No. 415-2017

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID R. TURNER,

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE TOUROVIA COURT OF APPEALS

BRIEF FOR PETITIONER

TEAM 23

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QUESTIONS PRESENTED

I. Whether the ministerial exception of the First Amendment protects religious institutions from wrongful termination claims 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 the lawsuit?

JURISDICTIONAL STATEMENT

The judgment of the Tourovia Court of Appeals affirming dismissal for the respondents was entered on August 16, 2016. R. at 4. Turner timely filed a Petition for Writ of Certiorari, which was granted by this Court. R. at 15. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Statement of Facts

The petitioner, David R. Turner, was hired as pastor of St. Francis Church of Tourovia (hereinafter "St. Francis" or "the Church") on July 1, 2009. R. at 4. Turner was employed by the Church under a series of annual employment contracts. *Id.* While employed by the Church, Turner's contract was renewed three times, in June 2010, June 2011, and June 2012. *Id.* The term of all three contracts was designated as July 1st through June 30th. *Id.*

On May 16, 2012, the Church was informed that it was scheduled to receive a bequest from the Edward Thomas Trust (hereinafter "the Thomas Trust" or simply "the Trust"), of which St. Francis was a beneficiary. *Id.* at 5. The bequest to the Church was $1,500,000.00, one half of which was to be used for the general operation and maintenance of the Church, and the other half of which was to assist in maintaining the Church's cemetery. *Id*. Turner, who before becoming pastor had worked as a financial manager for IBM Corporation for nearly twenty-five years, and then as Treasurer and Chief Financial Officer of another regional office of the Tourovia Conference of Christian Churches (hereinafter, "CCC"), was selected by

the congregation of St. Francis to administer the bequest because of his deep financial expertise. *Id.*

However, Turner soon learned that the Church had sold its cemetery in 2009 and no longer maintained a cemetery fund. *Id.* He then determined that it may constitute a breach of trust – as well as possible fraud and tax evasion – for St. Francis to accept the portion of the bequest relating to the maintenance of the cemetery. *Id.* As a result, Turner advised the Church's Board of Trustees to notify Wells Fargo Bank (which was serving as the trustee of the Thomas Trust) that it no longer owned the cemetery, and to request that the bank provide further guidance. *Id.* Nevertheless, the Vice Chairman of the Board of Trustees instructed Turner to request the full amount of the bequest ($1,500,000.00) from the bank and deposit it into the Church's general operating account. *Id.* Turner refused to follow these instructions and, in August of 2012, reported his concerns about accepting the portion of the bequest that was meant for the cemetery to Dr. Jones. *Id.*

In early October 2012, Turner, having determined that the CCC and the Church trustees had no intention of informing Wells Fargo of the circumstances, contacted the bank himself to request guidance. *Id.* He left a message for the bank representative who he believed was handling the Trust. *Id.* Moreover, he attempted to contact the IRS to advise them of the situation and to discuss any potential tax ramifications. *Id.* On October 16, 2012 – only four months into this third and final annual contract – Turner's employment at St. Francis was terminated prematurely by the Reverend Dr. Roberta Jones, superintendent of the CCC. *Id.* Dr. Jones

informed Turner that his pastorship at St. Francis would end effective October 31, 2012. *Id.* Jones explained to Turner that St. Francis was "transitioning" because it had "lost faith" in his ability to lead the Church in a pastoral role. *Id.* at 4.

B. Procedural History

On September 12, 2013, Turner filed a Complaint in the State of Tourovia Supreme Court against St. Francis, the CCC, and Dr. Jones. R. at 5. The Complaint alleged wrongful termination based on breach of the employment contract and on retaliatory discharge because of Turner's threat to report and refusal to participate in the Church's potentially tortious acts, including alleged fraud and tax evasion, connected with the administration of funds from the Thomas Trust. *Id.* In the Complaint, Turner requested relief in the form of monetary damages for the breach of contract and retaliatory discharge claims. *Id.*

On March 31, 2014, the Church, the CCC, and Dr. Jones filed a Rule 12(b)(6) Motion to Dismiss Turner's September 12, 2013, Complaint for failure to state a cognizable claim, asserting that the First Amendment's ministerial exception precluded the lawsuit as a matter of law. *Id.* at 2, 5. The Tourovia Supreme Court held a hearing on January 20, 2015, to consider the motion. *Id.* at 5-6. The next day, the Supreme Court granted dismissal under Rule 12(b)(6) in favor of the Church, the CCC, and Dr. Jones. *Id.* at 2, 6.

