Case No. 415-2017

In the

Supreme Court of the United States

DAVID R. TURNER,
Petitioner-Appellant,

v.

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

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE
UNTIED STATES COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT

TEAM 21

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the ministerial exception of the First Amendment protects religious institutions from wrongful termination claim based on breach of contract and retaliatory discharge lawsuits brought by their employees.

II. Whether complaints alleging wrongful termination by a minister are subject to 12(b)(6) Motions to Dismiss for failure to state a claim, without an opportunity for discovery, based solely on the application of the ministerial exception to lawsuit.

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BRIEF FOR PETITIONER

Petitioner David R. Turner respectfully requests this Court reverse the judgement of the United States Court of Appeals for the Fourteenth Circuit.

OPINIONS BELOW

On January 20, 2015 Tourovia District Court for Eastview County ordered the case dismissed. R at 2. On August 16, 2016 the Court of Appeals of Tourovia affirmed the trial court's decision. The opinion of the court is available in the record at pages 4-14. The opinion of the United States Court of Appeals for the Fourteenth Circuit is not published.

JURISDICTION

Petitioner filed a timely petition for a writ of certiorari to the United States Supreme Court which was granted. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT

On July 1, 2009 David R Turner (hereinafter "Appellant" or "Turner") began working for St. Francis Church of Tourovia (hereinafter "Respondent" or "Church") as a pastor subject to a yearly employment contract which was renewed three times in June 2010, June 2011, and June 2012. R at 4.

On May 16, 2012 the Church was informed it was to receive a bequest from the Edward Thomas Trust (hereinafter "Trust") in the amount of $1,500,000. R at 5. The Trust provided

$750,000 for the general operation and maintenance of the Church while the other $750,000 was to be used for upkeep of the Church's cemetery. *Id.* Appellant, based on his experience as a financial manager for the IBM Corporation for nearly 25 years and as the Treasurer and Chief Financial Officer of a regional office of the Tourovia Conference of Christian Churches (hereinafter "CCC"), was chosen by the congregation of the Church to administer the bequest. *Id.* Soon after Appellant began to administer the bequest he learned the Church no longer maintained a cemetery fund; determining it would be a breach of trust – and possibly fraud and tax evasion – for the church to accept the $750,000 relating to the upkeep of the cemetery. *Id.* Appellant then advised the Church to seek the counsel of the Trustee, Wells Fargo Bank, to determine how to proceed since the Church no longer owned the cemetery. The Vice Chairman of the Board of Trustees however instructed Appellant to request the full amount of the bequest from the bank anyway. And to deposit it into Church's general operating account. *Id.*

Appellant refused to request the funds, and in August 2012 took his concerns to Reverend Dr. Roberta Jones (hereinafter "Jones"). Later in October 2012, after determining the CCC and the Church did not intend to inform Wells Fargo that the Church no longer maintained the cemetery, Appellant contacted the bank himself to ask for guidance; leaving a message for the bank representative who he believed was handling the trust. *Id.* Appellant also contacted the IRS to advise them of the situation and to discuss any possible tax ramifications but was not able to reach the appropriate party. *Id.*

On October 16, 2012 Jones notified Appellant his pastorship at the Church was terminated effective October 31, 2012 claiming that the Church was "transitioning" because it had "lost faith" in his spiritual leadership. R at 3.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests this Court vacate the Court of Appeals of Tourovia's ruling for the following reasons: (I) Granting relief for wrongful termination based on breach of contract and retaliatory claims does not violate the free exercise clause because it does not inhibit a Church's ability to choose their own ministers; (II) Granting relief for wrongful termination claims based on breach of contract and retaliatory claims does not violate the establishment clause because it does not promote excessive entanglement between church and state.

The court has set a high threshold for a defendant to prevail on a motion to dismiss under 12(b)(6) prior to discovery. The court should only dismiss a claim based FRCP 12(b)(6) when the facts do not contain a plausible claim upon which relief may be granted. Turner has met this burden. The CCC and Dr. Jones may present an affirmative defense in order to show a claim would not exist if the remedy would intrude on the First Amendment. They have failed to do so as the have pointed out that the ministerial exception may apply but that does not preclude discovery to show that the claim would not interfere with the Autonomy Doctrine. The CCC and Jones simply raise the defense but have failed to show how the result of the case would impermissibly interfere would intrude on church doctrine.

ARGUMENT

I. The Ministerial Exception Under the First Amendment Does Not Extend to Wrongful Termination Claims Based on Breach of Contract and Retaliatory Discharge Lawsuits.

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), this Court determined the Ministerial Exception to lawsuits for employment

discrimination involving ministers bars claims against churches. However, the Court declined to extend the exception to breach of contract and retaliatory claims stating: "We express no view on whether the exception bars other types of suits." *Id.* at 716. Section A discusses how granting relief for breach of contract and retaliatory claims do not violate the Free Exercise Clause. Section B provides breach of contract and retaliatory claims similarly do not violate the Establishment Clause. Section C discusses individual liability for retaliatory employment actions. And Section D explains why ruling in favor of Petitioner protects third party interests of the Edward Thomas Trust.

