415-2017

THE SUPREME COURT OF THE UNITED STATES

DAVID R. TURNER,

Petitioner,

-against-

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

Respondents.

BRIEF FOR PETITION

TEAM # 7

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Questions Presented

I. Whether the trial court erred when it held that the ministerial exception protected a religious organization from enforcement of a valid employment contract and retaliatory discharge when the organization terminated the employment of a pastor after he reported potentially illegal conduct by that organization?

II. Whether the trial court erred by granting Respondents' Rule 12(b)(6) Motion to Dismiss without providing an opportunity for discovery or allowing a pretextual challenge to Respondents' reasoning?

Jurisdictional Statement

The Supreme Court granted Respondents' Motion to Dismiss on January 20, 2015. R. at 2. This decision was affirmed by the Appellate Division, Second Department of the State of Tourovia on December 18, 2015, and subsequently affirmed by the State of Tourovia Court of Appeals on August 16, 2016. R. at 3, 4. The Supreme Court of the United States granted certiorari. R. at 14. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Statement of the Case

A. Proceedings Below

On September 12, 2013, Petitioner filed a complaint in Tourovia District Court against Respondents: St. Francis Church of Tourovia (hereinafter, "the Church"), the Tourovia Conference of Christian Churches (hereinafter "the CCC"), and Reverend Dr. Roberta Jones. R. at 5. Judge Michelle Hall granted the March 31, 2014 Motion to Dismiss of the Respondents in a brief Order on January 20, 2015. R. at 2. In granting Respondents' Motion, Judge Hall found that the ministerial exception barred Petitioner's claims against Respondents, a decision that the Appellate Division, Second Department affirmed. R. at 2, 3. The Tourovia Court of Appeals affirmed the determination of the District Court, finding that the ministerial exception applied to Petitioner's claims and that discovery was unwarranted. R. at 9, 11.

B. Factual Record

Petitioner David R. Turner entered into three renewable yearly employment contracts with Respondents for employment as pastor of St. Francis Church of Tourovia. R. at 4. The relationship progressed smoothly from 2009 until 2012 when Respondents breached the employment contract by terminating Mr. Turner with eight months left on his 2012 contract. R. at 5.

Mr. Turner has significant experience in finance management, having previously been employed for years as a financial manager at IBM and as Treasurer and Chief Financial Officer of a different branch of the CCC. R. at 5. Based on his extensive experience, Respondents delegated to Mr. Turner in May of 2012 the duty of administering a bequest the church was expecting to receive. R. at 5. The terms of the bequest from Thomas Trust provided that one half of the one and a half million-dollar bequest was to be utilized for upkeep of the church's cemetery. R. at 5. Mr. Turner became concerned when he learned that the church had sold its cemetery in 2009 and therefore he would be unable to administer the bequest in compliance with its terms. R. at 5. In particular, Mr. Turner thought it would be a breach of trust, fraud, and tax evasion if St. Francis were to keep that half of the bequest. R. at 5. He quickly informed the Board of Trustees of the situation and advised that they should immediately inform Wells Fargo, as Trustee of the Thomas Trust, of St. Francis' lack of a cemetery and seek further advisement from the bank. R. at 5. Instead of disclosing their inability to comply with the bequest in good faith to the Trustee, the Vice Chairman of the Board instructed Mr. Turner to accept and deposit the full one and a half million dollars into the Church's general operating account. R. at 5.

This instruction greatly concerned Mr. Turner, who refused to comply with the instructions that he felt would subject the Church and himself to potentially severe legal consequences. R. at 5. In August, Mr. Turner informed Reverend Dr. Roberta Jones, who is the superintendent of CCC, of the situation. R. at 5. When his efforts with the CCC proved to be fruitless, Mr. Turner called Wells Fargo to inform them himself of the problems administering the bequest. R. at 5. He left a message with the person he believed to be handling the trust. R. at 5. He also called the IRS in hopes of discussing the matter and any potential tax ramifications, but he was unsuccessful in reaching the proper party. R. at 5.

Less than two weeks after reporting the incident to Wells Fargo and the IRS, on October 16, 2012, Dr. Jones terminated Mr. Turner's employment, stating that the Church had "lost faith" in his spiritual leadership and would be "transitioning." R. at 3. At this point, Mr. Turner's contract was supposed to guarantee his employment for an additional eight months. R. at 4–5.

