government to refrain from interference with religious practice. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005). The Religion Clauses were created to prevent the civic divisiveness that occurs when government involves itself in a religious debate. McCreary Cty. v. ACLU, 545 U.S. 844, 876 (2005). The First Amendment requires courts to "keep in mind the myriad [of] subtle ways in which Establishment Clause values can be eroded." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (internal quotations omitted). The Religion Clauses additionally empower courts to ensure these freedoms are exercised without fear of retaliation. NLRB v. Montgomery Ward & Co., 157 F.2d 486, 500 (8th Cir. 1946).

With the Religion Clauses' purpose in mind, this Court adopted the ministerial exception in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012). In Hosanna-Tabor, the Court concluded that the ministerial exception bars discrimination claims brought by a minister against his former religious employer. Id. at 188. Many circuit courts and state courts have concluded

that the ministerial exception bars both breach of contract and retaliatory discharge claims. See, e.g., Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997) (barring breach of contract claim); Prince of Peace Lutheran Church v. Linklater, 421 Md. 664 (Md. 2011) (barring retaliatory discharge claim). Courts have also concluded that the ministerial exception may be asserted as an affirmative defense in a 12(b)(6) motion, thus barring subsequent discovery. See, e.g., Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012) (applying the ministerial exception to a 12(b)(6) motion thus barring discovery). This Court should continue to protect the freedom of religion by affirming the decision of the Tourovia Court of Appeals.

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE TOUROVIA COURT OF APPEALS BECAUSE THE MINISTERIAL EXCEPTION BARS PETITIONER'S EMPLOYMENT CLAIMS.

This Court should uphold the decision of the Tourovia Court of Appeals because the ministerial exception applies to Petitioner's wrongful termination claims based on breach of contract and retaliatory discharge. St. Francis successfully satisfied all elements of the ministerial exception. Hosanna-Tabor, 565 U.S. at 188–91. Permitting litigation of Petitioner's breach of contract and retaliatory discharge claims would require governmental interference, which is prohibited by the First Amendment. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976).

A. St. Francis Satisfies All Elements Of The Ministerial Exception Which Allows The Exception To Apply To Petitioner's Claims.

St. Francis satisfies the required elements of the ministerial exception defense. Two elements must be met for the ministerial exception to apply: (1) the employer

must be a religious organization, and (2) the plaintiff must be a ministerial employee. Hosanna-Tabor, 565 U.S. at 190–91. To determine if the ministerial exception applies, courts must analyze the totality of the circumstances. Hosanna-Tabor, 565 U.S. at 190; Melhorn v. Balt. Wash. Conf. of the United Methodist Church, No. 2065, 2016 Md. App. LEXIS 933 at *9 (App. Mar. 16, 2016). A religious organization under the first element includes churches, other religious entities within their control, and religiously affiliated entities with a religious mission.[3] Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829 (6th Cir. 2015). The second element of the ministerial exception requires that the employee is involved in carrying out the church's religious mission. Hosanna-Tabor, 565 U.S. at 187.

Here, both elements of the ministerial exception are met. St. Francis is a church and therefore meets the first element. Id. at 190–191; R. 4–6. Petitioner meets the second element because he acknowledges that he is a minister. Hosanna-Tabor, 565 U.S. at 190–191; R. at 10. Since all elements to the exception are met, it applies to the case at bar.

This Court should reject Petitioner's argument that the ministerial exception contains additional elements concerning entanglement of a court in the internal affairs of a church. This Court's discussion and adoption of the ministerial exception focuses only on the definition of a minister and presence of a church. Hosanna-Tabor, 565 U.S. at 188–90. The ministerial exception is meant to prevent entanglement. Therefore, the only inquiries a court must answer are whether the plaintiff is a

[3] Respondents will address all these entities as churches to simplify our discussion.

minister and whether the defendant is a church. Id. at 181–87. Since St. Francis has met both elements, the ministerial exception applies to Petitioner's claims.

B. Petitioner's Retaliatory Discharge Claim Requires Review of St. Francis's Internal Affairs Which Is Strictly Prohibited Under The First Amendment.