A. Granting Relief for Wrongful Termination Based on Breach of Contract and Retaliatory Claims Does Not Violate the Free Exercise Clause Because the Church's Ability to Choose Its Ministers Is Not Inhibited.

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise Clause precludes governmental interference with the church's ability to appointment its clergy. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F. 2d 1354 (1990). However, it is well established that courts do hold jurisdiction to hear and resolve employment disputes, contract claims, tort claims or similar claims. *Kirby v. Lexington Theology Seminary*, 426 S.W 3d 597 (2014) (holding contract claims could proceed because enforcing the parties' contract required no government interference in selecting ministers, and it involved no ecclesiastical matters, as the employer limited grounds to fire a tenured professor, and the employee did not seek reinstatement); *Bigelow v. Sassafras Grove Baptist Church,* 786 S.E. 2d 358, 364 (2016)(holding that a court could decide the pastor's contract-based claims applying "neutral principles of law," without entangling the court in an ecclesiastical dispute or

interpretation, the ecclesiastical abstention doctrine did not require dismissal of his complaint). Section i discusses why Mr. Tuner's ("Turner") breach of contract claim can move forward without violating the free exercise clause. Section ii discusses why Turner's retaliatory claim does not violate the free exercise clause.

i. Granting Relief for Contract Claims by Church Employees Does Not Inhibit the Churches Ability to Choose Its Ministers.

Churches are organizations free to burden its activities by voluntarily entering into enforceable contracts with its own pastors. *Id.* at 364. "Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." *Id.*

In *Bigelow* the Plaintiff, a former pastor, filed a complaint against defendants – the Church and its board – for breach of contract. *Id.* at 361. Plaintiff claimed defendant church failed to pay compensation and benefits due under his written employment contract. *Id.* at 360. While the defendants argued the First Amendment's ministerial exception and ecclesiastical abstention doctrine barred the court from deciding plaintiff's claim. *Id.* The Court held that because "Plaintiff's complaint does not challenge the Church's decision to terminate his employment, but instead seeks to enforce a contractual obligation regarding his compensation and benefits, the ministerial exception does not apply and is not a basis for dismissal of plaintiff's claims." *Id.* at 365. The Court accordingly decided Plaintiff had sufficiently stated claims for relief. And because the Church, as an organization, willingly entered into the contract, the Court reversed the trial court's order dismissing his complaint. *Id.* at 366.

In *Kirby* Plaintiff was a tenured professor at Lexington Theological Seminary teaching Christian social ethics for many years. *Id.* at 601. But in 2009 the seminary

began experiencing severe financial problems amidst a nationwide economic downturn. During the period of July 2007 to January 2009, the Seminary saw a $9 million reduction in its endowment. *Id.* at 604. And as a result, Plaintiff was terminated. *Id.* He challenged the validity of his termination by bringing an action against the seminary for breach of contract. *Id.* at 602. The trial court granted summary judgment for the Seminary on First Amendment grounds.

On appeal, the Supreme Court of Kentucky established that, when granting relief for a breach of contract, the court was "not presented with a situation where the government is inappropriately meddling in the selection of who will minister to the congregation." *Id.* at 616. The court further stated:

> The government had no role in setting the limits on how the Seminary's tenured professors may be terminated. Instead, this is a situation in which a religious institution has voluntarily circumscribed its own conduct, arguably in the form of a contractual agreement, and now that agreement, if found to exist, may be enforced according to its own terms.

Id. As such, the breach of contract claim was allowed to move forward. *Id.* at 621.

Similarly here, Turner was hired as pastor of St. Francis Church of Tourovia ("St. Francis" or "Church"). R. at 4. Both he and the church willingly entered a yearly employment contract, which was renewed three times in June 2010, June 2011, and June 2012. *Id.* The terms designated July 1st through June 30th as the effective dates of the contract. But Turners employment with St. Francis was terminated on October 31, 2012. *Id.* Turner, just like Plaintiff in *Bigelow* and *Kirby*, is not challenging the Church's decision to terminate his employment, but is rather seeking relief in the form of monetary damages for the breach of contract. R. at 5. As such, Respondent St. Francis Church

should therefore be liable for breaching the obligations it voluntarily took on under the agreement with Petitioner Turner.

ii. Granting Relief for Retaliatory Claims Does Not Inhibit A Church's Ability to Chose Their Ministers and the Free Exercise Clause Does Not exempt Church's from Complying with Valid Laws.

Section 1 illustrates that District Courts have allowed retaliatory claims to move forward. Section 2 provides that this Court has never held the Free Exercise Clause precludes religious institutions or its members from complying with valid laws.

