No. 415-2017

In the

Supreme Court of the United States

April Term, 2017

DAVID R. TURNER
Plaintiff-Petitioner,

v.

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

ON WRIT OF CERTIORARI TO THE STATE OF TOUROVIA COURT OF APPEALS

BRIEF FOR THE PETITIONER

Team #5
BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

The facts that follow have been agreed upon by both parties. The appellant, David R. Turner, (hereafter "Mr. Turner") was hired as a pastor of St. Francis Church of Tourovia (hereafter "the Church") on July 1, 2009. R. at 4. Mr. Turner had an annual employment contract that was renewed on three occasions: in June of 2010, 2011, and 2012. R. at 4. Each contract ran from July 1 through June 30 of the following year. R. at 4. However, in 2012, Mr. Turner's contract would be cut short due to his unwillingness to participate in potentially tortious and fraudulent conduct. R. at 4.

On May 16, 2012, the Church learned that it was to acquire a bequest of $1,500,00.00 from the Thomas Trust, and that one half of the bequest was designated for the maintenance of the Church's cemetery, while the other half was designated for the general operation and maintenance of the Church. The congregation of the Church selected Mr. Turner to administer the bequest due to his past experience, both as a financial manager for the IBM corporation for twenty-five years and as the Treasurer and Chief Financial Officer of another regional office of the CCC. R. at 5. However, because Mr. Turner discovered the Church had sold its cemetery in 2009, he determined that it would be not only a breach of trust but also possible tax evasion and fraud for the Church to accept the portion of the funds designated for the maintenance of the cemetery. R. at 5. Given the potential for fraudulent conduct, Mr. Turner encouraged the St. Francis' Board of Trustees to tell the trustee (the Wells Fargo Bank) that the Church had sold the cemetery and to ask the bank for further guidance on the matter. Instead, the Vice Chairman of the Board of Trustees disregarded Mr. Turner's advice and instructed him to have the bank deposit the entire bequest of 1.5 million into the Church's general operating account. R. at 5. Mr. Turner refused to comply with the instructions, and instead took his concerns about the possible

fraudulent conduct to Dr. Jones in August of 2012. By early October, however, Mr. Turner was convinced that the CCC and the Church's trustees had no intention of informing Wells Fargo and so he reached out to the bank himself. R. at 5. While he was unable to speak with anyone at the bank directly, he left a message with the representative he believed oversaw the trust. R. at 5. Additionally, he contacted the IRS with the purpose of learning of the tax implications that might be relevant to the Church, but was unable to connect with the correct party. R. at 5.

Dr. Jones notified Mr. Turner on October 16, 2012 that his position as pastor had been terminated, and that the decision would take effect on October 31, 2012. R. at 5. Dr. Roberta Jones, the superintendent of the Tourovia Conference of Christian Churches, (hereafter the "CCC") terminated Mr. Turner's employment on October 31, 2012, claiming that the church was "transitioning" because it had "lost faith" in his spiritual leadership. R. at 4. Mr. Turner responded to his termination by filing a complaint on September 12, 2013 in the State of Tourovia Supreme Court against Dr. Jones, the CCC, and the Church alleging wrongful termination due to breach of an employment contract and retaliatory discharge due to Mr. Turner's threat to report and his unwillingness to participate in what he believed to be potential tortious conduct, which included tax evasion and fraud. R. at 5. Mr. Turner sought monetary damages for both claims. R. at 5.

OPINION BELOW

The decision for the State of Tourovia Court of Appeals is located in the record at pages 4–14 in the record as *Turner v. St. Francis Church of Tourovia*. The order of the State of Tourovia Supreme Court can be found on page 2 and the order of the Appellate Division, Second Department of the State of Tourovia Supreme Court on page 3 of the record. These latter opinions also carry the name of *Turner v. St. Francis Church of Tourovia*.

SUMMARY OF THE ARGUMENT

An innocent man should not be punished for being an accountable employee. Mr. Turner's right not to be complicit in the Church's fraudulent conduct is worth protecting. The ministerial exception does not apply to Mr. Turner's termination for two reasons. First, because Mr. Turner's wrongful discharge claim is based on a secular breach of contract claim, it can be considered by the court without implicating the Church's religious doctrine or practice. Furthermore, Mr. Turner's retaliatory discharge claim can be considered by the courts as it is not, "rooted in religious beliefs." *Galetti v. Reeve,* 331 P.3d 997, 1000 (N.M. Ct. App. 2014) (internal citation omitted). Second, because a state's wrongful discharge law is necessary to protect public health and safety, a church should not be permitted to violate it. A tortfeasor is not shielded from liability simply by committing his torts within the walls of a church or under the guise of church governance. *Ira Banks v. St. Matthew Baptist Church*, 406 S.C. 156 (S.C. 2013). To hold otherwise, would allow the ministerial exception to contravene the *Smith* rule that a religious claimant may not do harm to another person. *See Employment Division v. Smith*, 494 U.S. 872, 884 (1990) (arguing that the Free Exercise Clause does not allow exceptions to "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct").

Respectfully, the court below committed reversible error by misapplying the "deference to neutral principles of law" in this case. There is no dispute that the First Amendment to the United States Constitution protects religion, specifically the Church's right to hire and fire clergy. But, the amendment itself has limits. The Constitution has always protected belief, but not necessarily fraudulent and tortious action. To allow the trial court's decision to stand would, in effect, grant churches blanket immunity from not only torts but potentially criminal law. Such a decision stands contrary to the holdings of the Supreme Court of Kentucky, New Mexico, South

Carolina and the Supreme Court of the United States. Furthermore, notwithstanding the First Amendment, there were clearly disputes of material fact in the court below sufficient for Mr. Turner's claims to be presented before the court for discovery.