In the dismissal order, the Supreme Court stated that its decision was based upon "reason[s] stated on the record in open court," which included the court's finding that Turner's claims were intrinsically connected to issues of church

doctrine and governance and would require investigation into the Church's motives for the termination, which is prohibited by the ministerial exception. *Id.* at 6. The Appellate Division of the Tourovia Supreme Court affirmed the trial court's dismissal order on December 18, 2015. *Id.* at 3, 6. Subsequently, the Tourovia Court of Appeals affirmed on August 16, 2016. *Id.* at 4. Turner timely filed a Petition for Writ of Certiorari in this Court, which was granted pursuant to 28 U.S.C. § 1257(a). *Id.* at 15.

SUMMARY OF THE ARGUMENT

The trial court's grant of respondents' Rule 12(b)(6) motion to dismiss was contrary to federal and state law. First, the court failed to acknowledge that the First Amendment does not bar courts from considering all breach of contract or retaliatory discharge claims. The trial court should have analyzed whether lawsuits brought by employees are judicially cognizable where adjudication of the claims would not interfere in religious institutions' doctrinal or spiritual decisions. Had the court engaged in the proper analysis, it would have found that both the breach of contract claim and the state law retaliatory discharge claim were properly brought, and that dismissal was inappropriate. *See, e.g., Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006); *Galetti v. Reeve*, 331 P.3d 997 (N.M. Ct. App. 2014). Moreover, because the Supreme Court has held that the First Amendment's ministerial exception is an affirmative defense that must be pleaded and proved by the defendant, and because limited discovery into the secular claims would not require inquiry into matters of religious belief, doctrine, or church administration, dismissal based solely upon consideration of the complaint was inappropriate. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012); *see also Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1989). For these reasons, the trial court's grant of dismissal was improper and should be reversed, and the case remanded for further proceedings.

ARGUMENT

I. The trial court's grant of dismissal should be reversed because the First Amendment's ministerial exception does not bar wrongful termination suits brought against religious institutions by their employees based on breach of contract and retaliatory discharge.

The trial court found that dismissal of Turner's complaint was proper because the First Amendment's ministerial exception bars employment-related claims against the Church, the CCC, and Dr. Jones.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is warranted only where the plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). In evaluating such a claim, the court's analysis is limited to consideration of the pleadings. *See Carter v. Stanton*, 405 U.S. 669, 671 (1972). Additionally, in reviewing a 12(b)(6) motion, courts must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 551 (2007). Only a complaint that states a plausible claim for relief will survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 551.

It is well-settled that a trial court's conclusions of law are reviewed *de novo*. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). In the instant matter, there is no disputed issue as to the facts the trial court applied in its dismissal analysis. However, the trial court committed two errors of law. First, the court improperly failed to recognize that the First Amendment permits wrongful termination claims

based upon breach of contract and retaliatory discharge. Moreover, the trial court erred when it granted dismissal without providing Turner an opportunity for discovery. Because this appeal involves errors of law, this Court should review the trial court's dismissal order *de novo*.

A. The First Amendment does not preclude courts from considering wrongful termination claims that are purely secular and do not interfere in internal religious decisions.

The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I. These protections are applicable both against the federal government as well as the states. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 14-16 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). In its cases considering the two Religion Clauses, the Supreme Court has shed light upon their guarantees.

First, the Free Exercise Clause protects religious freedom by "embrac[ing] two concepts – freedom to believe and freedom to act." *Cantwell*, 310 U.S. at 303-04 (footnote omitted). Fundamentally, the "free exercise of religion means…the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The first is "absolute but, in the nature of things, the second cannot be. Conduct [must be] subject to regulation for the protection of society." *Id.* The Free Exercise Clause also provides institutional protection by forbidding governmental action from "encroaching on the ability of a church to manage its internal affairs." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C.

Cir. 1996) (citing *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952) (explaining that the Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine")).