1. Consideration of Retaliatory Claims Do Not Inhibit a Church's Ability to Choose Their Ministers.

The United States Court of Appeals for the Ninth Circuit and numerous state courts have held that the First Amendment does not preclude ministers from suing for sexual harassment. *Bollard v. California Province of the Society of Jesus,* 196 F.3d 940 (1999) (holding that the ministerial exception did not apply to plaintiff's sexual harassment claim because defendants were neither exercising their constitutionally protected prerogative to choose their ministers nor embracing the behavior at issue as a constitutionally protected religious practice.); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1006 (2004) (establishing the First Amendment does not preclude plaintiff from stating a claim for sexual harassment.)*; McKelvey v. Pierce*, 800 A.2d 840 (2002); *Black v. Snyder*, 471 N.W.2d 715 (Minn.Ct.App. 1991) (holding a sexual harassment claim does not involve scrutiny of church doctrine, interfere in matters of an inherently ecclesiastical nature, or infringe upon the church's religious practice). Furthermore, the United States Court of Appeals for the Tenth Circuit has recognized that retaliatory harassment, if sufficiently severe, may constitute adverse employment action for

purposes of a retaliation claim. *See Sanchez v. Denver Pub. Schools,* 164 F.3d 527, 533 (10th Cir.1998)

In *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1000 (2004), Plaintiff, a minister, claimed the church's choir director, an elder of the church, sexually harassed her and after she reported the unlawful activity, her supervisors unfairly disciplined her in retaliation. The District Court, in this case, noted that the evidence would likely involve the nature and severity of the harassment, whether the church knew of it, and whether the church adequately responded. *Id.* at 1007. Nevertheless, the Court held that if Plaintiff could demonstrate that the church had engaged in retaliatory harassment that did not involve an employment decision relating to its choice of minister, and so long as the church did not assert a religious justification for the alleged retaliation: the First Amendment did not preclude her claims. *Id.* at 1009.

Here, Mr. Turner discovered that the Church sold its cemetery in 2009 and no longer maintained a cemetery fund. R. at 5. Thus, he determined that it would be a breach of the terms of the trust—as well as possible fraud and tax evasion—for St. Francis to accept the portion of the bequest relating to the upkeep of the cemetery. *Id.* Therefore, the appellant advised the St. Francis' Board of Trustees to notify Wells Fargo Bank (which was serving as trustee of the Thomas Trust) that it no longer owned the cemetery to ask for guidance. *Id.* Despite his advice, the Vice Chairman of the Board of Trustees instructed Mr. Turner to request the full amount of the bequest from the bank and deposit it into the Church's general operating account. *Id.* Rather than acquiesce in the illegal activity, Mr. Turner reported the situation to Dr. Jones and attempted to contact the IRS for advice. *Id.* It was after this that his contract was terminated. *Id.*

Similar to the facts in *Dolquist*, Mr. Turner reported an illegal act to his supervisors. R. at 5. And just like in *Dolinquist*, the timing of the church's retaliation was soon after reporting the illegal activity. *Id.* Thus, because the court allowed the retaliatory claim to proceed, Mr. Turner's claim should also proceed, as it does not involve the Tourovia Conference of Christian Churches ("CCC") or the Church's ability to choose its ministers. *Id.*

2. The Free Exercise Clause Does Not Exempt Religious Organizations From Compliance With Valid Law.

The free exercise of religion provides, first and foremost, the right to believe and profess whatever religious doctrine one desires. *Employment Div. v. Smith,* 494 U.S. 872, 877 (1990). Thus, the First Amendment excludes all governmental regulation of religious beliefs that infringe on those rights. *Id.* The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, nor lend its power to one or the other side in controversies over religious authority or dogma. *Id.* It is a permissible reading of the First Amendment to say that if prohibiting the exercise of religion is not the object of a law, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. *Id.* at 878. An individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. *Id.* at 878-79.

In *Employment Div. v. Smith*, Respondents were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both respondents were

members. *Id.* Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless a medical practitioner has prescribed the substance. *Id.* When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." *Id.* The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment. *Id.* On appeal, the Supreme Court stated that it "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. *Id.* at 879. Thus the court held that because respondents' ingestion of peyote was prohibited under state law, and because that prohibition is constitutional, state action was consistent with the Free Exercise Clause. *Id.*

Similarly here, Taurovia Labor Law §740(1)(A) prohibits an employer from taking retaliatory adverse employment action against employee because that employee discloses information to a public entity or objects to participation in an action that violates law. *Appendix at 1*. Just like in *Smith*, the law in this case is not designed to inhibit the exercise of religion, but is instead a constitutional restriction on employment practice. Because retaliations are prohibited under Taurovian law, and the prohibition is constitutional, allowing the retaliatory claim to move forward does not violate the Free Exercise Clause.

B. Granting Relief For Breach of Contract and Retaliatory Claims Does Not Violate the Establishment Clause Because it Does Not Promote Excessive Entanglement Between Church and State.