Summary of the Argument

The Supreme Court's last ruling regarding the ministerial exception confined application of that exception to cases of employment discrimination. There is no Supreme Court authority supporting Appellant's proposition that a court cannot enforce a religious employer's valid employment contracts. A contract's worth is in its enforceability. Failure to uphold a valid employment contract between a religious employer and its employee will have adverse consequences that would violate the Establishment Clause. It will, in one sense, inhibit religion, because qualified employees will not work for a religious organization knowing that any contract is unenforceable and therefore, worthless. On the other hand, it will also advance religion by carving out a special exception whereby religious institutions can make contractual promises on which the employees rely, and subsequently renege without consequence.

There are important policy considerations warranting reversal of the Tourovia Court of Appeals' decision. To fail to give a remedy for an employee who reports unlawful conduct by his or her employer will result in incentivizing illegal conduct. An employee like Mr. Turner will feel compelled to participate in the wrongdoing, knowing that the law will provide him no remedy if he is terminated. Additionally, religious institutions will have an incentive to thwart the law and pressure their employees to aid in the campaign; knowing that the employee would choose to keep their job rather than getting fired for reporting the conduct. To say that the Religion Clauses were intended to prevent judicial inquiry into the matter at hand is to distort the

Constitution. The Religion Clauses were intended to prevent judicial inquiry into church doctrine and internal governance. Mr. Turner's grievances can be addressed on wholly secular grounds since the church has entered into a valid, secular contract. Additionally, Mr. Turner seeks only monetary damages, preventing the court from forcing an unwanted minister upon the church.

Because Respondents have not effectively vitiated the claims set forth in Appellant's complaint, the affirmative defense cannot succeed at the motion to dismiss stage and basic discovery is warranted. Respondents claim that the ministerial exception bars an inquiry into whether the reason presented by the religious entity is pretextual, based on the Supreme Court's denial of such an inquiry in the employment discrimination context. However, this proposed rule has not been consistently applied. The Supreme Court has a history of distinguishing between different areas of law in its application of religious protections. There is no reason here to extend its bar on the issue of "pretextuality" to contract and tort disputes. If courts were to dismiss every case where churches denied a governmental right of interference, too many remedies would be only nominal. Courts have successfully contested churches' characterization of decisions as being solely based in religious reasoning. Petitioner, like others before him, has challenged a church in its performance of independent legal duties under tort and contract law. To allow Respondent in this case to escape all liability and obligation—even if willfully and independently created—is to rob Appellant and others like him of the only opportunity for redress. The leading Supreme Court case involving the ministerial exception, *Hosanna-Tabor*, was decided at the summary judgment stage. Therefore, it allowed for at least minimal discovery. Courts necessarily take great care in allowing affirmative defenses to end a case at the pleadings stage. Any judicial trend allowing such presumptive power to an unsworn

statement by a church undermines the weight of legal obligations. The ministerial exception should not be lightly extended beyond the Supreme Court's narrow employment discrimination ruling.

Despite Respondents' attempts to conflate Appellant's two claims with impermissibly entangled inquiries into doctrinal decisions, discovery can be accomplished in this case without intruding on concerns of religious leadership. Because Appellant is seeking monetary damages, not reinstatement, the resolution of the contract dispute demands an analysis of the existence and terms of the contract, not an examination of his qualifications for religious leadership. His claim for retaliatory discharge requires investigating the church's disputed activities involving the Thomas Trust, not their actions as a church. The Supreme Court barred inquiry into strictly ecclesiastical matters. Yet so long as some inquiry and some remedy may be pursued, granting a motion to dismiss is unjustly premature. If at any time, of course, it is determined that Appellant's claims are so inextricably bound with the strictly ecclesiastical functions of Respondent, and that further investigation would be impermissible, the case may be dismissed. In some cases, courts have limited plaintiffs' claims to those that are permissible instead of dismissing cases outright. The ministerial exception was not intended to establish religious organizations as sovereign entities, immune from any and all obligations of law. Discovery acts as a minimal safeguard for the otherwise viable claims of Appellant. Therefore, the lower courts were wrong to dismiss the case without allowing discovery.