The ministerial exception does not act as a jurisdictional bar to all employment-related lawsuits brought before the secular courts, this Court limited its holding in *Hosanna-Tabor*, to employment discrimination cases and ecclesiastical claims. 565 U.S. 171, 196 (2012). The lower court, in affirming dismissal, itself referred to the ministerial exception as an affirmative defense. In accordance with the ruling in *Hosanna-Tabor*, Mr. Turner's complaint intentionally limited his requested relief to monetary damages, so not to require the court to inquire into religious matters or intrude on the church's governance and selection of its own ministers. On its face the Complaint contained no reference to religious matters and had sufficient secular disputes of facts, consequently, limited discovery would not have intruded upon church doctrine. Adopting the summary judgement standard, the trial judges would have adequate discretion to control discovery so that if ecclesiastical matters began to predominate the litigation, the case could be stopped by summary judgement or simply dismissing at that point.

For the reasons set forth herein, the Appellate Division of the Tourovia Supreme Court should be reversed and remanded for trial.

ARGUMENT

I. THE FREE EXERCISE CLAUSE DOES NOT ALLOW A CHURCH TO FIRE ITS PREACHER FOR COMPLYING WITH A STATE LAW NECESSARY TO PROTECT PEOPLE FROM FRAUDULENT OR TORTIOUS CONDUCT

The Free Exercise Clause should not allow the Church to fire Mr. Turner because the ministerial exception does not apply in this case. In *Hosanna-Tabor v. E.E.O.C.*, this Court recognized that the purpose of the ministerial exception is to allow a church "control over the selection of the those who will personify its beliefs." 565 U.S.171, 188. Furthermore, it noted that the ministerial exception "protects a religious group's right to shape its own faith and mission through its appointments." *Id.*

However, none of these purposes are remotely jeopardized in the present case, as Mr. Turner's wrongful discharge claim is based on a secular breach of contract that can be adjudicated by a court without implicating the Church's religious doctrine or practice. R. at 4; *See Jones v. Wolf*, 443 U.S. 595 (U.S. 1979) (holding that courts may hear church claims insofar as "it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.") Furthermore, the retaliatory discharge part of Mr. Turner's claim can be adjudicated because it is not rooted in the Church's religious beliefs, but rather concerns his attempt to report its fraudulent and tortious conduct—behavior that has nothing to do with religion. R at 5; *See also Galetti v. Reeve,* 331 P.3d 997 (N.M. Ct. App. 2014) (holding that a court can decide a retaliatory discharge case against a church so long as it is not "rooted in religious beliefs") (internal citation omitted).

In interpreting the scope of the ministerial exception, this Court applies a de novo standard of review. See *Hosanna-Tabor*, 565 U.S. at 191.

1. ***Because Mr. Turner's wrongful discharge claim can be considered by the court without implicating the Church's religious doctrine or practice the ministerial exception does not apply***

A. Determining the applicability of the ministerial exception is a fact-specific inquiry.

The ministerial exception is not a blanket rule, but rather requires a fact specific inquiry. *Hosanna-Tabor*, 565 U.S. at 191. In *Hosanna-Tabor*, this Court limited its holding to employment discrimination claims, rather than apply the ministerial exception to all claims. *Id.* at 196. Specifically, the Court did not express any view on whether the ministerial exception bars actions by employees alleging breach of contract or tortious conduct by their religious employers. *Id.* This holding is consistent with a long line of cases that have found that the ministerial exception is not a bar to all claims involving intra-church disputes. As early as 1871, this, Court found that churches may be held liable upon their valid contract claims and that secular courts may resolve those disputes. *Watson v. Jones*, 80 U.S. 679, 714 (1871). Moreover, in *Jones v. Wolf*, this Court clarified that courts may adjudicate a claim when "it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." 443 U.S. 595 (U.S. 1979).

While this Court has not addressed the specific issue of whether the court can review a wrongful termination claim based on breach of contract and retaliatory discharge, the principle found in *Jones* —namely, that a court can review a claim so long as it is secular in nature, should apply. Lower courts have applied this standard and have concluded that the ministerial exception does not bar a wrongful discharge claim based on breach of contract and retaliatory discharge, to which we will now turn.

B. The ministerial exception does not apply to a wrongful termination claim based on breach of contract and retaliatory discharge so long as it is not "rooted in religious beliefs."

The ministerial exception does not immunize any claim between a church and its members so long as the claim is not "rooted in religious beliefs." *Galetti v. Reeve,* 331 P.3d 997 (N.M. Ct. App. 2014) (quoting *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir.2002)). In *Galetti*, the defendant breached express and implied promises to the plaintiff regarding timely notification of non-renewal of their teaching contract, on which the plaintiff reasonably relied. *Id.* at 1001. The court held that the plaintiff could succeed on a wrongful termination and breach of contract claim without any religious intrusion. *Id*. The court reasoned that it did not require a determination of the cause of discharge, but only whether the defendant complied with its contractual obligation regarding timeliness of notice provided to the plaintiff. *Id.* Furthermore, it found that the retaliatory discharge claim could be considered by the trial court as it would "not necessarily result in religious entanglement." *Id.* at 1002.