To determine whether state action is valid with respect to the Establishment Clause of the First Amendment, the Supreme Court of the United States applies a three-part test established in *Lemon v. Kurtzman*, 91 S. Ct. 2105, 2111(1971). This Court in *Lemon* provided the three part test stating: "the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; finally, state action must not foster excessive government entanglement with religion." *Id.* at 2118 (internal quotations omitted). This Court further explained that, "[i]nteraction between church and state is inevitable, and the Supreme Court of the United States has always tolerated some level of involvement between the two. *Id.* at 2112. Since *Lemon* this Court has clarified in *Agostini v. Felton*, 117 S. Ct. 1997 (1997): "Entanglement must be '*excessive*' before it runs afoul of the Establishment Clause." *Id.* at 2015 (emphasis added). In order to determine when entanglement becomes excessive courts must look "to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.*

i. Allowing Remedy For Breach of Contract Does Not Necessarily Involve Any Religious Entanglement.

"The First Amendment does not immunize every legal claim against a religious institution or its members, but only those claims that are rooted in religious belief." *Galetti v. Reeve*, 331 P.3d 997, 999 (2014). Moreover, "[t]he Church Autonomy Doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and politics." *Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648, 655 (2002). However, the immunity afforded by the Church Autonomy Doctrine is not absolute. *Id.* Before barring a specific cause of action,

a court first must analyze each element of every claim and determine whether adjudication would require the court to choose between competing religious visions, or cause interference with a church's administrative prerogatives. Next, the court must examine the remedies sought by the plaintiff and decide whether enforcement of a judgment would require excessive procedural or substantive interference with church operations. *Id.* at 1001.

In *Galetti* Plaintiff, was employed as a teacher in a religious school, from 2009-2011. *Galetti,* 331 P.3d at 999. The school was operated by the Conference: a part of the Seventh Day Adventist Church. *Id.* The plaintiff claimed her supervisor harassed her, in the summer of 2010 and later submitted a complaint to the defendant church conference, which issued a written reprimand to the supervisor. *Id.* Afterwards the plaintiff was terminated from her employment leading her to claim her supervisor and conference retaliated against her. *Id.* Plaintiff was told she would be employed as a teacher for the 2011-12 school year but was terminated before completing the year. *Id.* Thus, Plaintiff sued for breach of contract.

The Court of Appeals determined Plaintiff could "succeed on her breach of contract claim without any religious intrusion." *Id.* at 1001. And further stated, " [t]he district court does not need to determine whether the Conference had cause to terminate Plaintiff's employment, but only whether the Conference complied with its contractual obligation with respect to the timeliness of the notice it provided to Plaintiff." *Id.* Furthermore, in terms of remedy, Plaintiff was not seeking reinstatement but instead monetary damages. *Id.* As such, the court held that her breach of contract claim could

potentially be resolved without any religious entanglement," and furthermore, the breach of contract claim could survive summary judgment. *Id.* at 1002.

Similarly here, the court would not need to determine whether the Church had just cause to terminate Mr. Turner, but instead whether the Church complied with their contractual obligation. In addition, just like in *Galetti*, Mr. Turner is not seeking reinstatement only monetary damages. *Id.* at 5. Lastly, the court could potentially resolve his contract claim without any religious intrusion or entanglement. As such, allowing Mr. Turners breach of contract claim does not violate the Establishment Clause. *Id.*

ii. Retaliatory Claims Can Move Forward Without Any Entanglement.

An adverse employment action is cognizable if it is reasonably likely to deter employees from engaging in protected activity. *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951, 965 (2004). The court explained that, "[u]nder this definition, the universe of potential adverse employment actions for retaliation claims is larger than the universe of potential tangible employment actions that can subject an employer to vicarious liability for harassment. *Id.* Thereby illustrating that in the absence of a religious justification, allegations of retaliation survive the ministerial exception. *Id.*

In *Elvig v. Calvin Presbyterian Church*, Plaintiff reported that a pastor was sexually harassing her. *Elvig*, 375 F.3d at 953. After she reported the incident to the defendant church, it retaliated against her by firing her. On appeal, the circuit court determined that intimidation is not a protected employment decision and those types of actions by employers can be the basis for a retaliation claim. The court held Plaintiff "may, consistent with the First Amendment, show the elements of a retaliation claim." *Id.* at 965.

Similarly here, Taurovia Labor Law §740(1)(A) prohibits an employer from taking retaliatory adverse employment action against employee because that employee discloses information to a public entity or objects to participate in an action that violates law. Appendix at 1. Mr. Turner attempted numerous times to report the potential breach of the terms of the trust—as well as possible fraud and tax evasion—by the Church. And by accepting the portion of the bequest relating to the upkeep of the cemetery the church was committing an illegal act. *Id.* at 5. It was after this Mr. Turner's employment was terminated. On its face, the facts clearly illustrate that Mr. Turner was potentially terminated as retaliation for reporting the Church's illegal activity. As such, if the court determines that there is no religious justification, there would be no entanglement and the retaliation claim could go forward.