This court should find that the ministerial exception bars a retaliatory discharge claim brought against a church because the claim improperly requires the court to review and delve into ecclesiastical matters. This Court has posited that the decision of a church concerning "the appointment and removal of ministers . . . are beyond the ken of civil courts. Rather, such courts must defer to the decisions of religious organizations on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." Serbian Eastern Orthodox Diocese, 426 U.S. at 714.

This Court has applied the ministerial exception to a discriminatory discharge claim which is similar to a retaliatory discharge claim. In Hosanna-Tabor, this Court held that the ministerial exception bars employment discrimination suits brought by a minister against her church. Hosanna-Tabor, 565 U.S. 171. There, this Court considered a discharge action between a minister and a church, where the minister claimed she was fired contrary to the Americans with Disabilities Act. Id. at 172. Specifically, this Court stated that any investigation by a court into a church's decision to fire its minister would interfere with the church's internal governance and such interference would deprive the church of its exclusive control over the selection of leaders who personify its beliefs. Id. at 174; 188. Critically, this Court emphasized that this singular freedom allows churches the ability to hire and fire ministers,

thereby moldings its faith. Id. at 173.

Courts have applied similar reasoning to retaliatory discharge claims. For example, in Prince of Peace Lutheran Church, the Maryland Court of Appeals held retaliatory discharge claims of a former church employee necessarily involved inquiry into church matters. Prince of Peace Lutheran Church, 421 Md. at 667. In her pleadings, the minister alleged she was fired because she complained to the church about her sexual harassment incident. Id. The court explained that evaluating the merits of the claim required an inquiry into the employment actions taken by the church, which encroached on the church's ability to manage its internal affairs. Id. at 697. The Maryland Court of Appeals reasoned that an inquiry would require a count-by-count analysis of the complaint and the investigation of these allegations would question the ecclesiastical employment decisions of the church. Id. at 686. The court further stated that this type of judicial inquiry into church governance is prohibited by the First Amendment. Id. at 676.

Similarly, the Superior Court of Pennsylvania held that the First Amendment and the ministerial exception apply to bar a minister's cause of action which required the court to interfere with how a church chooses its priest. Warnick v. All Saints Episcopal Church, 116 A.3d 684 (Pa. Super. Ct. 2014). In Warnick, the pastor's ministerial license was revoked and he was terminated from employment. Id. The Superior Court explained that the First Amendment barred the minister's termination claims because the claims were directly related to his relationship with the church's leaders and congregants. Id. at 686. Permitting the claims would have

required the court to determine whether Warnick was terminated for "good and sufficient cause" based on his performance. Id. That conduct is entwined to the minister's fitness, and therefore court investigation would absolutely interfere in an ecclesiastical decision. Id.

In the present case, St. Francis is free to decide whether a ministerial employee should be terminated because the minister will "preach the church's beliefs, teach their faith, and carry out their mission." Hosanna-Tabor, 565 U.S. at 188. The First Amendment grants St. Francis this exclusive right. Id. Petitioner was terminated because the church had lost faith in his spiritual leadership. R. at 4. Even if St. Francis had not lost faith in Petitioner, the church need not offer any religious justification for the decision because the Free Exercise Clause "protects the act of a decision rather than a motivation behind it." Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985).

This case involves a dispute as to whether Petitioner was fired for his refusal to comply with St. Francis's unlawful order or if he was fired because St. Francis had lost faith in his spiritual leadership. R. at 4–5. As stated in Prince of Peace Lutheran Church, any inquiry as to the validity of St. Francis's reasons for firing Petitioner will involve consideration of ecclesiastical decision making, thereby infringing on St. Francis's First Amendment right. Prince of Peace Lutheran Church, 421 Md. at 686. By questioning St. Francis's decision to end Petitioner's employment, the court would deprive St. Francis of its exclusive right to mold its mission. Hosanna-Tabor, 565 U.S. at 188. As illustrated in Warnick, Petitioner's complaint improperly requests the

court to delve into whether there was good and sufficient cause for termination, disregarding the First Amendment. Warnick, 116 A.3d at 686.