Similarly, the supreme court of Kentucky held that while secular courts have no jurisdiction over ecclesiastical controversies, they do have jurisdiction over cases involving church employment disputes if "neutral principles of law" can be applied in reaching the resolution. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, at 618 (Ky. 2014). In *Kirby*, the case involved a contract, which specifically stated that the religious employer could only fire an employee under certain specified conditions *Id.* at 617. The court held that this breach of contract claim was not precluded by the ministerial exception because it required no inspection or evaluation of church doctrine and neutral principles of law could be applied to it. *Id.* at 618. The court's rationale was that contracts between two parties, even if the parties are a religious institution and a former employee, do not involve government interference because the

parties negotiated the particular conduct limitations. *Id.* at 620. Thus, here too the court found that the ministerial exception did not apply because the wrongful termination claim could be decided without wandering into religious and doctrinal territory.

In *DeBruin v. Saint Patrick Congregation*, however, the court declined to adjudicate a breach of contract claim by a minister against her church, explaining that hiring and firing of ministerial employees are protected by the First Amendment. 343 Wis. 2d 83 (July 12, 2012). Here, the court's rationale is different from the *Kirby* court's reasoning above because here the specific condition of the contract itself stated that the employee could not be discharged without a good and sufficient cause to be determined by none other than the parish itself. *Id.* Thus, in *DeBruin* the court reasoned that, "for civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law." For the courts to contravene the contract here would be both to disobey the neutral principles of contract law (by ignoring the clause that specifically states that the Parish decides what a good and sufficient clause ought to be) and to disobey precedent for ecclesiastical matters (as it would require courts to delve into an evaluation of the Parish's understanding of good and sufficient cause, which is religious in nature).

Respondents rely on this case and other lower court decisions that primarily focus on religious and doctrinal belief, easily distinguishable from our case which never deferred the adjudication of the matter to a church body and is based on contractual obligations and fraudulent church conduct unrelated to religion. For example, in *Serbian Eastern Orthodox Diocese v. Milivojevich,* this Court deferred to the highest church authority the decision to defrock a bishop, because it was inherently a religious inquiry which did not involve fraud, collusion or arbitrariness. 426 U.S. 696, 708-09 (1976). Finally, in *Presbyterian Church,* which

involved local churches breaking away from the general church, the Supreme Court invalidated a Georgia law that required courts to resolve this type of dispute by deciding whether the general church had departed from the tenets of faith and practice it held at the time the local churches first affiliated with it. 393 U.S. 440 (1969). Thus, it can be noted that when this Court and lower courts have deferred disputes to highest church bodies those disputes centered on religious practice or belief, not contractual obligations or controversies over fraud or collusion.

Therefore, as the foregoing case law makes clear, determining whether Mr. Turner's secular claims are precluded by the ministerial exception is a fact specific inquiry. In the context of secular courts' breach of contract claim review, relevant case law demonstrates that this inquiry remains similarly fact intensive and does not extend to all employment cases in general. Nevertheless, for guidance in this context, courts have consistently deferred to applying principles of neutral law to ascertain compliance with non-religious contractual obligations. This approach has led some lower courts to find that the ministerial exception did not apply to wrongful termination claims based on breach of contract and retaliatory discharge, as they did not implicate religious matters.

C. Courts may apply neutral principles of law to Mr. Turner's tortious conduct claim without implicating church governance.

Tortious conduct claims do not implicate church governance, consequently courts may apply neutral principle of law to resolve such claims. *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605 (S.C. 2013). In *Banks*, the Supreme court of South Carolina ruled that the First Amendment does not require granting tort law immunity to religious practitioners, where the claim is susceptible to neutral principles of law. The court, however, took into account that the First Amendment requires "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as

well as those of faith and doctrine." *Id.* at 160 (quoting *Kedroff v. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Nevertheless, the court also recognized that civil courts may hear cases touching upon religious organizations where the dispute may be resolved entirely by neutral principles of law. *Id.* Moreover, the court remarked, "[i]f the Trustees had embezzled money from the Church, we would not hold that the Church could not bring an action in civil court against the Trustees because the funds were taken in the context of church governance." *Id.* at 608. In short, a tortfeasor is not shielded from liability simply by committing his torts within the walls of a church or under the guise of church governance. *Id.* Thus, when tortious or fraudulent conduct is independent of church doctrine or governance, courts should adjudicate such claims by applying neutral principles of law.

Likewise, the Seventh Circuit Court of Appeals has found that fraud is tortious conduct and the Free Exercise Clause does not bar a secular court from reviewing a fraudulent transfer of funds. *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). The court in *Listecki* held that church doctrine was irrelevant when a group of creditors sued a diocese, claiming that the diocese had fraudulently transferred $55 million dollars in funds just to declare bankruptcy to defraud creditors. *Id.* The court determined that the sole question was whether the transfer was fraudulent; yet even if intra-church doctrine was involved, the court would probably still not be barred from inquiry as fraud was alleged. *Id.* at 742. The Court reasoned that the Code and its relevant provisions were generally and neutrally applicable.

This Court should give particular attention to the fraudulent, non-religious nature of the breach of contract and retaliatory discharge claim. As the above case law makes clear, lower courts have been hesitant to grant immunity to tortious ministerial actions, or deferring them to highest church bodies especially when neutral principles of law may be applied. In doing so, this

Court should find that Mr. Turner's claims are secular, non-religious, do not require any inquiry by the court into church doctrine, and neutral principled of law may be applied when fraud is alleged.