Argument

POINT I

THIS COURT SHOULD REVERSE THE HOLDING BELOW BECAUSE THE MINISTERIAL EXCEPTION DOES NOT PREVENT ENFORCEMENT OF A CONTRACT AND AS A MATTER OF PUBLIC POLICY, MINISTERIAL EMPLOYEES SHOULD BE PROTECTED WHEN THEY ARE TERMINATED IN RETALIATION FOR REFUSAL TO PARTICIPATE IN, AND REPORTING OF, ILLEGAL ACTIVITIES BY THE RELIGIOUS EMPLOYER.

The ministerial exception is the result of both Religion Clauses of the United States Constitution working in tandem to guarantee a certain level of autonomy to religious organizations in choosing "who can act as its ministers." *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012). "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. The ministerial exception does not provide a cloak for all employment decisions by a church, as "[s]ecular courts may . . . have jurisdiction over a case involving a church if 'neutral principles of law' can be applied in reaching the resolution." *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 618 (Ky. 2014).

A. Petitioner's Suit is not Barred by the Ministerial Exception Because Respondents Voluntarily Entered into a Contract with Petitioner, the Case can be Decided on Neutral Principles of Law, and Petitioner does not Seek Reinstatement to his Previous Position.

The ministerial exception does not prevent a ministerial employee from seeking a remedy against a religious organization employer for breach of a valid contract. *See Kirby*, 426 S.W.3d at 620; *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (Ct. App. N.C. 2016); *Second Episcopal Dist. African Methodist Episcopal Church v. Prileau*, 49 A.3d 812, 818 (Ct. App. D.C. 1990); *Petruska v. Gannon*, 462 F.3d 294, 312 (3d Cir. 2006). "A church is always

free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (citing *Watson v. Jones*, 80 U.S. 679, 714 (1871)).

The Supreme Court of Kentucky, in *Kirby v. Lexington Theol. Seminary*, was faced with a case alleging breach of an employment contract by a tenured teacher against the theological seminary employer. *Kirby*, 426 S.W.3d at 603. Despite the court's finding that Kirby was a ministerial employee and that the seminary was a religious institution—seemingly bringing the parties within the purview of the ministerial exception—the court found that the ministerial exception did not apply to breach of contract cases that could be decided on neutral principles of law and without "wading into doctrinal waters." *Id.* at 620. In deciding the case as such, the court gave great weight to the fact that the seminary had voluntarily contracted with Kirby, and therefore the restrictions on how Kirby could be terminated were not governmental restrictions. *Id.* at 615. "Contractual transactions, and the resulting obligations, are assumed voluntarily. Underneath everything, churches are organizations. And, like any organization, a 'church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.'" *Id.*

Kirby is a decision that is wholly relevant and applicable to Mr. Turner's claims against Respondents. Like the religious employer in *Kirby*, the Respondents voluntarily chose to enter into a contract with Mr. Turner. *Kirby*, 426 S.W.3d at 603; R. at 4. In *Kirby*, the seminary terminated the employment of a tenured teacher, and similarly, Mr. Turner's year-long employment contract was breached when the Respondents terminated Mr. Turner's employment despite his employment being contractually guaranteed for an additional eight months. *Kirby*, 426 S.W.2d at 616; R. at 5. Respondents have failed to assert that Mr. Turner's termination was

for any contractually permissible reason, and instead they attempt to shield themselves from their promises by invoking the ministerial exception. R. at 5. There is no indication that Mr. Turner's contract dispute with Respondents cannot be resolved using "neutral principles of law." *Kirby*, 426 S.W.3d at 618. This Court should follow the reasoning of the Supreme Court of Kentucky and hold that the ministerial exception does not bar a dispute based on breach of a valid employment contract.

In *Galetti v. Reeve*, the plaintiff was the principal and a teacher at a religious school. *Galetti*, 331 P.3d 997, 999 (Ct. App. N.M. 2014). She alleged claims including retaliation and breach of contract when she was terminated "without reason or cause" after reporting sexual harassment to the Church. *Id.* The court reversed the trial court's dismissal of the claims, holding that the ministerial exception "is not triggered simply by the subject matter of the complaint." *Id.* at 1002. Instead, the court stated that some threshold inquiry was required to assess "whether the alleged conduct is rooted in religious beliefs." *Id.* at 1000 (quoting *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002)). In assessing the plaintiff's claims, the court noted that the breach of contract claim did not appear to implicate any religious intrusion, especially considering that her sought remedy was damages, not reinstatement. *Id.* at 1001.