Essentially, Petitioner's claims would require this Court to inappropriately delve into ecclesiastical matters and force the Court to consider Petitioner's adherence to religious tenants, teaching skills, relationship with the clergy and followers, and success as a minister as determined by the church. Id. Examining the validity of Petitioner's termination implicates religious doctrine; questioning St. Francis's good faith would allow a challenge to it's rationale for termination. Id. Accordingly, adjudicating such ecclesiastical matters would impermissibly require this Court to insert itself into a realm where the Constitution strictly forbids the court to tread contrary to the very purpose of the ministerial exception.

This Court should reject Petitioner's argument that his retaliatory discharge claim is distinguishable from the discrimination claim in Hosanna-Tabor. 565 U.S. 171. Since both the Hosanna-Tabor discrimination claim and Petitioner's retaliatory discharge claim address employment discharges, First Amendment protections apply. Id. at 204–05 (Alito, J. concurring). Although Serbian Eastern Orthodox Diocese applied the Free Exercise Clause outside the discrimination claim context that was discussed in Hosanna-Tabor, it adopted the same discussion regarding state limitations. Hosanna-Tabor, 565 U.S. at 172–73; Serbian Eastern Orthodox Diocese, 426 U.S. at 714. This Court's opinion in Serbian Eastern Orthodox Diocese shows this Court has historically allowed churches to make ecclesiastical decisions without intervention from civil courts. Serbian Eastern Orthodox Diocese, 426 U.S. at 714.

Since both Hosanna-Tabor and Serbian Eastern Orthodox Diocese support St. Francis's position, this Court should affirm the Tourovia Court of Appeals and hold retaliatory discharge claims fall under the ministerial exception.

C. The Ministerial Exception Bars Petitioner's Breach Of Contract Claim Because A Contract Between A Church And Its Minister Is A Religious Text That Cannot Be Examined By The Court.

A contract between a church and its minister is a religious text that falls within the ministerial exception and outside of a court's purview. As the Fifth Circuit stated, "[t]he relationship between an organized church and its ministers is its lifeblood." McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972). The relationship between a minister and a church therefore touches upon a matter of ecclesiastical concern, making any employment agreement between the two subject to the ministerial exception. DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 899 (Wis. 2012).

Religious texts were first considered unreviewable when the Supreme Court of New Hampshire concluded that secular courts may enforce the terms of a non-doctrinal employer handbook against a religious employer. Reardon v. Lemoyne, 122 N.H. 1042 (N.H. 1982). In Reardon, the court considered whether the trial court had erred in ruling that the First Amendment precluded a court from considering the breach of contract claims brought by a school teacher and principal of a religious school. Id. at 1045. The court dismissed these claims and explained that "religious documents as a rule do not give rise to an employment contract cognizable in a civil court . . ." while purely secular items, such as an employee handbook, may give rise

to such claims. Id. at 1047.

The distinction between religious and non-religious texts was adopted by the D.C. Circuit when it held a breach of contract claim must be dismissed because the court lacked jurisdiction to interpret a religious text. Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990). In Minker, the court considered a breach of contract claim by a minister based upon the provisions from the Methodist Book of Discipline concerning the assignment of pastorships. Id. at 1358. The D.C. Circuit explained that the First Amendment compels civil courts to defer resolution of issues relating to religious doctrine or policy to the highest court of the ecclesiastical organization. Id. at 1357. For a court to construe provisions from the Book of Discipline would require interpretation and even enforcement of matters of religious dogma. Id. at 1358. The D.C. Circuit therefore determined that religious texts are unreviewable under the First Amendment. Id.

The Fourth Circuit Court of Appeals considered an employment contract to be a religious document and held that a breach of contract claim was an ecclesiastical dispute beyond the purview of civil courts. Bell, 126 F.3d 328. The court evaluated whether the employee's breach of contract claim was an ecclesiastical dispute involving discipline, faith, custom, internal organization or law. Id. at 331. Employment contracts, the Fourth Circuit reasoned, cannot be considered in isolation, but must instead be considered in context. Id. The court explained that evaluating adherence to an employment contract would force a court to decide whether the employee met the qualifications to act as a minister thereby implicating

the ministerial exception. Id. at 332.