D. Applying this fact-specific inquiry to Mr. Turner's claims demonstrates that it is not precluded by the Ministerial Exception; neutral principles of law may be applied to his secular claims.

As stated above, determining whether Mr. Turner's claim is barred by the ministerial exception is a fact-specific inquiry. Relevant factors, however, include that it is a non-religious, secular claim, to which neutral principles of law may be applied by courts, without implicating church autonomy.

In the present case, Mr. Turner's claim is neither an employment discrimination claim nor a doctrinal matter, it is a secular breach of contract claim and the Church should be held liable upon their valid contract claim similar to what this Court held in *Hossana-Tabor*, *Jones* and *Watson*. Mr. Turner never exercised any religious discretion in reporting tortious church conduct. Prior to his role as a Minister, Mr. Turner had been both a financial manager for the IBM corporation for twenty-five years and, a Treasurer and Chief Financial officer of another regional office of the CCC. R. at 5. In recognition of this, the Church selected him to administer a large bequest from the Thomas trust. R. at 5. In doing so, Mr. Turner discovered the Church had sold its cemetery in 2009, he determined because of his solid background knowledge in finance that it would be not only a breach of trust but also possible tax evasion and fraud for the Church to accept the portion of the funds designated for the maintenance of the cemetery. R. at 5. This claim has no relation to religion or employment discrimination but is entirely secularly based on Mr. Turner's application of accounting and financing principles.

Indeed, just like the plaintiff in *Galetti*, Mr. Turner got fired for a breach of contract claim to which neutral principles of law could be applied. And also as in *Galetti*, Mr. Turner's retaliatory discharge claim is not rooted in religious beliefs. In *Galetti*, the court held that plaintiff can succeed on wrongful termination and breach of contract and retaliatory discharge without any religious intrusion. This Court should similarly follow that holding. The court in *Galetti* explained that it need not determine the cause of termination but only whether the defendant complied with its contractual obligation. Likewise, here, the Court need not determine the cause of termination but only whether the church had breached its contract and whether the retaliatory discharge claim is not rooted in religious beliefs.

The court in *Kirby* similarly stated that ministerial exception is best understood narrowly and as focused on ecclesiastical matters. There, a minister was fired when the contract specifically stated that he may only be discharged under specific conditions. Here, too, a minister was fired outside the framework of the contract conditions, when the contract specifically stated that it was a one-year contract. R. at 4. In *Kirby*, the court held that this scenario did not require an inquiry into church doctrine, but simply an application of neutral principles of contract law specifically because the parties negotiated the particular conduct limitations. Similarly, here too, Mr. Turner and the Church negotiated the contract for a one-year (to be renewed annually) and are therefore in breach of their contractual obligations for firing Mr. Turner before the end of term. R. at 4.

While in *DeBruin* and *Milivojevich* the courts refused to adjudicate a breach of contract where a minister was fired, the facts in those cases are fundamentally different from those in the present case. In *DeBruin*, the contract itself stated that the Parish may decide the good and sufficient cause discharge of a minister and in *Milivojevich* the court specifically stated that it

will not adjudicate as the inquiry into a bishop's defrockment as it entailed religious analysis specially when there was no fraud or collusion. These cases are easily distinguishable from our case. Here, Mr. Turner's contract did not have a clause that stated that the Church may decide a good and sufficient cause for his discharge, but in fact is more similar to *Kirby*, where the contract was negotiated and specifically stated the tenure. R. at 4. Likewise, the court does not delve into an analysis for the cause of termination as it did in *Milivojevich* as that would entail a religious analysis, but here, unlike *Milivojevich*, we have a fraud and tortious conduct involved. Therefore, like in *Galetti*, this Court need not conduct a religious analysis on the cause of termination but simply look to whether the contract was breached and to the fraudulent church activity in violation of neutral state law.

Similarly, *Banks* and *Presbyterian Church* may be materially distinguished from our case as both of those claims involved an inquiry into religious church mission and whether the general church had departed from the tenets of faith and practice it held at the time the local churches first affiliated with it. Here, Mr. Turner's claim are neither an inquiry into the church's religious mission nor an inquiry into church's tenets of faith but is entirely based on a secular breach of contract claim to which neutral contract law may be applied.

Moreover, Mr. Turner's claims are substantively similar to *Banks* and *Listecki* in which courts have specifically identified fraud as a tortious conduct which does not implicate church doctrine and to which neutral laws may be applied by courts. In *Banks*, the court explained that, "if the Trustees had embezzled money from the Church, we would not hold that the Church could not bring an action in civil court." Similarly, in our case the Church had fraudulently accepted trust money for a cemetery it no longer had, Mr. Turner simply reported that to the bank. R. at 5. Like *Banks,* the Court here should find that fraudulently transferring money is

illegal conduct to which neutral laws may be applied. Similarly, the court in *Listecki* ruled that ministerial exception did not bar a secular court from reviewing fraudulent transfer of money, which may be adjudicated by neutral law. Likewise, the Court here should follow the same holding as transferring money from Thomas trust for a cemetery the church no longer had is tortious conduct to which neutral laws may be applied. R. at 5.

Given all the circumstances of his claim, the ministerial exception should not apply. As it is, religious employers walk a fine line when their religious identity permeates virtually everything they do. Granted, Mr. Turner is a minister of the church, but to allow this factor to be dispositive would be an affront to the "this is a limited holding" approach articulated in *Hosanna-Tabor*. Furthermore, his spiritual qualifications or ministerial role are not at issue here. Thus, this Court should look at the secular breach of contract claim and the non-religious role that Mr. Turner played in reporting fraud, and more importantly, consider that religious institutions do not deem protection when they violate neutral laws of general applicability. In doing so, this Court should find that the lower court was incorrect in its original determination of the issue.