Mr. Turner is similar to the plaintiff in *Galetti* because they both reported wrongful behavior and subsequently had their employment terminated in breach of their contracts with the religious institutions. *Galetti*, 331 P.3d at 999; R. at 5. Like the claims in *Galetti*, Mr. Turner's claims do not involve questions of religious belief; only those of secular contract law and retaliatory discharge. Resolution of his grievances will not violate the First Amendment since he does not seek reinstatement—which Mr. Turner concedes would be impermissible—but instead merely seeks monetary damages for the wrongs perpetrated against him. R. at 5. The *Galetti* court

emphasized that if, as litigation proceeded, it became clear that the issues were unresolvable without "religious entanglement," then the claims could be dismissed at that time. *Galetti*, 331 P.3d at 1002. Mr. Turner should be afforded the opportunity to demonstrate that resolution can be obtained applying secular principles of law.

There are other compelling reasons to hold a church liable for breach of employment contracts, as the dissent in *DeBruin v. St. Patrick Congregation* acknowledged. *DeBruin*, 816 N.W.2d 878, 902 (Wis. 2012) (Bradley, J., dissenting). Holding that an employee such as Mr. Turner cannot have his valid employment contract enforced in court could result in inhibiting religion. As Judge Bradley recognized, "the underpinning of contract law is that competent parties are permitted to bind themselves to voluntary agreements, and such agreements will be enforced by courts." *Id.* at 907. If the Court refuses to enforce a valid contract, religion will be inhibited because qualified potential employees would be wary to enter into a meaningless employment contract, knowing that is was unenforceable. *Id.* "A church's ability to recruit the best and brightest candidates for ministerial positions could be undermined because the church would be unable to offer desirable candidates any contractual assurances regarding job security." *Id.*

Alternatively, such a ruling could be seen as advancing religion. The Court would essentially be carving out an exception, allowing religious organizations to renege on their contractual obligations without any remedy to the wronged party. *See Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1184 (Md. 2011) ("Declining to impose neutral and otherwise applicable tort or contract obligations on religious institutions and ministers may actually support the establishment of religion, because to do so effectively creates an exception for, and may

thereby help promote, religion."). Certainly such a result is unwarranted by the First Amendment where the goal is to neither advance nor inhibit religion.

Giving a remedy to "ministers" who are harmed by their religious employer's breach of contract—contracts being a wholly secular concept—would not violate the First Amendment, but would rather ensure that religious organizations are held to the valid contracts that they choose to enter into, just like any other employer.

B. *Hosanna-Tabor* does not Bar the Current Suit Because *Hosanna-Tabor* was Decided on Narrow Grounds and the Court Explicitly Expressed that Narrow Holding.

Respondents argue that the Court's decision in *Hosanna-Tabor* is the applicable legal precedent to be applied in this case. *Hosanna-Tabor*, 565 U.S. 171. The Court did last address the ministerial exception in *Hosanna-Tabor*, but the case is very different from the case before the Court today. In *Hosanna-Tabor*, the plaintiff had been a "called teacher"—as distinguished from a "contract" teacher—who was bringing an action for employment discrimination under the Americans with Disabilities Act. *Id.* at 176–79. In contrast, Mr. Turner was under an employment *contract* that Respondents voluntarily entered into. R. at 4. In denying the plaintiff's request for injunctive relief in *Hosanna-Tabor*, the Court noted that "The EEOC and [the plaintiff] originally sought an order reinstating [the plaintiff] to her former position as a called teacher. By requiring the church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers." *Id.* at 194. This is a stark contrast to the case of Mr. Turner, who seeks only monetary damages for breach of the employment contract that the parties voluntarily entered into. R. at 5. If Respondents did not want the courts interfering in their employment decisions, then they should not have turned their employment relationship with Mr. Turner into a secular

matter by entering into an employment contract. The most significant reason that *Hosanna-Tabor* is inapplicable as legal precedent is that the Court construed its holding very narrowly in *Hosanna-Tabor*:

> The case before us is an *employment discrimination* suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold *only* that the ministerial exception bars such a suit. *We express 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*.

Hosanna-Tabor, 565 U.S. at 196 (emphasis added). The Court could not have expressed more clearly that their decision does not bar to cases of this ilk, where a church voluntarily contracts with a minister and subsequently breaches that contract.