By contrast, the Establishment Clause prohibits states from promoting religion or becoming excessively entangled in religious affairs. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1989). The Supreme Court has observed that there are three primary evils against which the Establishment Clause was intended to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

From these clauses arose what has been called the "church autonomy" doctrine,[1] which "prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). The church autonomy doctrine guarantees protections for both interests enshrined in the First

[1] Courts have attributed various names to this doctrine, including "church autonomy" and "ecclesiastical abstention." *See, e.g., Galetti v. Reeve*, 331 P.3d 997, 1000 (N.M. Ct. App. 2014) (analyzing the case under the "church autonomy" doctrine); *Malichi v. Archdiocese of Miami*, 945 So.2d 526 (Fla. Dist. Ct. App. 2006) (considering the "ecclesiastical abstention" doctrine). For purposes of the present case, this brief will use the term "church autonomy doctrine."

Amendment. First, it "prevents civil legal entanglement between government and religious establishments by prohibiting courts from trying to resolve disputes related to ecclesiastical operations." *Galetti*, 331 P.3d at 1000. Second, it "protects the free exercise of religion by limiting the possibility of civil interference in the workings of religious institutions." *Id.* (internal quotation omitted).

Additionally, in *Hosanna-Tabor*, the Supreme Court recognized that there exists a "ministerial exception" protected by the First Amendment, which precludes courts from applying employment discrimination statutes in suits between a religious institution and its ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). The ministerial exception is "best understood as a narrow, more focused subsidiary of the [church autonomy] doctrine." *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 604 (Ky. 2014). Stated simply, it is a judicially-derived "principle whereby the secular courts have no competence to review" claims by ministers brought as a result of employment discrimination. Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 234 (2012). Importantly, the Court in *Hosanna-Tabor* explicitly limited its adoption of the ministerial exception to claims involving violations of employment discrimination statutes – there, the Americans with Disabilities Act – and reserved the question of "whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Hosanna-Tabor*, 565 U.S. at 196.

Courts have generally held that the church autonomy doctrine and its narrower ministerial exception do not apply to "purely secular decisions, even when made by churches." *Bryce*, 289 F.3d at 657. Churches "are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts or upon their valid contracts. Their employment decisions may be subject to…scrutiny, where the decision does not involve the church's spiritual functions." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

Thus, as a threshold matter, a religious organization must demonstrate that a dispute between an employee and the church is "rooted in religious belief" in order to trigger the church autonomy doctrine or the narrower ministerial exception. *Bryce*, 289 F.3d at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)); *accord Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997) (describing threshold inquiry as determining whether the dispute is ecclesiastical or purely secular); *Malicki v. Doe*, 814 So.2d 347, 360-61 (Fla. 2002); *McKelvey v. Pierce*, 800 A.2d 840, 856 (N.J. 2002); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (N.C. Ct. App. 2016); *Galetti v. Reeve*, 331 P.3d 997, 1000 (N.M. Ct. App. 2014).

The initial issue in the present case, then, is whether the dispute between Turner and the respondents is "an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule custom or law,'" or rather is "a case in which…religious organizations [should be held] liable in civil courts for purely

secular disputes[.]" *Bell*, 126 F.3d at 331 (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976); and *Gen. Council on Fin. & Admin., United Methodist Church v. California Superior Court*, 439 U.S. 1369, 1372 (1978)).

Under the facts of the instant case, it is clear that the First Amendment does not bar Turner's claims for breach of contract and wrongful termination. In considering this issue, the Third Circuit's decision in *Petruska v. Gannon Univ.*, 462 F.3d 294, 300 (3d Cir. 2006), is instructive. The plaintiff in *Petruska*, a chaplain at a Catholic diocesan college, was forced to resign as part of an administrative restructuring despite having signed an employment agreement. *Id.* at 300. As part of her lawsuit against the college, Petruska brought a breach of contract claim. *Id.* at 310. Performing an initial inquiry into the college's Free Exercise and Establishment Clause arguments, the Third Circuit reversed and remanded for further consideration, holding that application of state contract law did not involve any government-imposed limits on the college's First Amendment rights. *Id.* The court reasoned that resolution of the dispute "d[id] not inevitably or even necessarily lead to government inquiry into [Gannon's] religious mission or doctrines," nor "turn on an ecclesiastical inquiry," *id.* at 312 (internal quotation omitted), and thus consideration of the claim would violate neither the Free Exercise Clause nor the Establishment Clause. *Id.* at 310-11. Based on the same logic, Turner's breach of contract claim should be permitted to move forward.