2. ***Because a state's wrongful discharge law is necessary to protect public health and safety, a church should not be permitted to violate it.***

A. The Free Exercise clause does not permit a church to harm another person.

The Free Exercise Clause does not permit the violation of a neutral and generally applicable law designed to prohibit "socially harmful conduct." *Employment Division v. Smith*, 494 U.S. 872, (1990). This Court's ruling in *Smith* is part of a long and consistent line of cases that limit Free Exercise claims from including the ability to do violence or to harm others. From as early as 1878, this Court has held that a religious belief cannot "be accepted as a justification

of an overt act made criminal by the law of the land." *Reynolds v. United States v. U.S.*, 98 U.S. 145, 162 (1878). Further, in this Court's landmark case that applied the Free Exercise Clause against state governments, *Cantwell v. State of Connecticut*, it held that "[n]othing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.... Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury." 310 U.S. 296. (1940); *see also Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (holding that Free Exercise claims reach their limit "when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.") Thus, it can be concluded that the Free Exercise Clause cannot immunize a church against fraud, violations of a criminal law, or socially harmful conduct generally.

Turning to our case, allowing a church to retaliate against an employee for reporting fraud and tortious conduct not only harms the employee, but also harms third-parties that might be affected by the illegal conduct. Such a result contravenes this Court's holding not only in *Smith* but in its entire line of Free Exercise cases dating back to the nineteenth century. To be sure, the Free Exercise Clause guarantees both religious individuals as well as institutions the absolute right to freedom of belief and thought. *See, e.g., Sherbert v. Verner* 374 U.S. 398, 402 (1963) (the First Amendment prohibits all "governmental regulation of beliefs as such"). However, at no time has this Court ever ruled that the right to act on one's religious beliefs is absolute; such a ruling, as the *Smith* Court stated, would "permit every citizen to become a law unto himself." (quoting Reynolds, at 167). Allowing a church to fire its employee, simply for not being willing to go along with an illegal act or for reporting it, would permit another person to be harmed on the grounds of religion, something that this Court has never accepted.

Furthermore, allowing a religious employer to fire an employee for not being complicit in an illegal act would create a chilling effect on employees, and would deter many from coming forward and exposing the illegal activity of churches. Thus, it would be dangerous for this Court to hold that a religious employer can violate the law with impunity. It does not strain credulity to believe that more crimes would go unreported if church employees believed they would be retaliated against for reporting them. Moreover, there is little to be gained from permitting a church to violate the law in the name of religion, as there is no indication that the alleged fraudulent and tortious activity has anything to do with the Church's religious doctrine or mission. Rather, it seems almost certain that fraudulent and tortious conduct have nothing to do with the religious exercise of the Church. And the Church has not claimed anything to the contrary. *See* R. at 4, 5. Firing an employee for not engaging in or reporting illegal conduct has nothing to do with what this Court in *Hosanna-Tabor* sought to protect: namely, "a religious group's right to shape its own faith and mission through its appointments." 565 U.S. 171, 188 (2012). Thus, finding for the Church would do nothing to further the goals of the church autonomy doctrine and ministerial exception, and would only allow the law to be broken with greater frequency and for more people to be harmed, exactly what the *Smith* decision does not allow.

B. Finding that a Free Exercise claim does not extend to permitting a church to engage in illegal conduct is consistent with both the *Smith* and *Hosanna-Tabor* decisions.

As we have shown above, not extending the ministerial exception to allow a church to harm others is fully consonant with this Court's decision in *Smith*. Moreover, that decision is also consonant with *Hosanna-Tabor*. To be sure, this Court has allowed religious liberty to transcend employment discrimination claims. *See Presiding Bishop v. Amos* 483 U.S. 327 (1987)

(finding that religious organizations are permitted to discriminate against their employees). However, in *Hosanna-Tabor,* this Court has specifically "express[ed] 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.* at 176. Furthermore, in *Hosanna-Tabor*, this Court did not apply *Smith* to the case, as, unlike its facts that dealt with employment discrimination, *Smith* dealt with "outward physical acts," rather than an internal church employment decision. *Id.* at 190. The logical conclusion from this Court's holding is that the *Smith*-rule should apply to the ministerial exception in cases dealing with "outward physical acts" that are socially harmful. The case at bar, is just such a case.

Here, the facts deal specifically with outward physical acts. Unlike in *Hosanna-Tabor* where the religious employer was not alleged to have committed any tortious conduct, Mr. Turner was terminated because he refused to make himself complicit in Church's tortious and fraudulent conduct. Put another way, the Church acted outwardly when it sought to defraud the Thomas Trust and the IRS, and when it retaliated against its own employee for failing to break the law. Thus, because the Church committed outward acts, the case at bar should be governed by the *Smith* standard and not by *Hosanna-Tabor*.