C. Public Policy Compels a Holding in Petitioner's Favor Since Petitioner was Terminated in Retaliation for Refusal to Participate in, and Reporting of, Fraudulent Conduct by Respondents.

The Supreme Court has expressed views that the Religion Clauses are limited in application, and could potentially be overcome in cases of fraud. *See Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("Nothing 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."); *see also Gen. Council on Fin. & Admin. v. Cal. Superior Court*, 430 U.S. 1369, 1373 (1978) (Rehnquist, J., in Chambers) ("[Dangers of being entangled in religious controversies] are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged."). Courts, Supreme or otherwise, have frequently allowed cases—otherwise barred—to continue when there is fraudulent or illegal conduct being perpetrated upon a third party or

where an employee is being encouraged to commit illegal acts by his employer. *See, e.g.*, *McClanahan v. Remington Freight Lines*, 517 N.E.2d 390, 393 (Ind. 1988).

In *McClanahan*, the plaintiff was an at-will truck driver who was fired by his employer when he refused, despite instruction by his employer, to drive a "load" into Illinois when the truck was over the legal weight limit. *McClanahan*, 517 N.E.2d at 391. As a result of the plaintiff's refusal to commit an unlawful act, the employer immediately terminated the employment of the truck driver. *Id.* Despite the plaintiff's status as an at-will employee—which would normally foreclose an employee's ability to bring a wrongful discharge suit—the court allowed such a suit to proceed under the circumstances. *Id.* at 393. In reasoning why such a result was warranted, the Supreme Court of Indiana noted the strong public policy interests at stake, stating that

> Depriving McClanahan of any legal recourse under these circumstances would encourage criminal conduct by both the employee and the employer. Employees faced with the choice of losing their jobs or committing an illegal act for which they might not be caught would feel pressure to break the law out of financial necessity. Employers, knowing the employees' susceptibility to such threats and the absence of civil retribution, would be prompted to present such an ultimatum.

Id. The court allowed for an exception to what would normally be a bar on the ability of a terminated employee to bring suit in cases where an employee refused "to commit an act for which he would be personally liable." *Id.*

The same public policy interests at stake in *McClanahan* are at stake in Mr. Turner's situation. Like the plaintiff in *McClanahan*, Mr. Turner was instructed by his employer to commit an illegal act—accepting the portion of the bequest intended for upkeep of the non-existent cemetery—that Mr. Turner felt would result in personal liability. R. at 5. Also like the plaintiff in *McClanahan*, Mr. Turner was fired after refusing to participate in the unlawful act. *McClanahan*, 517 N.E.2d at 391; R. at 5. A holding in Respondents' favor will result in the same public policy implications that the *McClanahan* court acknowledged. *McClanahan*, 517

N.E.2d at 393. A result of holding that the ministerial exception insulates religious employers from any liability whatsoever for terminating an employee who refuses to participate in conduct that violates wholly secular law, all religious employees would potentially be asked to make a choice between keeping their livelihood or following the law. On the other hand, giving religious employees a remedy would encourage truthful reporting of violations of secular law; an outcome that certainly benefits society as a whole.

The Court has the opportunity, in providing relief to Mr. Turner, to create a legal precedent that is integral to protection of the public. By holding that the ministerial exception is inapplicable in cases of retaliatory discharge when the "minister" reports fraud being perpetrated upon a third party, the only thing being "inhibited" is a church's illegal conduct—an outcome surely not barred by the Religion Clauses. This is the opportunity for the Court to practice what had been preached in *Cantwell* by slightly inconveniencing free exercise of religion by preventing Respondents from escaping liability to Mr. Turner by hiding "under the cloak of religion." *Cantwell*, 310 U.S. at 306.

POINT II

BECAUSE THE CHURCH'S AFFIRMATIVE DEFENSE AS TO THE MINISTERIAL EXCEPTION DOES NOT EFFECTIVELY VITIATE PETITIONER'S CLAIMS, DISCOVERY IS WARRANTED TO DETERMINE WHETHER APPELLANT'S CLAIMS CAN PROCEED WITHOUT IMPERMISSIBLE ENTANGLEMENT IN STRICTLY ECCLESIASTICAL MATTERS.