Finally, while applying the ministerial exception, the Supreme Court of Wisconsin held that a court was barred from considering a breach of contract claim that would require examination of the minister's contract and the church's reasons for his termination. DeBruin, 816 N.W.2d 878. In DeBruin, the court was asked to determine if a church terminated the minister within the limitations specified by the contract. Id. at 913. The court reasoned that interpreting and analyzing the contract would diminish the authority given to a church by the First Amendment. Id. at 888. Such action, the court concluded, violated the First Amendment. Id. Furthermore, it posited that determining the reason for termination would infringe upon a church's choice as to who should be the voice of their congregation and faith. Id.

In the present case, Petitioner's breach of contract claims are barred by the ministerial exception. Petitioner was a minister for St. Francis and entered annual employment contracts between 2009 and 2012 for that purpose. R. at 4. A typical employment contract lays out secular details such as wage, employer or position, but also specifies the duties that an employee is responsible for during his employment. McClure, 460 F.2d at 556. Since a minister is the chief instrument in fulfilling the church's purpose, the minister's duties are of the utmost importance. Id. at 559. Since Petitioner's ministerial contract defines the extent of his ministerial duties, it is effectively a religious document, and a court cannot review it under the ministerial exception. Id.

Not all church contracts are secular. As Reardon conveys, an employee

handbook is quite different from an employment contract. Reardon, 122 N.H. at 1047. While a church's employee handbook informs all church employees of its rules, regulations and policies, a ministerial employment contract is far more individualized, corresponding specifically with each employee's position within a church. See id. at 1044–45. For instance, one employee may have provisions and responsibilities that are directly rooted from the Bible, as evidenced by Minker. Minker, 894 F.2d 1354. Such provisions make the document effectively unreviewable under the First Amendment and therefore the ministerial exception.

Examining the circumstances, Petitioner's claims are subject to the ministerial exception. R. at 7–9. A court should not look solely at a contract, but the circumstances surrounding the contract to determine if Petitioner's breach of contract claim is reviewable. Bell, 126 F.3d at 331. Accordingly, this Court must evaluate Petitioner's specific duties as a minister, the rationale for such responsibilities, and his performance of those tasks. Id. at 332. As indicated above, the examination of such inquiries poses an interference into the church's exclusive control over the selection of its religious leaders. Hosanna-Tabor, 565 U.S. at 173. Such interference into church governance is prohibited by the First Amendment and undermines a church's authority to shape its faith. Id. The contract between a church and its' minister, therefore, is a religious text that encompasses the church's faith, custom, and internal governance and therefore falls within the ministerial exception.

Allowing damages for a breach of contract claim will influence how a church hires its ministers. By adjudicating and potentially granting a monetary award, this

Court would effectively penalize St. Francis for terminating an "unwanted minister." DeBruin, 816 N.W.2d at 889. Such action contradicts the First Amendment's aim to allow a church to carry out its mission without interference. Id. at 882. The First Amendment gives St. Francis the unqualified right to terminate Petitioner "for any reason, or for no reason, as it freely exercises its religious views." Id. at 888. This protection keeps with the spirit of independence from secular control that protects a church's freedom of religion. Id. at 885. Since monetary damages influence how a church exercises its religious views, this Court should hold that the ministerial exception applies to Petitioner's breach of contract claim.

This Court should reject Petitioner's argument that the contract at issue is a voluntary contract and is therefore enforceable in court. While there are contract claims that are amenable to judicial determinations without violating the First Amendment, Petitioner's contract claim is not such a claim. Minker, 894 F.2d 1359. The Establishment Clause guarantees the separation of church and state and prohibits secular courts from acting in areas which would result in excessive entanglement of secular attitudes with religious beliefs. Cutter, 544 U.S. at 719. Specifically, the Establishment Clause creates for churches, "an independence from secular control or manipulation . . . from state interferences [in] matters of Church government as well as those of faith and doctrine." Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952). Issues involving internal church governance, such as Petitioner's employment contract and reasons for terminating Petitioner, are beyond a secular court's scope of

review. Id. Requiring the court to police St. Francis's compliance with its own internal procedures and contracts interferes with the doctrine. Id. This Court should therefore conclude the ministerial exception bars Petitioner's breach of contract claim and affirm the Tourovia Court of Appeals.