C. The Ministerial Exception Does Not Automatically Bar Individual Liability Against Dr. Jones Because the Retaliatory Claim Might Not Involve Any Religious Entanglement.

As stated above, "[t]he First Amendment does not immunize every legal claim against a religious institution or its members, but only those claims that are rooted in religious belief." *Galetti v. Reeve,* 331 P.3d 997, 999 (2014). In *Galletti*, the plaintiff not only brought claims against the church but also sued three supervisors at the church for retaliatory and false claims against her. And although, the district court dismissed these claims as possibly entangling the court in religious doctrine; the appellate court held that the district court erred because "they do not necessarily involve religious matters." Id. at 1002.

Similarly here, district court held that, as a matter of law, the "First Amendment does protect the Church against a wrongful termination claim, even on the types of

matters raised in this Complaint." R. at 8. The District Court, just like in *Galletti*, did not inquire as to whether there would be any entanglement, but simply assumed that there would be, and did not engage in fact-specific or claim specific inquiries. Instead, it merely assumed that the retaliatory claim against Dr. Jones would inevitably result in religious entanglement. Like in *Galetti*, the individual claim might not necessarily involve any religious entanglement. As such, the dismissal against the individual claim against Dr. Jones was improper and should be allowed to move forward.

D. If This Court Determines That The Ministerial Exception Applies To Wrongful Termination Based On Breach Of Contract And Retaliatory Claims, It Will Effectively Abolish Third Party Rights Regarding These Types of Claims.

This Court in *Hosanna-Tabor* emphasized that their decision was limited to employment discrimination suits brought on behalf of a minister, challenging the defendant church's decision to fire her. *Hossanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. 694, 710 (2012). The Court explicitly stated they expressed no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. *Id.* Neutral application of the rule of law protects everyone's interests and is required by the First Amendment. *See, e.g., Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 709 (1985) (religious accommodations must take account of third-party interests); *United States v. Lee,* 455 U.S. 252, 261 (1982) (same); *Cutter v. Wilkinson,* 544 U.S. 709, 720, 722 (2005) (prisoners' demands under RLUIPA must be weighed against the "burdens a requested accommodation may impose on nonbeneficiaries" and "measured so that [they do] not override other significant interests."); *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.

Ct. 2751 (2014) (religious accommodations must consider interests of third-party employees).

Tort law and tax law, like most neutral laws of general applicability, protect third parties' interests even when the third parties are not litigants. This Court has always weighed the proposed actions of First Amendment rights holders against potential harm to third parties because "[a]t some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 145 (1987)). Thus, it is appropriate for this Court to consider third-party interests in Petitioner's case.

If the court extends the ministerial exception to wrongful termination based on breach of contract and retaliatory claims, it will undermine third party rights, specifically in this case, the Edwards Thomas Trust. Had Mr. Turner not reported the incident, the fact that the Church could breach the trust might not have been discovered, preventing the Edwards Thomas Trust from asserting its rights.

II. The Court Erred in Granting the Defendant's 12(b)(6) Motion Because the Ministerial Exception Requires Discovery in Determining Whether a Claim Entangles the Court Depends on the Facts and Circumstances of Each Case.

A sufficient complaint only requires a "short and concise statement of the facts" that create "a plausible claim upon which relief may be granted". *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The plausibility standard only requires a court may draw a reasonable inference of liability. *Id.* In the current case, the CCC freely contracted under civil law with Turner creating a yearly employment contract with effective dates starting

July 1, 2012 and terminating on June 30, 2013. R at 3. When they dismissed Turner on October 31, 2012, the CCC breached this contract. This gives rise to a plausible breach of contract claim and meets the sufficiency standard.

Under Tourovia Labor Law §740, a suit requires adverse action against an employee because he reports or threatened to report an employer that a law was violated and the violation causes a substantial and specific danger to public safety and health. (App. 1) The present case has met this standard as first an adverse action occurred when the CCC discharged Turner. Second Turner reported the CCC for fraud violations that pose danger to the public. Lastly it presented a specific danger in defrauding the government. Since the facts show a plausible claim exists due to the time between the reporting and the discharge. Turner has met burden of proof.

A FRCP 12(b)(6) motion looks at either a lack of sufficiency of the facts upon which relief can be granted or affirmative defenses. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). A defendant may raise an affirmative defense but may only rely on the "four corners of the complaint in order to lay out the elements of a defense. *Id. at* 1947. The motion sets a high hurdle for the defendant to overcome when considering an affirmative defense at this stage. Even if an affirmative defense exists, "the mere presence of a potential affirmative defense does not render the claim for relief invalid." *Collette v. Archdiose of Chi.*, 200 F.Supp.3d 730 (2016). Essentially saying that a defendant may raise an affirmative defense but that does not end the need for further proceedings. Under *Connor v. Archdioceses of Philadelphia,* 975 A.2D 1084, 1103 (Pa. 2009), the defendants have the burden to show that the claim and defense would intrude on the First

Amendment. The CCC and Dr. Turner have not as it illustrated below discovery could possibly avoid entangling the court in the First Amendment.