Moreover, the New Mexico Court of Appeals performed the "religious or secular" threshold inquiry in considering a state law retaliation claim brought by a

minister against a church. *Galetti v. Reeve*, 331 P.3d 997 (N.M. Ct. App. 2014). In *Galetti*, the plaintiff, a former principal[2] at a Seventh Day Adventist school, brought wrongful termination and retaliatory discharge claims against the local church conference and several administrators when she was terminated soon after reporting an allegation of harassment against her supervisor. *Id.* at 999. The trial court dismissed the claims, concluding that they were barred under the First Amendment's church autonomy doctrine and ministerial exception. *Id.* On review, the New Mexico Court of Appeals engaged in the "threshold inquiry" to "determin[e] whether the alleged misconduct [was] rooted in religious beliefs." *Galetti v. Reeve*, 331 P.3d at 1000 (citing *Bryce*, 289 F.3d at 648). The court concluded that the retaliatory discharge claims would not "necessarily result in religious entanglement" or implicate religious doctrine. *Id.* at 1002. Noting that the church autonomy doctrine is "not absolute," and does not bar purely secular claims even for retaliation, the court reversed and remanded for further proceedings. *Id.* at 1000, 1002. *See also Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 615 (Ky. 2014) (concluding that ministerial employee's non-religious claims following termination survived motion for summary judgment because "(1) the enforcement of the [employment] arrangement….does not arouse concerns of government interference

[2] The defendants contended that the plaintiff was a minister of the church, and therefore her claims were barred by the ministerial exception. *Galetti*, 331 P.3d at 1001. The New Mexico Court of Appeals noted that it "assume[d] for purposes of the…appeal that [the] [p]laintiff's position was a ministerial one." *Id.* n.3.

in the selection of ministers, and (2) the [adjudication would] not involve any matter of ecclesiastical concern").

Because Turner's breach of contract and wrongful termination claims are "not rooted in religious belief," they thus "do not implicate the First Amendment as a matter of law," and should be permitted to proceed. *Galetti*, 331 P.3d at 999.

B. The breach of contract claim is cognizable because it does not impede the church's selection of its ministers and involves "neutral principles" of state law.

Even if this Court finds that Turner's claims touch upon religious matters under the church autonomy doctrine's threshold inquiry, the ministerial exception nevertheless fails to immunize the respondents from suit under a breach of contract theory. First, the claim does not interfere in the Church's selection of its ministers, which is the primary concern against which the ministerial exception is designed to protect. Additionally, the claim for breach involves "neutral principles" of state contract law, and falls outside the scope of the ministerial exception.

i. The contract claim does not violate the ministerial exception's underlying purpose of allowing religious institutions the freedom to select their ministers.

As the Kentucky Supreme Court observed in *Kirby v. Lexington Theological Seminary*, "[w]hen deciding whether a claim is barred by the ministerial exception, it is important to remain mindful of the ministerial exception's underlying purpose: to allow religious institutions, free from government interference, to exercise freely their right to select who will present their faith tenets." *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 615 (Ky. 2014). Further, "[a]lthough state contract law

does involve the governmental enforcement of restrictions on a religious institution's right or ability to select its ministers, those restrictions are not *governmental* restrictions," but rather voluntarily entered into by the Church. *Id.* For these reasons, the contract between Turner and the Church was valid, and his claim for breach should be remanded for further consideration.

In *Hosanna-Tabor*, the Supreme Court explained that a primary basis for its decision was to avoid "requiring the [c]hurch to accept a minister it did not want," which "plainly" violated the church's freedom under the religion clauses to select its own ministers. 565 U.S. at 194. The instant case, however, does not present a "situation where the government is inappropriately meddling in the selection of who will minister to the congregation." *Kirby*, 426 S.W.3d at 616. Indeed, "[l]imits on a religious institution's ability to choose – or the criteria for choosing – who will minister to its faithful are not being foisted on the religious institution." *Id.* Rather, the Church here has voluntarily circumscribed its own conduct through a contractual agreement, and now that agreement – if it is determined by the court to exist and bind the parties – may be enforced according to its own terms. *See id.* That cannot be said to violate church autonomy.