II. THIS COURT SHOULD AFFIRM THE TOUROVIA COURT OF APPEALS AND DENY DISCOVERY BECAUSE THE MINISTERIAL EXCEPTION PROTECTS CHURCHES FROM PROBING BY SECULAR COURTS.

This Court should affirm the decision of the Tourovia Court of Appeals to deny discovery. First, Respondent has met all the necessary elements of the ministerial exception from the facts pleaded in the complaint. The ministerial exception, therefore, is applicable in a Rule 12(b)(6) motion. Jones v. Bock, 549 U.S. 199 (2007). Second, discovery would excessively entangle civil courts in the internal affairs of the church, thus violating the First Amendment. DeBruin, 816 N.W.2d 878. For both these reasons, this Court should affirm the Tourovia Court of Appeals.

A. The Ministerial Exception Meets The Requirements Of A 12(b)(6) Defense And Bars All Discovery After It Is Asserted.

The ministerial exception is an affirmative defense that appears on the face of Petitioner's complaint. "A complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense appears on its face." Jones, 549 U.S. at 215.

Courts have already enumerated the requirements enabling a defendant to assert affirmative defenses in a 12(b)(6) motion. Id. When evaluating a motion to dismiss, a court must determine whether a plaintiff can succeed assuming he could prove the factual assertions in his complaint. Petruska v. Gannon Univ., 462 F.3d

294, 302 (3d Cir. 2006). When it is clear on the face of the complaint that the plaintiff cannot succeed, the claim may be dismissed. Stephens v. Clash, 796 F.3d 281, 288 (3d Cir. 2015). An affirmative defense is an argument that "will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Defense*, Black's Law Dictionary (10th ed. 2014). Therefore, when an affirmative defense appears on the face of the complaint, a defendant may assert it in a 12(b)(6) motion. Conlon, 777 F.3d at 833.

This Court has already held that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim." Hosanna-Tabor, 565 U.S. at 195 (quotations omitted). Even before this Court's decision in Hosanna-Tabor, the First, Third, Ninth and Tenth Circuits treated the ministerial exception as a 12(b)(6) affirmative defense. See, e.g., Petruska, 462 F.3d 294; Bryce v. Episcopal Church in the Diocese, 289 F.3d 648, 654 (10th Cir. 2002); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 951 (9th Cir. 1999); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989). Since then, the Fifth and Sixth Circuits have adopted the ministerial exception as a 12(b)(6) affirmative defense.[4] Conlon, 777 F.3d at 833; Cannata, 700 F.3d 169. As with any affirmative defense in a 12(b)(6) motion, the ministerial exception applies when the minister has pleaded all facts that give rise to that affirmative defense. Puri v. Khalsa, 844 F.3d 1152, 1158 (9th Cir. 2017) (citing Jones, 549 U.S. at 215). When applicable, the ministerial exception bars

[4] The Second, Fourth, Seventh, Eighth, Eleventh, Twelfth and D.C. Circuits have not had an opportunity to address whether the ministerial exception is a 12(b)(6) affirmative defense since this Court's decision in Hosanna-Tabor.

inquiry into a church's rationale for termination and prevents discovery of that issue. Petruska, 462 F.3d at 304.

Here, all elements of the ministerial exception are contained within Petitioner's complaint. R. at 4–6. As discussed above, the ministerial exception applies to Petitioner's retaliatory discharge and breach of contract claims. R. at 7–9. Petitioner does not dispute that he is a minister and that St. Francis is a church. R. at 11. Since St. Francis has satisfied both elements of the ministerial exception defense based upon the facts pleaded by Petitioner, this Court should affirm the Tourovia Court of Appeals. Jones, 549 U.S. at 215.