But the issue in this case lies in whether an old exception applies to a new type of claims. As the parties concede: Turner is a minister. This case seeks to examine if and how to apply a ministerial exception. The CCC claims the ministerial exception as an absolute defense and bars discovery. But this Court should examine the factual record in order to determine if the defense applicable because the Court has never applied it to a civil breach of contract claim regarding retaliatory employment actions. This Court should not dismiss Turner's case without the trial court first looking at what discovery seeks to uncover and if those discoveries would entangle the court.

A. The Court Should Not Adopt the Ministerial Exception as an Absolute Affirmative Defense Because the Court Can Examine Breach of Contract Claims on a Case by Case Basis.

The ministerial defense derives itself around the autonomy of the church: Two principles to support such a defense. The Establishment Clause of the First Amendment prevents the excessive entanglement in to matters of the church. *Celnik v. Congregation of B'Nai Isreal*, 139 N.M. 252 (NM 2006). In this case, the lower courts have skipped a step when examining whether the ministerial exception should apply. Their strong reliance on *Hosanna-Tabor's* holding ignores the larger picture of the First Amendment that this Court undertook in examining the issue. In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), this Court first looked to the underpinning of the First Amendment through its history and reasoning for its creation.

The Court expressly left the question of how to apply the ministerial exception to breach of contract claims open. In *Hosana-Tabor*, the Court stated the exception may not

necessarily apply to "actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* at 196. Because this Court has not ruled on this issue, the Court may adopt different rules on discovery for the exception on breach of contract claims. Moreover, This Court warned other courts against adopting a rigid rule in regards to the ministerial exception. *Id.* at 191. The court in *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d. 1360 (D.C. 1990), held that only "some form of inquiry is permissible and some form of remedy is available to survive a motion to dismiss." The inquiry into whether discovery would entangle the court impermissibly should depend on the facts of the case.

i. The Inquiry into the Context of a Dismissal Would Not Intrude on Church Doctrine as the Discovery Depends on a Case-by-Case Basis of the Facts.

This Court has held that not all entanglements violate the First Amendment. In *Agostini v. Felton,* 117 S. Ct. 1997, 2015 (1997), this Court explained that a court may interact with a church so long as it is not "excessive". In *Agostino* the court used the following factors to determine when entanglement becomes excessive: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* The current case questions whether discovery into "pretext" firings would excessively entangle the court in ecclesiastical matters.

The court can separate ecclesiastical matters and contract law without excessively entangling itself. In *Minker* the court examined what constitutes ecclesiastical matters regarding church doctrine. The case split between what the court could permissibly inquire into and when it crosses the threshold of ecclesiastical matters. The court found the ministerial exception did apply to the claim based on the religious doctrine known as

the "Book of Discipline". In order to inquire into the matter it would require the court to look at the validity of its decision based on the religious law created by the text. *Id.* at 1360. On the other hand, however, the court applied civil law to the oral contract aspect of the case. *Id.* And in doing so did not encroach on the First Amendment by only looking for the elements of contract law.

In the plurality opinion of *DeBruin v. St. Patrick Congregation*, 343 Wis. 2d 83 (2012), Justice Crooks presents a framework that examines a contract through civil law. The important part of his opinion depended on the terms of the contract. *Id.* at 109. The terms of the plaintiff's contract explained grounds for dismissal as "for good and sufficient cause". Crooks pointed out that this clause creates and illusory promise making the contract unenforceable but did not comment on the First Amendment issue. *Id.* This follows the framework of the ministerial exception in a different way because under those terms the ministerial exception would apply. But if the requirements for dismissal have detailed requirements, depending on the terms of the contract, inquiry would not question a religious issue.

Courts choose to enforce parts of these contracts such as procedural issues. *Galletti* at 1001. In this case a procedural issue may arise. This creates the need for discovery to investigate the terms of a contract under the ministerial exception. Under the current set of facts, Turner provided enough facts to meet the sufficiency standard. He does not need to explain every detail of the claim but instead, only that a plausible claim exists. How the CCC breached the contract other than the plausible theory of retaliation does not go into the nuances of contract law. After discovery the court may find enforceable provisions and unenforceable provisions based on the ministerial

exception. This creates the need for remand so the court may proceed in determining whether at least some parts of the contract remain enforceable.

Depending on facts found in discovery, Turner may still have a viable claim not subject to the ministerial exception. The court must examine the contract in more detail to determine what approach to use as the facts only state the length of the contract of one year. R. at 3. If procedural requirements under the contract did exist then the court should enforce them. The Court would not need to question the Church's reason for dismissal, only that the CCC violated a procedural term of employment.

ii. The Liability of Dr. Jones Requires Discovery Because a Separate Tort Claim Against an Individual Differs from a Normal Ministerial Employment Dispute.