Moreover, as Turner is not requesting reinstatement as a minister, allowing the breach of contract claim to go forward does not place the court in the difficult position of "choos[ing] between 'competing religious visions,'" *McKelvey v. Pierce*, 800 A.2d 840, 856 (N.J. 2002), but instead simply ensures that Turner is made whole under a valid and bargained-for agreement. The Church remains free to

select anyone it feels is qualified to lead its congregation. *See Hosanna-Tabor*, 565 U.S. at 194-95. Thus, barring a breach of contract claim does nothing to further what the Supreme Court described as the central purpose of the ministerial exception. It is perhaps for this reason that the Court and several federal circuit courts considering the issue have held that breach of contract claims brought against churches, including in the employment context, are judicially cognizable. *See Watson v. Jones*, 80 U.S. 679, 714 (1871) (holding that courts are always authorized to resolve contractual disputes involving churches); *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1989) (holding that a church is free to voluntarily burden its activities through contracts, and these contracts "are fully enforceable in civil court"); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Like any other…organization, [churches] may be held liable…upon their valid contracts."). Because Turner's breach of contract claim does not implicate the type of dispute the ministerial exception was designed to preclude, it should be remanded to the trial court for further consideration.

ii. <u>The contract claim is supported by constitutionally-permissible "neutral principles" of state law</u>.

The Supreme Court has also held that states may apply "neutral principles" of law to resolve disputes involving religious institutions. *See Jones v. Wolf*, 443 U.S. 595 (1979). Neutral principles of state common law have previously been found applicable to religious organizations, and should extend to Turner's breach of contract claim.

In *Jones*, after the majority of a local Presbyterian church voted to switch allegiances from one to another Presbyterian denomination, the minority group sued to establish its right to the local church property. *Jones*, 443 U.S. at 595. Applying "neutral principles" of state law, the Georgia courts determined that the majority members of the local church had the right to take the property with them. *Id.* On appeal, the U.S. Supreme Court upheld the constitutionality of the neutral principles approach. *Id.* at 601. Highlighting the virtues of the neutral principles approach, Justice Blackmun wrote for the majority that "[t]he method relies exclusively on objective, well-established concepts of trust and property law" which "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603. Further, the "neutral-principles analysis…is flexible enough to accommodate all forms of religious organization and polity." *Id.* Thus, the first consideration addresses the Establishment Clause concern of avoiding entanglement, and the second the Free Exercise concern of permitting religious communities to determine their own doctrine and governance. *See* Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 317 (2016). The Court went on to note that the neutral principles doctrine could not possibly inhibit a church's free exercise rights, "any more than do *other neutral provisions of state law* governing the matter in which churches own property, *hire employees*, or purchase goods." *Jones*, 443 U.S. at 606 (emphasis added).

While the record does not reflect the State of Tourovia's approach to this issue, over 29 states have adopted "neutral principles," 12 are unclear or undecided, and 9 states have retained the more deferential pre-*Jones v. Wolf* approach articulated in *Watson v. Jones*. *See* McConnell & Goodrich, *supra*, at 319. Thus, the overwhelming majority of states that have definitively considered the issue have elected to adopt the neutral principles approach. Further, the doctrine has been extended to include claims against churches in numerous common law contexts, including property, tort, and, importantly, contract. *See, e.g., Jones*, 443 U.S. at 601; *Pearson v. Church of God*, 478 S.E.2d 849, 852-54 (S.C. 1996) (applying "neutral principles" of state law in deciding breach of contract action brought by minister against his former church employer); *Reardon v. Lemoyne*, 454 A.2d 428, 431 (N.H. 1982) (holding that, even though not a property dispute, "neutral principles" of state law could be used to resolve a contract dispute between several nuns and a Catholic school following termination of the nuns' employment agreement).

Consistent with the reasoning articulated in *Jones*, this Court should hold that neutral principles of law may be employed to adjudicate Turner's claim for breach. Certainly, a "church can contract with its own pastors just as it can with outside parties." *Jenkins v. Trinity Evangelical Lutheran Church*, 356 N.E.2d 1206, 1212 (Ill. App. Ct. 2005). Additionally, "[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006). Like any other organization, a "church is always free to burden its activities

voluntarily through contracts, and such contracts are fully enforceable in…court." *Minker*, 894 F.2d at 1360 (citing *Watson*, 80 U.S. at 714). For these reasons, the trial court's dismissal of Turner's breach of contract claim should be reversed, and the case remanded for further proceedings.

C. The ministerial exception does not bar the retaliatory discharge claim because it does not involve religious matters or result in improper entanglement.