For an affirmative defense to be grounds for dismissal on the pleadings, the elements of the defense must be matched and satisfied by the facts set forth in the plaintiff's complaint. *Barney v. PNC Bank*, 714 F.3d 920, 926 (6th Cir. 2013); *see also Geiling v. Wirt Fin. Servs.*, 2014 U.S. Dist. LEXIS 183237, *1, *25 (E.D. Mich. Dec. 31, 2014) (quoting *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012); *Basile v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 551 F. Supp. 580, 591 (S.D. Ohio 1982)) ("[A] complaint must 'set[] out all of the elements of an affirmative defense [to make] dismissal under Rule 12(b)(6) appropriate . . . and 'effectively vitiate' the claim.").

A. Appellant Should be Allowed to Pursue Discovery to Contest Respondent's Religious-Based Reasoning as Pretextual in Nature, because the First Amendment does not Foreclose Inquiry into the Secular, Legal Obligations of Religious Entities.

Although the Supreme Court in *Hosanna-Tabor* did not permit a pretextual characterization of the church's intention in the employment discrimination context, the Court explicitly declined to extend their narrow ruling to other contexts, including contract and tort disputes. 565 U.S. at 193, 196. Despite Respondents' arguments, the Court's censure of inquiries into whether a church's reasoning was pretextual or not was linked directly to the context of employment discrimination. *Id.* at 194. Who a church hires or fires cannot be dictated by governmental decree; *Hosanna-Tabor* firmly established that the choice of who will direct the formation of the faithful receives blanket protection, even if a church's criteria for employment are discriminatory or without cause. *Id.* at 194–95 (citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952)). A pretextual challenge in that context is impossible, because the criteria of qualification belong to the church and the church alone, whatever they may be. Respondents leap to a conclusion of victory on this basis, but in so doing, they overlook the longstanding willingness of the judicial system to involve itself in meting out justice outside the confines of a church's religious structure. *See Watson v. Jones*, a case favorably cited by *Hosanna-Tabor*:

> [I]t may very well be conceded that if [a church] should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical

> questions, its decision would be utterly disregarded by any civil court where it might be set up.

Watson v. Jones, 80 U.S. at 733; *see also Hosanna-Tabor*, 565 U.S. at 185–86.

Though *Watson* is an early case, its distinction between church affairs or governance and independent civil obligations has been repeated over the years by courts. One such case, *Minker v. Balt. Annual Conference of United Methodist Church*, permitted discovery to determine the existence of an oral contract between a church and a minister, without finding a violation of the First Amendment. 894 F.2d at 1360–61. The court in *Minker* reasoned that the breach of contract issue was independent and could (at least theoretically) be solved without entangling religion; if at any time this became impossible, the district court could grant summary judgment and safeguard the church's First Amendment rights. *Id.* at 1360.

Similarly, in *Sanders v. Casa Baptist Church*, the Fifth Circuit reinstated a cause of action for counseling malpractice when a pastor, in the role of marriage counselor, had sexual relations with participants. 134 F.3d 331, 333, 338 (5th Cir. 1998). The court denied the pastor's claim that the counseling relation was immune to judicial oversight based on its apparently religious nature, because a finding in the pastor's favor "would necessarily extend constitutional protection to the secular components of these relationships." *Id.* at 335–36.

In both of these cases, the court's hand would have been forced to an opposite conclusion if there was an absolute prohibition on challenging a church's insistence on automatic First Amendment protection. Each time, the church and its parties claimed that they were protected on the grounds of their religious reasoning, just as Respondents claim in this case. R. at 6. Certainly, Petitioner is barred from arguing that the church's reasoning was pretextual as it concerns his fitness to lead the congregation, but, as in *Minker*, such a prohibition should not extend to his contract dispute. The voluntary formation of a contract does not fall under

"questions of religious doctrine and practice" in which the judiciary must leave the judgment of a church undisturbed. *Sanders*, 134 F.3d at 337. When dealing with First Amendment religious protections, the Supreme Court has notably drawn marked distinctions between areas of law when determining how to interpret Constitutional protections: in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, Justice Scalia, writing for the Court, indicated that the level of scrutiny differed depending on what area of law was entangled in a dispute regarding religious rights. 494 U.S. 872, 883 (1990) (finding that strict scrutiny in Free Exercise cases was limited to the unemployment compensation context, and was not the test for generally applicable criminal laws). Though the present case addresses the applicability of an affirmative defense, not the denial of unemployment benefits, the Supreme Court's own jurisprudence warns against making assumptions that what applied in a case of employment discrimination will also absolutely apply in a case of contract or tort.