This Court should reject Petitioner's argument to construe Jones narrowly. Id. While affirmative defenses typically are not asserted during a 12(b)(6) motion, Stephens, 796 F.3d at 288, that is because the facts needed to establish all elements of an affirmative defense usually require the defendant to provide additional information outside the complaint. Hyson USA, Inc. v. Hyson 2U, Ltd., 821 F.3d 935, 939 (7th Cir. 2016). In this case however, Petitioner has pleaded all necessary elements of the defense. Puri, 844 F.3d at 1158; R. at 4–6. There is no need for further discovery if all elements of the defense are established. See Petruska, 462 F.3d 294 (dismissing claims without discovery where the ministerial exception applied). This Court should therefore affirm the decision of the Tourovia Court of Appeals.

B. The Religion Clauses And The Ministerial Exception Prevent Excessive Entanglement Thus Precluding Discovery Of Petitioner's Retaliatory Discharge And Breach Of Contract Claims.

Even if the ministerial exception does not apply, discovery regarding St. Francis's rationale for firing Petitioner would inevitably lead to impermissible meddling in church affairs. Both Religion Clauses prevent governmental interference in a church's decision to fire a minister and therefore preclude discovery on that decision. Hosanna-Tabor, 565 U.S. at 181. Since both the Establishment Clause and the Free Exercise Clause protect a church's employment decisions, this Court should affirm the decision of the Tourovia Court of Appeals to deny discovery. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 957 (9th Cir. 2004).

1. The Establishment Clause Precludes Discovery That Would Impermissibly Infringe On A Church's Freedom To Appoint Its Own Ministers.

Discovery of Petitioner's claims would violate the Establishment Clause of the Constitution. The Establishment Clause prevents state and federal governments from appointing ministers. Hosanna-Tabor, 565 U.S. at 184. Since discovery will impact who fills church leadership positions, the decision of the Tourovia Court of Appeals must be upheld. Harris v. Matthews, 643 S.E.2d 566, 572 (N.C. 2007).

The Establishment Clause commands a separation of church and state, thereby preventing government from influencing who is a minister. Cutter, 544 U.S. at 7–9. In doing so, it guarantees a church's independence from the government and the power to decide internal matters for itself. Hosanna-Tabor, 565 U.S. at 199–200 (Alito, J. concurring). This ensures that a church is free from state interference and

that matters of church governance remain in the hands of the church itself. Id. Since the adoption of the Establishment Clause, courts have ensured that a state or federal government cannot affect who is the spiritual leader of a church. Conlon, 777 F.3d at 835–36. By forbidding the establishment of religion the Constitution ensures the government will "*have no role in filling ecclesiastical offices*." Hosanna-Tabor, 565 U.S. at 184 (emphasis added).

Since an inquiry into the validity of a church's reasons for the firing of a ministerial employee involves "consideration of ecclesiastical decision-making," a court violates the Establishment Clause whenever it examines a church's ministerial decisions. DeBruin, 816 N.W.2d at 889. Without First Amendment protections, churches may be open to suits from *any* employment decision whether it is hiring, firing, demotion, failing to promote, or reassignment. Elvig, 375 F.3d at 960–61. This Court has already posited that "the success of judicial supervision in checking discovery abuse has been on the modest side." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007). In a ministerial case, the church must not only bear the burdens of discovery, Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009), but must also suffer a violation of its First Amendment right to appoint its own ministers. DeBruin, 816 N.W.2d at 889. The Establishment Clause is therefore "implicated if the church's freedom to choose its ministers is at stake." Elvig, 375 F.3d at 957 (quotations omitted). Simply stated, "the decision to select and control ministers belongs to the church alone." Cannata, 700 F.3d at 174 (citing Hosanna-Tabor, 565 U.S. at 195).

The majority and concurring opinions in Hosanna-Tabor expressed concern with a court influencing a church's decision to fire a minister. This Court established that "[r]equiring 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." Hosanna-Tabor, 565 U.S. at 188–89 (emphasis added). Justice Alito reasoned that a fact-finder is called upon to determine what matters are ecclesiastical and how those matters affected the minister's employment status. Id. at 205 (Alito, J. concurring). He posited that such action opens the door for potential abuse, and that the Establishment Clause therefore requires a court to allow the congregants—and only the congregants—to choose who their spiritual leaders are. Id. at 205–06 (Alito, J. concurring).