Turner also brought a claim against the respondents for retaliatory discharge under State of Tourovia Labor Law § 740. As with the breach of contract claim, Turner's suit for retaliatory discharge is not barred by the First Amendment.

Courts have held that retaliation claims brought by ministers against their religious employers are legally cognizable provided they do not "involve religious matters" or "result in religious entanglement." *Galetti*, 331 P.3d at 1002; *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965-66 (9th Cir. 2004). Here, Turner's claim involves neither, and thus should be remanded for consideration by the trial court.

In *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit considered a retaliation claim brought under Title VII by an ordained minister against her former church and its pastor, after the congregation dismissed her following her filing of a sexual harassment complaint against the pastor with the U.S. Equal Employment Opportunity Commission (EEOC). *Elvig*, 375 F.3d at 953. The district court dismissed the plaintiff's suit under Rule 12(b)(6) for failure to state a claim based on the First Amendment's ministerial exception, concluding that her

allegations "implicated the Church's constitutionally protected right to choose its ministers." *Id.* at 954.

However, the Ninth Circuit reversed and remanded the case, upholding the plaintiff's retaliation claim. *Id.* at 953. The court explained that the "retaliation claim can succeed if [the plaintiff] proves that she suffered retaliatory harassment…because of her complaints to the Church and the [EEOC]." *Id.* The court reasoned that the retaliatory action the plaintiff suffered was non-religious and "not a protected employment decision," and thus "[i]n the absence of a…religious justification," the plaintiff properly "state[d] a retaliation claim that survives the ministerial exception." *Id.* at 965. Although the court noted that the plaintiff may be precluded from "relying on the[] protected decisions themselves as acts of retaliation," she should nonetheless be permitted to "show the three elements of a retaliation claim: that she engaged in a protected activity, that she suffered an adverse employment action and that there is a causal connection" between her conduct and the adverse action. *Id.* at 965.

As was the case in *Elvig*, Turner's retaliatory discharge claim is not barred by the ministerial exception. As an initial matter, retaliatory conduct is non-religious, and falls outside the scope of the church autonomy doctrine and the ministerial exception. *See Galetti*, 331 P.3d at 1002. Moreover, like in *Elvig*, the retaliatory action taken against Turner is "not a protected employment decision." Therefore, Turner should be accorded the opportunity to prove the elements of his retaliation claim under Tourovia Labor Law § 740.

II. The trial court erred by granting dismissal of Turner's wrongful termination claim under Rule 12(b)(6) based on the ministerial exception without providing an opportunity for discovery.

The trial court erred in granting the respondents' Rule 12(b)(6) motion without permitting discovery. First, because the ministerial exception is an affirmative defense, the defendant religious institution must bear the burden of proving by a preponderance of the evidence that the exception applies to the case at bar. *See Hosanna-Tabor*, 565 U.S. at 709 n.4. As courts have noted, this is difficult – if not impossible – to do on a 12(b)(6) motion, because courts are limited only to considering a plaintiff's complaint in deciding the motion. *See Collette v. Archdiocese of Chi.*, 2016 WL 4063167, at *3 (N.D. Ill. July 29, 2016) (citing FED. R. CIV. P. 12(b)(6)). Moreover, because Turner's complaint stated a valid claim for relief that is not barred by the First Amendment, dismissal of the complaint on a Rule 12(b)(6) motion was inappropriate. Finally, focused discovery will not intrude into matters of religious belief, doctrine, or church administration, and thus the case should be remanded and an opportunity for discovery provided.

A. The ministerial exception is an affirmative defense that must be pleaded and proved.

The United States Supreme Court, in a *Hosanna-Tabor* footnote, was unambiguous in its determination that the ministerial exception is an affirmative defense. *See Hosanna-Tabor*, 565 U.S. at 709 n.4; *see also Kirby*, 426 S.W.3d at 607. After noting a circuit split on the issue, the Supreme Court stated that "[w]e conclude that the exception operates as an *affirmative defense* to an otherwise cognizable claim, *not a jurisdictional bar*. That is because the issue presented by the

exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has power to hear [the] case." *Hosanna-Tabor*, 565 U.S. at 709 n.4 (emphasis added).