Moreover, *Hosanna-Tabor* did not overrule the *Smith decision*, but recognized both "[t]he interest of society in the enforcement of employment discrimination statutes" and "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* Thus, this Court in *Hosanna-Tabor* reasoned that the competing interests of the state and religious groups alike must be balanced, not unlike the Court's creation of a balancing test in *Sherbert v. Verner*. 374 U.S. 398 (1963) (explaining that the Court found that that the substantial burden of a free exercise claim by a law should be balanced against the

compelling government interest of that same law). If we were to apply such a balancing test to our case, there would be little religious burden placed on the church's mission and doctrine for having a claim brought against it for wrongful termination based on breach of contract and retaliatory discharge rooted in fraud and tortious conduct, distinguishable from a claim rooted in religious belief. In a balancing test, church's interest would be eclipsed by the harm that allowing breach of contract based on retaliatory discharge would cause. Although the Church's ability to hire or fire a minister is admittedly very significant, that right should not extend to firing an employee for not going along with fraudulent conduct. Not only would this create a chilling effect on the reporting of tortious and fraudulent activity, but it would also harm the terminated employees as well as any third-parties affected by the tortious conduct.

Therefore, because *Smith* and *Hosanna-Tabor* agree that the Free Exercise Clause does not permit churches to commit "outward physical acts" that are "socially harmful," this Court should not allow a church to retaliate against an employee for reporting fraudulent and tortious conduct.

II. THE LOWER COURT ERRED WHEN IT DENIED MR. TURNER THE OPPORTUNITY FOR DISVCOVERY BY WRONGFULLY GRANTING RESPONDENTS' MOTION TO DISMISS

The lower court's dissent correctly points out two very important premises for its opinion. Firstly, this Court has held that the First Amendment does not preclude courts from adjudicating secular matters that are completely unrelated to religion. *See Jones v. Wolf*, 443 U.S. 595 (U.S. 1979). Secondly, the ministerial exception does not act as a jurisdictional bar to all employment-related lawsuits brought before secular courts, as this Court specifically limited its holding in *Hosanna-Tabor* to employment discrimination cases and ecclesiastical claims. 565 U.S. 171, 196 (2012). Given the secular nature of Mr. Turner's claims, the lower court erred in

not allowing for limited discovery for a factual record to be developed to rebut an otherwise affirmative defense. Mr. Turner's claims should not have been subjected to 12(b)(6) dismissal because on its face the Complaint contained no reference to religious matters and had sufficient secular disputes of facts and, consequently, limited discovery would not have intruded upon church doctrine. *See Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 at 1361 (D.C. Cir. 1990) (explaining that discovery was permissible when inquiry into a claim might not necessarily require inquiry into religious issues); *See also Galetti*, 331 P.3d at 1001 (holding that a breach of contract claim should be remanded for discovery because the claim, on its face, did not require inquiry into issues of church governance).

1. The ministerial exception operates as an affirmative defense, not a jurisdictional bar.

In *Hosanna-Tabor*, this Court clarified that, the ministerial exception does not serve as a jurisdictional bar; rather, it "operates as an affirmative defense to an otherwise cognizable claim." 565 U.S. at 195 at 206. It went on to state that, the "issue presented by the [ministerial] exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear the case.'" *Id*. (citing *Morrison v. National Australia Bank Ltd.,* 561 U. S. 247, 254 (2010)). This interpretation, of the ministerial exception's applicability has been the common understanding in state courts as well. The Supreme Court of Kentucky echoed this in its 2014 decision in *Kirby v. Lexington Theological Seminary*, where it noted that, the ministerial exception is an affirmative defense that must be pleaded and proved. 426 S.W.3d 597 at 607 (Ky. 2014). "The ministerial exception does not strip the court of its jurisdiction but, instead, simply disallows the forward progress of the particulate suit." *Id*. at 607. In fact, inherently, the ministerial exception's own name suggests it does not operate as a jurisdictional bar; it is an "exception," not an exemption nor blanket immunity. *Id*. (emphasis added). A majority of federal

circuit courts, that have addressed this issue, have similarly agreed with the Kentucky supreme court's understanding. *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) (contending that the fraud claim was not constitutionally barred); *Bryce*, 289 F.3d 648 (10th Cir. 2002) (same); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) (same); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (same).

The lower court, in affirming dismissal, itself referred to the ministerial exception as an affirmative defense, when relying upon the Pennsylvania supreme court's decision. R. at 10. With the clear understanding that the exception operates as an affirmative defense, it becomes permissible to then analogize its procedural requirements with that of other affirmative defenses, such as qualified immunity. *Kirby,* 426 S.W.3d at 608. Mr. Turner's claim compels discovery as it is understood that such affirmative defenses, must be specifically pleaded and rebutted. *Id.* (citing *Gomez v. Toledo*, 446 U.S. 635, 641 n.8 (1980)). When applicability of this defense is in question, discovery is necessary rather than a hasty dismissal so that the court may ascertain and resolve the applicability of the defense to the fact-specific claim. *See Anderson v. Creighton*, 483 U.S. 635 (1987) (contending that the principles of qualified immunity acted as an affirmative defense which entitled the petitioner to argue for a summary judgment ruling).

In the present case, Mr. Turner's claims were not dismissed because they "failed to state a claim upon which relief could be granted;" but instead, the lower courts hastily dismissed the claim under the guise that all church related claims are immunized under the First Amendment's religion clauses. Fed. R. Civ. P. 12(b)(6). Mr. Turner's cognizable claims entitles him to relief because they were claims alleging breach of contract and retaliatory discharge for refusal to participate in tortious acts. R. at 5. This Court has long held that the appropriate 12(b)(6) inquiry into cases involving affirmative defenses is begun by taking note of the elements that the

plaintiff must plead to state a claim against the asserted defenses. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675, (2009). Given this Court's treatment of qualified immunity, a similarly situated affirmative defense, discovery and further factual inquiry is inferably required.