Here, granting discovery will influence how St. Francis makes future firing and hiring decisions. Such discovery will undoubtedly burden a church, which now must comply with discovery requests simply because it followed its congregation's religious convictions. Ashcroft, 556 U.S. at 672. Courts are ill-equipped to use the appropriate care that is required by the Establishment Clause when examining matters touching upon religious doctrine. Bell Atlantic Corp., 550 U.S. at 559; DeBruin, 816 N.W.2d at 889. In effect, subjecting St. Francis to costly discovery and litigation would require a civil court to punish St. Francis for failing to retain a minister. Hosanna-Tabor, 565 U.S. at 188–89. Allowing discovery would influence St. Francis's decision to fire one of its ministers, thus revoking the independence from

government control guaranteed by the Establishment Clause. Hosanna-Tabor, 565 U.S. at 199–200 (Alito, J. concurring).

The Establishment Clause protects St. Francis's decision to hire and fire its ministers. This Court declined to adopt a multifactor or bright-line test when determining who was a minister under the ministerial exception. Hosanna-Tabor, 565 U.S. at 190. In doing so, this Court allowed the ministerial exception to apply to more than pastors. See Cannata, 700 F.3d at 177 (applying the ministerial exception to a piano player). The Establishment Clause requires a court leave the question of ministerial employment to the church. Cannata, 700 F.3d at 174. Members of this Court have expressed concern when courts and juries weigh issues of spiritual fact. Hosanna-Tabor, 565 U.S. at 205 (Alito, J. concurring). This Court should protect St. Francis's independence to shape its own message through choosing its messenger by denying discovery when the party requesting it is a former minister.

This Court should reject Petitioner's assertion that Hosanna-Tabor granted courts the flexibility to tailor limited discovery rules when it declined to adopt a bright-line test. Contrary to Petitioner's argument, this flexibility ensures that "the freedom to select the clergy, where no improper methods of choice are proven," remains a First Amendment right. Hosanna-Tabor, 565 U.S. at 186 (internal quotations omitted). Unrestricted by a bright-line test, courts can promote "the diversity of religious practice in this country" and support "the pluralism of religious thought for which America is known and celebrated . . . ." Cannata, 700 F.3d at 176. This Court's dicta is not, as Petitioner argues, permission to permit discovery in

breach of the Constitution. Once a court concludes that the employee is a minister, the First Amendment demands that the court cease all further inquiry to protect the church's independence. Harris, 643 S.E.2d at 572; DeBruin, 816 N.W.2d at 889. Therefore, this Court should affirm the holding of the Tourovia Court of Appeals.

2. The Free Exercise Clause Bars Discovery Concerning Ministerial Employment Because Discovery For The Legal Claims Would Require Definitive Fact-Finding Of Religious Beliefs.

Petitioner urges this Court explore the reason he was fired. This Court should reject this request because discovery into the motives for a ministerial discharge, "plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause." Natal, 878 F.2d 1575.

The Free Exercise Clause prevents courts from inserting themselves into the spiritual realm. The Clause has long required "noninterference with the religious beliefs" of the people of the United States. Cutter, 544 U.S. at 719. To this day, courts question their ability to gauge religious devotion without interfering with a church's right to determine its own beliefs. Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008); Petruska, 462 F.3d at 302. Examining a church's hiring or firing decision would require a judge to examine such religious devotion and engage himself in the internal affairs of the church. Id. Realizing the constitutional problems arising from this question, courts have concluded they are unable to determine whether a church has "legitimate or illegitimate grounds" for firing a minster. Elvig, 375 F.3d at 961. Ill-

equipped to make conclusions concerning religious doctrine, courts protect the decision to fire a minister. Rayburn, 772 F.2d at 1169.