The Church does not escape liability under a tort theory because tort liability attaches to Dr. Jones separately. Turner reported the illegal nature of accepting the bequest to Dr. Jones the superintendent of the CCC. R. at 4. While the power to dismiss Turner likely vests in Dr. Jones, discovery is needed to determine if separate liability attaches to Dr. Jones. Similar to other tort claims in other courts, singular liability provides another method for a claim to survive a motion to dismiss.

A tort for wrongful discharge under the theory of retaliation may still attach to an individual. In *Galletti v. Reeve*, 331 P.3d 997 (NMCA, 2014), the New Mexico Court of Appeals points out an individual may not qualify as a church under the ministerial exception. *Id.* at 1001. The court claimed it would not intrude on the First Amendment if the court should find at the outcome it would not entangle the court. *Id.* The defendants argued that the tort would arise out of the church autonomy doctrine because it would inherently involve the church's reasoning for dismissal. *Id.* But the court did not agree

by stating the issue relates to a case-by-case finding of fact. *Id.* Galletti thereby illustrated that the court may examine the possibility of pretext dismissal against Dr. Jones under this framework. While other courts have ruled the exception applies; such as in *Elvig v. Calvin Presbyterian Church*, F.3d 951, 966 (9th Cir. 2004), the reasoning also comes down to the fact that may lead to a limited discovery so long as the court directs the discovery into such limited issues.

In discovery, the court may limit itself to specific issues in order to determine liability to Dr. Jones. While possibly the head of the church, she is still just an employee in her individual capacity. The court may find in discovery that she acted outside of her duties making her liable to Turner because her actions may not have involve the churches approval and contain only secular issues. Under the exception the courts often express a broad view of church governance but in those cases more information was available.

B. Discovery Would Not Excessively Entangle the Government and Ecclesiastical Matters in Regards to the Internal Governance of the CCC Because Turner Does Not Bring a Claim Under Church Doctrine.

The First Amendment does not automatically bar inquiry into ecclesiastical matters but it is well established that the government may not excessively entangle itself into issues involving the church. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 Normally, the *Lemon* test applies to the Establishment Clause of the First Amendment based on an affirmative state action. Though this case involves a passive action, the *Lemon* test shows that the court has the capability to determine whether the entanglement qualifies as excessive. Here, the breach of contract claim need not look to church doctrine to determine whether the CCC breached its contract with Turner.

An excessive entanglement occurs when a law requires the court to have "comprehensive, discriminating, and continuing surveillance" to ensure ongoing compliance with the law. *Lemon* 403 U.S. at 619. In cases of discovery, the court does not require a comprehensive examination of all of the facts. It only needs to allow a factual record to develop before dismissing the claim. The discovery would intrude insofar as looking at possible human resources records and depositions. Moreover, the court may limit this discovery to make it a minimal and brief intrusion terminating as soon as the defendant established inquiry by the court would intrude on church doctrine.

i. The Court Must Allow Discovery to Determine Whether the CCC Had Relied on Either Church Doctrine or Procedure in the Dismissal of Turner Under the McConnell Test.

Most lower court cases examine not only whether a claim may exist but also if rules govern how the church selects its ministers and methods of redress within the church. Without these, the court could not know whether an ecclesiastical question exists. The court respects hierarchal decisions at the highest level of the church as this often requires interpretation of "ecclesiastical matters". *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 96 S. Ct. 2372, 2381 (1976) In *Milivojevich*, this Court suggested the prohibition of disturbing these decisions vest in the idea that church doctrine or rules in these decisions cause entanglement. *Id.* In essence, the Court has defined "ecclesiastical matters" as issues dealing with structure within the church such as procedures for internal disputes and religious text.

In the case at bar, the CCC has not shown any form of hierarchy other than Dr. Jones as a superior. The CCC has shown no church doctrine involved in how the church deals with internal disputes. A broad statement of "loss of faith" from a ranking official

in the church does not show that a religious reason actually existed for the dismissal. If the court finds that even if Dr. Jones did not have the power but the church entity supports his decision then the court may end its inquiry. But the court should still allow the inquiry to begin.

The CCC and Dr. Jones may argue that *Milvojevich* also discusses that a church may dismiss ministers arbitrarily or for no reason, *Id.* at 2382. But they do not address when they act tortuously without involving ecclesiastical matters. The purpose of *Milvojecich* was not meant to create a bar of discovery of any matter involving employment or property disputes. It serves the idea that once the court finds a reason that involves what the court may find arbitrary or lacks any reason then it may not intrude. *Id.* To consider retaliatory conduct arbitrary or lacks a reason does not fall within this framework.

Justice Alito in the concurring opinion for *Hosanna-Tabor*, points out that the pretext argument in that case had a specified reason that would entangle the court. He explains that under the facts of the case the defendant's reason for dismissal relied on a Lutheran principle of internal dispute resolution. *Hosanna-Tabor,* 132 S. Ct. at 715. The issue became about the sincerity of that belief and how religion intertwined in the dismissal. To question this specific issue would call into question religious doctrine and court's role. The question before the court does not ask if the religious reason has validity but if that was the actual reason for the dismissal.