As with any affirmative defense, the religious institution must bear the burden of proof to show that the exception, in fact, applies. Courts have observed that is difficult – if not impossible – to do on a 12(b)(6) motion, because only the plaintiff's complaint may be considered in deciding the motion. *See* FED. R. CIV. P. 12(b)(6); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 n.3 (5th Cir. 2012) (noting that "[g]iven the nature of the ministerial exception, we suspect that only in the rarest of circumstances would dismissal under [R]ule 12(b)(6) – in other words, based solely on the pleadings – be warranted); *Collette*, 2016 WL 4063167, at *3-4 (denying defendant church and diocese's 12(b)(6) motion to dismiss, and ordering limited discovery).

In its dismissal order, the trial court summarily barred Turner's claims without explaining the factual or legal analysis on which it relied in rendering its decision. R. at 2. Because the *defendant* must demonstrate that the defense applies, the case should be remanded and discovery permitted in order for the Church, the CCC, and Dr. Jones to make the legally-required showing.

B. Because Turner stated valid claims for relief not barred by the First Amendment, the trial court erred in dismissing the complaint under Rule 12(b)(6).

The Supreme Court has repeatedly noted that a church is always free to burden its activities voluntarily through contracts, and that such contracts are

enforceable in civil court. *Watson*, 80 U.S. at 714. Additionally, in *Jones v. Wolf*, the Supreme Court specified that courts may always resolve contracts governing churches' ownership of property, hiring of employees, and purchase of goods. 443 U.S. at 606. Even cases that have rejected ministers' discrimination claims have noted that churches nonetheless "may be held liable upon their valid contracts." *Rayburn*, 772 F.2d at 1171.

Further, before barring a specific cause of action, courts should 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, including its core right to select, and govern the duties of, its ministers. *See Minker v. Balt. Annual Conference of the United Methodist Church*, 282 F.2d 1354, 1360 (D.C. Cir. 1990); *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1103 (2009). In so doing, a court may "interpret provisions of religious documents involving property rights and other nondoctrinal matters as long as the analysis can be done in purely secular terms." *Minker*, 282 F.2d at 1360 (citing *Jones*, 443 U.S. at 600-01).

In *Minker*, a Methodist minister brought a suit asserting, *inter alia*, that he was orally promised a more suitable pastorship, but was denied such a position because of his age. *Id.* at 1355. The D.C. Circuit reversed the dismissal of the minister's breach of contract claim and remanded for limited discovery. *Id.* at 1359. The court acknowledged that inquiry into the church's *reasons* for failing to meet its contractual obligation would constitute an excessive entanglement under the

Establishment Clause, but nevertheless concluded that Minker's claim could "be adduced by a fairly direct inquiry" into whether there was an offer, acceptance, consideration, and breach. *Id.* at 1360. The court further noted that if resolution of the contract claim required inquiry into the church's ecclesiastical policy, the district court could grant summary judgment on entanglement grounds. *Id.* Here, as in *Minker*, Turner's claims do not require undue entanglement or evaluating the church's reasons for the alleged breach. For example, the breach of contract claim could be resolved with limited discovery into whether a contract existed and whether the church failed to perform its bargained-for obligations under the agreement's terms. The retaliation claim could be resolved by permitting Turner to present evidence to support the elements of his claim. *See Elvig*, 375 F.3d at 953.

As the D.C. Circuit noted in *Minker*, "[a] church is…free to burden its activities voluntarily" through its actions. *Minker*, 282 F.2d at 1360 (citing *Watson*, 80 U.S. at 714). Similarly, application of state contract and retaliatory discharge law to Turner's claims would not violate the Free Exercise Clause or Establishment Clause.

Moreover, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court is limited solely to consideration of the pleadings, *see Carter*, 405 U.S. at 671, and must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 551. Because Turner pleaded sufficient facts to state a plausible and valid claim for relief, the trial court's grant of

dismissal was inappropriate. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 551. For these reasons, this Court should reverse and remand the case to permit an opportunity for limited discovery.

C. Targeted discovery will not touch on matters of religious belief nor inquire into issues of church doctrine such as might create an entanglement.

Courts have repeatedly held that, where the plaintiff's complaint contains sufficient facts to allege a claim for relief that neither requires interference with a church's religious doctrine, nor seeks remedies that would require excessive procedural or substantive interference with church operations, the proper disposition is to return the case to the trial court for targeted discovery on the non-religious claims. *See Minker*, 894 F.2d at 1359; *Rayburn*, 772 F.2d at 1171; *Galetti*, 331 P.3d at 997; *Kirby*, 426 S.W.3d at 597; *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 816, 817-18 (D.C. 2012) (affirming the trial court's denial of the church's motion to dismiss a breach of contract claim and noting that the plaintiff "does not…tether her contract claim to matters of church doctrine or governance" but "claims only that the church failed to pay her salary after acknowledging its obligation to do so"); *see also Collette*, 2016 WL 4063167, at *3-4.