A. Mr. Turner's well-plead complaint stated a plausible claim for relief that should have survived the motion to dismiss pursuant to the Tourovia state law and Federal Rule of Civil Procedure 12(b)(6) standards.

To survive a 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* This Court offered two working principles as the basis for its decision in *Twombly*. First, a court must accept as true all allegations contained in a complaint as inapplicable to legal conclusions; and second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.*

On its face, Mr. Turner's complaint alleged wrongful termination based on breach of an employment contract. R. at 5. It further alleged wrongful termination based on retaliatory discharge due to Mr. Turner's refusal to participate in church fraud and tax evasion and report the tortious acts to the bank and the IRS. R. at 5. The fraud pertained to the administration of funds from the Edward Thomas Trust, for which the Respondents were beneficiaries. R. at 5. In the Complaint, Mr. Turner limited his requested relief to monetary damages for his claims despite being afforded the ability to request additional relief by State of Tourovia's labor law

statute.[1] Respondents themselves do not challenge the sufficiency of the factual matter plead by Mr. Turner; instead, they only assert that the Complaint, on its face, was sufficient to demonstrate the ministerial exception's applicability. R. at 7. Despite the clear standards set forth by this Court, regarding dismissal under 12(b)(6), the lower court chose to prohibit Mr. Turner's case from moving forward at all, because of the mere possibility that entanglement with church governance might exist. The Appellate Division of the Tourovia Supreme Court erroneously affirmed the trial court's granting of the motion to dismiss, failing to acknowledge that it is essentially secular relief being sought by Mr. Turner for secular wrongs committed by the Respondents.

2. On its face, Mr. Turner's claims did not clearly require an inquiry into religious matters or church governance.

The court in *Minker* held that discovery was permissible when inquiry into a claim might not necessarily require an inquiry into religious issues. *E.g. Minker*, 894 F.2d at 1361. It further held that breach of contract claims between ministers and their churches were permissible when the claims did not require an inquiry into religious doctrine. *Id.* Likewise, the court in *Galetti* held that a breach of contract claim should be remanded for discovery because the claim, on its face, did not require an inquiry into issues of church governance. *Galetti*, 331 P.3d at 1001. The court further held, that a wrongful termination complaint against a church may not necessarily result in religious entanglement and, therefore does not implicate First Amendment concerns. *Id.* at 999.

To be sure, this Court has long held that, "religious institutions may make arbitrary decisions regarding the hiring or firing of ministerial employees, and may be free from civil

[1] For Tourovia's law related to retaliatory discharge, *see* Appendix A.

review for having done so." *Milivojevich*, 426 U.S. 696 (1976). However, in *Hosana-Tabor*, this Court reasoned that in certain situations, an employment decision by a secular court may not "interfere[]with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." 565 U.S. at. 188. The Court essentially dealt with a situation where granting respondent's employment discrimination claim would have involved forcing a church to accept and retain an unwanted minister, or punishing a church for failing to do so.[2] This situation does not arise in the present case.

In granting Respondents' motion to dismiss, the trial court reasoned that, Mr. Turner's claims were "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for the discharge," which it viewed were essentially precluded by the ministerial exception. R. at 6. This was not the case, because on its face, Mr. Turner's claims did not clearly require an inquiry into religious matters or church governance. Mr. Turner's Complaint simply alleged wrongful termination on both breach of contract and retaliatory discharge grounds. In doing so, the Complaint contained no reference to religious matters and intruded upon no church doctrine. In accordance with the ruling in *Hosanna-Tabor*, Mr. Turner's complaint intentionally limited his requested relief to monetary damages for his claims, so not to require the court to inquire into religious matters or intrude on the church's

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[2] We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor, 565 U.S. at 188-89.

governance and selection of its own ministers. In the present case, it is a secular claim as it pertains to the contractual agreement between an employer and employee.

Accordingly, dismissal of Mr. Turner's claims was not appropriate under Rule 12(b)(6) because the factual allegations in the complaint accepted as true state a facially plausible claim for relief. *Hyson USA, Inc., v. Hyson 2U, Ltd.*, 821 F. 3d 935 (7th Cir. 2016). The lower courts should have, at minimum, allowed for limited discovery to determine whether the ministerial exception was applicable to the case. The court would have then been in a position, at any time during the limited discovery, to address any First Amendment entanglement concerns as discovery had made them apparent.

A. Summary judgement is the appropriate standard for evaluating breach of contract and tortious conduct lawsuits in cases involving the ministerial exception.

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

There is a split among the courts about whether the application of the ministerial exception is a question of subject matter jurisdiction or whether it is simply an affirmative defense. This Court affirmatively resolved this conflict by proclaiming the exception an affirmative defense. This clear resolution defines the procedural implications at the outset

of litigation: the allocation of the burden of proof, the burden of production, and the conversion of a motion to dismiss to one for summary judgment.[3] It is likely that this Court's ruling in *Hosanna-Tabor* did not address claims outside of federal statutory discrimination claims because it believed in resolving other kinds of claims, summary judgement is the more appropriate standard to be adopted on a case-by-case basis with inquiry into the merits of the claim. *See Hosanna-Tabor*, 565 U.S. at 1967. Claims involving breach of contract and tortious conduct should not be dismissed unless the court first permits a factual record to be developed and then determines, based on that record, the claims would substantially entangle the courts in religious doctrine. *See*, *Minker*, 894 F.2d 1354; *See also Galetti*, 331 P.3d 997. Adopting the summary judgement standard, the trial judges would have adequate discretion to control discovery so that if ecclesiastical matters began to predominate the litigation, the case could be stopped by summary judgement or simply dismissing at that point.[4]