Moreover, *Hosanna-Tabor* itself was decided at the summary judgment stage, and thus is an imperfect comparison to the cases cited by the Tourovia Court of Appeals in support of dismissal without discovery. 565 U.S. at 180; R. at 10. The Court of Appeals addresses the indisputable fact that courts both state and federal are divided on the issue of how far the ministerial exception extends and how entirely it should bar a claim from proceeding. *See, e.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2011) (both permitting ministers' sexual harassment claims, *inter alia*, to proceed). To support its own perspective—cementing and extending the power of the ministerial exception—the Tourovia Court of Appeals cites cases from Maryland and Kentucky state courts. *See, e.g.*, *Melhorn v. Balt. Wash. Conf. of the United Methodist Church*, No. 2065, 2016 Md. App. LEXIS 933 at *16 (Md. Ct. Spec. App. Mar. 16, 2016);

Crymes v. Grace Hope Presbyterian Church, Inc., No. 2011-CA-000746, 2012 Ky. App. Unpub. LEXIS 564 at *2 (Ky. Ct. App. Aug. 10, 2012).

Though the facts of *Melhorn* are markedly similar to those of the present case, there is no cause to rely on a case that was affixed with a notice that, as an unreported opinion, "it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent . . . or as persuasive authority." 2016 Md. App. LEXIS 933, at *1. Further, the *Melhorn* court relied on a predicate determination that it was impossible to investigate the plaintiff's claim without "an inquiry into religious matters." *Id.* at *15. In the present case, Petitioner had no choice but to include the church's rote statement of their reasoning in his pleadings, but as already established, this case involves the sort of secular matters into which courts can and have inquired. For instance, while the *Crymes* case did extend the ministerial exception to wrongful discharge claims in Kentucky, its holding does not wholly align with Respondents' arguments; the Kentucky court held that that breach of contract claims do not necessarily constitute an ecclesiastical matter, and can thus escape dismissal under the ministerial exception. 2012 Ky. App. Unpub. LEXIS 564, at *4.

A church's mere claim that a solely religious matter was involved and should accordingly bar further inquiry into any possible claim is not dispositive in every dispute between minister and church. There has *not* been such a strident insistence on automatic dismissal as the Tourovia Court of Appeals would suggest or instate. R. at 10. The test articulated by the Tourovia court was that, if a complaint is sufficient on its face to show that it is impossible to avoid religious inquiry, the complaint must be dismissed. R. at 10–11. Yet in the misapplication of this test, foreclosing the entirety of Mr. Turner's case, the Court of Appeals attempted to set a precedent allowing even a vaguely founded threat by a church to assume the full authority of a final

judgment. Petitioner does not seek to inquire into the doctrinal matters of the church, nor does he pursue a remedy of reinstatement for either of his claims. R. at 4. His breach of contract claim concerns the contract that necessarily stands apart from religious protection for the church. *See Minker*, 894 F.2d at 1359 (citing *Watson*, 80 U.S. at 714) (holding that church's contracts, voluntarily entered, are "fully enforceable"). Similarly, his retaliatory discharge claim involves the church's receipt of benefits from a trust, a non-religious entity, and is not a dispute over theological differences. R. at 5.

A holding today for Respondents would indicate this Court's willingness to entitle every church to absolute protection from judicial intervention whenever it wishes to evade freely developed legal obligations. All that such a church would need to do is proclaim that their reasoning is religious in a single, unsworn statement, as Respondents did here. When discovery is barred, as the Court of Appeals held, churches may proceed to enter and exit the legal arena with impunity, since they will be unburdened by the weight of legal promises made or legal duties owed. Therefore, this Court should not extend its prohibition of inquiries into the pretextual nature of a church's reasoning beyond the narrow holding of *Hosanna-Tabor*.

B. Discovery can be Conducted Without Affecting Strictly Protected Religious Matters of the Church Because the Rights and Remedies Sought by Petitioner are not Strictly Ecclesiastical in Nature.