In its dismissal order, the trial court, while acknowledging that "discovery is sometimes permitted" in suits against religious organizations brought by ministerial employees in order "to develop a factual record," nevertheless sought to distinguish cases such as *Minker* and *Galetti* on the grounds that those cases "did

not clearly require an inquiry into religious matters." R. at 9. However, the trial court failed to acknowledge that in each of those cases, the courts were engaged, as here, in determining whether the defendant religious institutions had violated the law under contract and retaliation theories, respectively.

In *Minker*, the D.C. Circuit remanded for discovery on the minister's contract claim. The courted noted that it "acknowledge[d] that the contract alleged by Minker threaten[ed] to touch the core of the rights protected" under the First Amendment, and that it "agree[d] that any inquiry into the [c]hurch's reasons for asserting that Minker was not suited for a particular pastorship would constitute an excessive entanglement in its religious affairs." *Minker*, 894 F.2d at 1360. Nevertheless, the court explained that the "[F]irst [A]mendment does not immunize the church from all temporal claims made against it," and that the "appellant need show only that *some* form of inquiry is permissible and *some* form of remedy is available to survive a motion to dismiss." *Id.* (emphasis in original).

Likewise, in *Galetti*, the plaintiff alleged that the church conference had "made express and implied promises to her." *Galetti*, 331 P.3d at 1001. The court emphasized that the trial court "does not need to determine whether the Conference had cause to terminate [p]laintiff's employment, but only whether the Conference complied with its…obligation[s]." *Id*. As in *Minker*, the court in *Galetti* ordered tailored discovery, noting that "[i]f, at some later stage in the proceedings, it becomes apparent that [the claim]…turns on matters of doctrinal interpretation or

church governance," then the trial court could terminate discovery and grant summary judgment. *Galetti*, 331 P.3d at 1002.

Thus, in the instant case, Turner need only show that *some* form of inquiry is permissible and that *some* form of remedy is available to overcome a Rule 12(b)(6) motion to dismiss. *See Minker*, 894 F.2d at 1360-61; *see also Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1051 n.31 (D.C. Cir. 1981) (holding that disposition on a pre-trial motion was inappropriate because the trial court should at least determine whether a religious concern existed and whether a nonintrusive remedy could be fashioned).

It is true, as the Supreme Court has noted in another context, that courts may not consider provisions whose enforcement would require "a searching and therefore impermissible inquiry" into church doctrine. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). However, because the resolution of Turner's claims will not result in religious entanglement, and because the trial judge is best-positioned to manage discovery and permit Turner the opportunity to seek legal relief while simultaneously protecting the church's First Amendment rights, the trial court erred in dismissing the suit for failure to state a claim. *See Bilbrey v. Myers*, 91 So.3d 887, 891-92 (Fla. Dist. Ct. App. 2012). Accordingly, this Court should reverse the judgments below, and return the case to the trial court for limited discovery on Turner's claims.

CONCLUSION

The district court misapplied the law in finding that Turner's wrongful termination claims against the respondents based on breach of contract and retaliatory discharge were barred by the First Amendment's ministerial exception. Because the court failed to undertake the analysis necessary to determine whether the claims were religious or secular in nature, its decision lacked a proper jurisprudential foundation and is inconsistent with the overwhelming weight of authority. Additionally, because the First Amendment does not preclude courts from considering wrongful termination claims that are purely secular and do not interfere in internal religious decisions, the trial court was incorrect in finding that Turner's suits for breach of contract and retaliatory discharge were barred as a matter of law. Moreover, the trial court erred in dismissing the complaint on a Rule 12(b)(6) motion without permitting discovery because the respondents must first show that the ministerial exception applies to Turner's otherwise valid claims for relief, and because focused discovery will not intrude into matters of religious belief, doctrine, or church administration. For the reasons stated herein, the trial court's dismissal order was improper and should be reversed, and the case remanded for further proceedings.

Dated this 10th day of March, 2017.

Respectfully submitted,

/s/ Team 23
Counsel for Petitioner