The Court would also not need to examine the validity and sincerity that a belief exists in discovery. In *Redhead v. Conference of Seventh-day Advent*, 556 F.Supp.2d 125, 134 (E.D. NY 2008), the district court used a workable framework to allow for

inquiry into pre-textual discovery without involving religious doctrine. The court framed the question as not whether the church sincerely believes in a religious tenet justifying a dismissal. *Id.* But whether the motive of the church "was in fact pretext". *Id.* That court differentiates the two by explaining the inquiry does not look at the substance of the motive but rather if the motive caused the dismissal. *Id.*

In the current case, this framework would allow Turner to bring inquiries into whether the church "lost faith" in him. Discovery would not look into the sincerity of the loss of faith but rather if another reason actually caused it. If the CCC had discussions regarding the firing of Turner, they may not involve religious doctrine. In discovery, the court could inquire into discussions or documents circulated about the dismissal such as e-mails between two members discussing the dismissal. If the content of discovery finds that the "loss of faith" reasoning did not exist prior to the suit brought by Turner, it would not examine the substance of a religious reason for the dismissal. By utilizing only limited discovery, the court may not necessarily have to look at the religious reasons for the dismissal. If the church did have an actual religious reason, the inquiry would end. But the question of a pretext firing does not need to look at the content of the pretext reason but instead only whether another motive exists.

The CCC freely contracted with Turner under civil law and this Court should allow discovery to determine whether it should apply the ministerial exception. The difference between courts examining a contract under civil law from impermissible entanglement of religious law derives from the source the contract originally stemmed from. Here the facts of the case do not show what theory of law the contract originated. Under limited discovery, the court may find that the terms do not involve religious

doctrine and could examine whether to apply the ministerial exception. For example, the court might find evidence that the church through e-mails did not even consider religious reasons. This would allow discovery into a contract issue without entangling the court as in *Minker*. But without discovery the court cannot even determine whether it would or would not encroach on the First Amendment.

ii. The Court Should Not treat the Ministerial Exception as an Absolute Defense as It May End Discovery at Any Time Should It Discover the Inquiry Into Turner's Breach of Contract Claim or Retaliation Claim Would Entangle the Court at the Conclusion of the Matter.

By not examining each claim under a case-by-case circumstance, the court would essentially create an absolute bar preventing discovery. This Court in *Hosanna-Tabor* warned about rigid formula when determining whether an employee falls under the definition of a minister. *Hosanna-Tabor,* 132 S. Ct. at 707. Moreover, this Court refused to apply it immediately to breach of contract claims and tort claims. *Id.* at 710. This indicates an unwillingness to adopt a bright-line rule regarding employment causes of action. If at that time this Court believed the rule should apply to all religious employment disputes, it would have done so. The court must base its finding based on the facts of the complaint. *Ashcroft* at 1948. If the complaint contains no religious issues other than the status of the parties and a general reason for the dismissal, then the court should proceed as this would not entangle the court in church doctrine.

Lower courts have held the ministerial exception does not create an absolute defense. In *Elvig v. Calvin Presbyterian Church*, F.3d 951 (9th Cir. 2004), the court held the defense does not always protect individual leaders and the vicarious liability of the church. In that case the court held that limited sexual harassment retaliation claims may still prevail depending on the facts of the case. *Id.* Although the court held that in part the

dismissal retaliation claim falls under the protection of the ministerial exception in that instance, it also provided that some employment actions claims would not fall under the First Amendment. *Id. at 964* (verbal abuse as retaliation). The court held that it could enter discovery so long as it limits itself to "discrete secular issues". *Id.* at 966. This shows that the court may proceed into discovery to determine if it would intertwine with the church autonomy doctrine.

This Court should be reluctance to apply the ministerial exception in tort cases and instead allow a factual record to develop. By allowing a church to freely commit tortious conduct and then claim First Amendment protection creates a shield that would place almost no liability on church actions. The reluctance the court has when discussing the ministerial exception lies in the outcome of a decision against the church. *Galletti* at 1002. The point of limited discovery seeks to answer that question. If a court can find a form of relief that would not infringe on the First Amendment, it should allow a civil court to decide the issue. *Id.*

The argument that a tort claim or breaching a contract for money damages would punish the church for its selection of ministers does not succeed in showing an intrusion of the First Amendment. Instead, it would serve as a deterrent for those churches acting in a tortious manner or entering into contracts they know the courts will not enforce.

CONCLUSION

For the reasons set forth above, this Court should find that the ministerial exception of the First Amendment does not protect religious institutions from wrongful termination claim and complaints alleging wrongful termination should not be dismissed without opportunity for discovery, based solely on the application of the ministerial exception.