By granting discovery and permitting fact-finding, "the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." Hosanna-Tabor, 565 U.S. at 188–89. Since a minister is the embodiment of a church's message, a church is obligated to carefully decide who its spokesperson is. Natal, 878 F.2d at 1578. The Free Exercise Clause prevents a civil court from usurping this authority and adjudicating matters that are "essentially ecclesiastical [in] nature, even if they also touch upon secular rights." Bollard, 196 F.3d at 946 (citing Serbian Eastern Orthodox Diocese, 426 U.S. at 713). If a court were to decide ecclesiastical questions that touch upon secular employment rights, a church would lose power to shape its spiritual mission through the selection of its minister. Hosanna-Tabor, 565 U.S. at 188–89. Given the adverse ramifications that arise from examining church affairs, who retains ministerial employment must remain solely the concern of the church. See id. at 206 (Alito, J. concurring).

The Third Circuit concluded that the Free Exercise Clause is tied to a church's decision to select its voice. Petruska, 462 F.3d 294. In Petruska, a minister asserted claims against a religious university after the school restructured its leadership and fired her. Id. at 299–303. The Third Circuit reasoned that the leadership of the organization necessarily touched upon how the university would execute its religious mission. Id. at 307. That effect on the university's governance violated the Free

Exercise Clause. Id. The Third Circuit therefore applied the ministerial exception and barred discovery on the minister's retaliatory discharge claims. Id. at 309–10.

Here, examining why Petitioner was fired through discovery would infringe upon the Free Exercise Clause. St. Francis fired Petitioner because it had "lost faith in his spiritual leadership" and "civil courts are in no position to second-guess that assessment." Hosanna-Tabor, 565 U.S. at 206 (Alito, J. concurring); R. at 4. Civil courts lack the expertise and constitutional authority to determine whether Petitioner met St. Francis's standards. Rweyemamu, 520 F.3d at 209; Elvig, 375 F.3d at 961. Even if Petitioner's breach of contract and retaliatory discharge claims "touch[ed] upon secular rights" the fact that St. Francis had lost faith in Petitioner's ministry makes the decision "essentially ecclesiastical in nature" thus precluding discovery. Bollard, 196 F.3d at 946. Since the Free Exercise Clause protects the decision to fire a minister, St. Francis requests that this Court deny discovery in this action. Rayburn, 772 F.2d at 1169.

This Court should also reject the "neutral principles" approach to discovery that Petitioner recommends. The Hosanna-Tabor Court effectively found that position "untenable." Hosanna-Tabor, 565 U.S. at 189. Adopting this approach will lead a court to treat a church the same way it does a labor union, or a private club. Id. Such an interpretation runs afoul of the explicit protections granted in the Religion Clauses. Id. Furthermore, denying Petitioner discovery in this case does not create a complete immunity of churches from suit. Id. at 195–96. This Court has already reasoned that the ministerial exception only applies to ministers asserting

claims against churches and does not extend to criminal or civil suits brought by those who are not ministers. Id. This Court should therefore affirm the Tourovia Court of Appeals.

The Constitution is clear. It "forbids courts to tread, [on] the internal management of a church." Elvig, 375 F.3d at 961. Determining whether Petitioner was let go for "legitimate or illegitimate grounds," Id., would send this Court "into a maelstrom of Church policy, administration, and governance . . . ." Natal, 878 F.2d 1575. As the Third Circuit recognized in Petruska, that inquiry affects how a church molds its mission and is barred by the Free Exercise Clause. Petruska, 462 F.3d at 307. This Court should therefore affirm the Tourovia Court of Appeals.

CONCLUSION

For the foregoing reasons, St. Francis respectfully requests this Court affirm the decision of the Tourovia Court of Appeals.

CERTIFICATION OF COMPLIANCE WITH RULE 33.1

We hereby certify that this brief complies with the type-volume limitation stated in the Rules of the Supreme Court of the United States. Specifically, using the word count feature of Microsoft Word, this brief is comprised of 7776 words. Per Touro National Moot Court Competition Rule 3(i), we also certify this brief is our original work.

Team #17

Team #17

Dated: March 10, 2017