The present case involves such claims, as Mr. Turner asserts that he was wrongfully terminated and seeks damages associated with breach of contract and retaliatory discharge for a refusal to participate in certain illegal and tortious acts. R. at 5. Petitioner agrees with the lower

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[3] Affirmative defenses are properly raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim, so a defendant raising the ministerial exception as a defense after Hosanna-Tabor always runs the risk of the motion being converted to one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). Courts have "complete discretion to determine whether or not to accept the submission of any material beyond the pleadings" in a 12(b)(6) motion, and therefore, whether to convert it to a summary judgment motion. 5C Wright & Miller, Federal Practice & Procedure § 1366 (3d ed. 1997-present). As a result, the Court's decision to treat the ministerial exception as an affirmative defense still leaves defendants at a risk of the increased time and expense associated with summary judgment.

SYMPOSIUM: DISCRIMINATION BY AND AGAINST RELIGION AND THE FIRST AMENDMENT: ARTICLE: STILL A THRESHOLD QUESTION: REFINING THE MINISTERIAL EXCEPTION POST-HOSANNA-TABOR, 10 First Amend. L. Rev. 233, 290

[4] *See Minker*, 894 F.2d at 1360 ("It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy even as to his contract claim. Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion.").

court's dissent; "a genuine issue of material fact was raised in the complaint when the [Petitioner] made allegations of tortious conduct by his former employer that were directly connected with his wrongful termination and breach of contract claims." R.at 14.

Permitting a factual record to be developed would not risk First Amendment entanglement because the court would remain free to address any unlikely concerns with a potential motion for summary judgment or later dismissal.

B. The Supreme Court intentionally left the question open for the case at bar.

In *Hosanna-Tabor*, the Supreme Court of the United States intentionally left open the question whether the ministerial exception would bar suits other than those brought in the context of employment discrimination. *Hosanna-Tabor*, 565 U.S. 171. In its decision, it noted that, it 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*. at 175. It actively chose to defer the issue for a later day; thereby, inferring that it believed, there are some suits that could progress forward despite its recognition of a ministerial exceptions in other suits. This Court found it particularly important to uphold the application of the exception because under First Amendment balancing, it believed that it would be in the best interest of both society and the church for the church to remain "free to choose those who will guide it on its way." *Id*. at 196.

In regards to the protection of church interest, the Kentucky Supreme Court warned that all religious employment contracts "would arguably be illusory," and schools would be unable to pursue their accreditation and hiring goals, if courts refused to enforce such contracts. *See Kirby*, 426 S.W.3d 597 at 616. Moreover, Justice Bradley's dissent in *DeBruin*, a Wisconsin case, echoed the Kentucky Supreme Court's arguments that churches may voluntarily enter into

contracts without running afoul of the First Amendment. By courts routinely dismissing certain contract claims, she warned, "they might create an unnecessary roadblock hampering a church's free exercise ability to select its ministers." *DeBruin*, 816 N.W.2d 878, at 907 (Wis. 2012) (Bradley, J., dissenting); *see also id*. ("Candidates for ministerial positions might be less inclined to enter into these types of employment arrangements in the first instance . . . because the church would be unable to offer desirable candidates any contractual assurances regarding job security."). Thus, a church may ultimately be harmed if the courts sought to apply the ministerial exception to the types of breach of contracts claims this Court found to be individually unique in *Hosanna-Tabor*. Additionally, by intentionally deferring the issue for the case at bar, the Court has made clear that through the ministerial exception courts are mandated to allow religious organizations to operate independent from secular control or manipulation; however, this does not mean that they have been given sword and shield protections from all conduct. Therefore, the lower courts erred in affirming the dismissal based on the mere presence of a potential affirmative defense that should not have rendered the claim for relief invalid. *Collette v. Archdiocese of Chicago*, 2016 WL 4063167 (N.D. Ill., 2016).

CONCLUSION

The Petitioner respectfully requests that this Court REVERSE both judgements of the Appellate Division of the State of Tourovia. The Free Exercise Clause does not permit a church to terminate an employee for refusing to be complicit in its tortious and fraudulent conduct. Furthermore, because the ministerial exception is an affirmative defense and not a jurisdictional bar, the Petitioner's claim should not have been dismissed on 12(b)(6) motion.

Respectfully Submitted,
Counsel for the Petitioner

Appendix A.

State of Tourovia
Labor Law, Section 740

(1) Prohibited Employer Activity

A. An employer may not discharge, suspend, demote or take other retaliatory adverse employment action against an employee because that employee discloses or threatens to disclose information to a public entity or objects to or refuses to participate in an action that violates law, rule, or regulation, which violation creates and presents a substantial and specific danger to public health or safety.

B. In order to maintain a Section 740 claim, the burden is on the plaintiff to show:

a. that he or she reported or threatened to report the employer's activity, policy or practice;

b. that a particular law, rule or regulation was violated; and

c. that the violation was the kind that creates a substantial and specific danger to public health or safety.

(2) This law protects both public and private employees

(3) Employee must first report any violation to his or her supervisor/employer and must allow a reasonable opportunity for the employer to correct

(4) It shall be a defense for the employer that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section, Section 740, of the Tourovia Labor Law.

(5) Remedies

a. Employee may file a civil action within one year of the incident

b. Employee may request relief in form of injunction, reinstatement, full compensatory monetary damages including fringe benefits and back pay, attorney fees, court cost