Not all state and federal courts have sided with the Tourovia courts' eagerness to dispense with most or all process in cases involving religious matters. Where it is possible, without violating the sanctity of churches' own internal workings and doctrines, to conduct some inquiry and fashion some remedy, courts should not automatically dismiss claims against a religious entity. *Minker*, 894 F.2d at 1360 (citing *Costello Pub. Co. v. Rotelle*, 670 F.2d 1035, 1050 n.31 (D.C. Cir. 1981); *see also Galetti v. Reeve*, 331 P.3d at 1002 ("[T]he church autonomy

doctrine applies only if judicial resolution of the claims would violate the First Amendment. This is a fact-specific and claim-specific inquiry [more appropriately resolved at a later stage].").

In *Minker,* the court refused to accept the church's contention that the plaintiff's breach of contract was unviable because it was a ministerial contract. 894 F.2d at 1360. The plaintiff sought to prove the existence of a contract and its terms, an inquiry that was sufficient to pursue a claim but that did not necessarily impede the church's religious freedom. *Id.* In reference to the terms in particular dispute, the court reasoned that "the issue of breach of contract can be adduced by a fairly direct inquiry into whether [plaintiff's] superintendent promised him a more suitable congregation, whether [plaintiff's] gave consideration . . . and whether such congregations became available but were not offered to [him]." *Id.* Bolstered by the additional support of a permissible remedy—monetary damages rather than reinstatement—the court rejected dismissal without discovery. *Id.* at 1361.

Instead of outright dismissal in the *Galetti* case, the court indicated that the trial court could merely excise the impermissible portions of a breach of contract claim. 331 P.3d at 1001. The plaintiff argued that her contract had been breached because she was not fired for "just cause" and she had not been provided with proper notice. *Id.* The New Mexico Court of Appeals determined that the lower court did not need to address the issue of "just cause," but could instead pursue the notice element to decide whether or not the defendant church had met their contractual obligations. *Id.* The court also found that a potential remedy existed beyond the bar of the ministerial exception, since the plaintiff sought only monetary damages. *Id.* The court reasoned that dismissal would have been premature and inappropriate because the contract matter was a secular one. *Id.* at 1002.

In affirming the dismissal of Mr. Turner's claims, the Tourovia Court of Appeals adopted the Pennsylvania Supreme Court's test to barring discovery in a ministerial exception case. After examining and identifying the elements of the plaintiff's cause of action and any affirmative defenses raised by the defendant, the court should consider whether "it is reasonably likely that, at trial, the fact-finder would ultimately be able to consider whether the parties carried their respective burdens as to every element of each of the plaintiff's claims without intruding into the sacred precincts." R. at 9–10 (quoting *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1103 (2009)). The Court of Appeals then concluded that it was obvious that it would be impossible to satisfy the *Connor* test because Petitioner acknowledged his role as minister and included the church's stated reason for firing him. R. at 10.

However, as above established, Mr. Turner's causes of action differ from the *Hosanna-Tabor* employment discrimination context, where the Supreme Court in essence ruled that it *would* be impossible to conduct an inquiry into the church's decision without violating "sacred precincts." 565 U.S. at 194–95. Under *Minker's* standard, coming from the D.C. Circuit, the case should not be dismissed upon the finding that there is some inquiry and some remedy available. 894 F.2d at 1360 (citing *Costello*, 670 F.2d at 1050 n.31). The Tourovia Court of Appeals attempts to distinguish *Minker* and *Galetti* by arguing that, in those cases, the secular inquiry and remedy were apparent on the face of the plaintiffs' claims. R. at 10. This oversimplification is misleading and unjust.

In *Galetti*, the court did not dismiss the plaintiff's case, even though part of her claim could not be addressed by the trial court without excessive entanglement in ecclesiastical matters. 331 P.3d at 1001. This adjustment to the plaintiff's claims shows that, at one time, it was *not* clear on the face of the claims that they were clear of all religious entanglement. Yet the

court in *Galetti* did not grant a broad sweep of impunity to the defendant church; instead, they limited it to the aspects of the claim that potentially *could* be heard. *Id.* In the present case, an inquiry could be conducted as to the terms of the contract, and whether the church's actions—irrespective of their religious nature—violated the terms of the contract or not. Basic discovery is particularly urgent in this case to obtain a copy of Mr. Turner's employment contract with Respondents. *See generally* R. at 1–16. As aforementioned, Mr. Turner is not attempting to wage doctrinal warfare against Respondents. His case may be necessarily limited by the operation of the First Amendment, but it ought not to be foreclosed. As the court stated in *Minker*: "It is possible that the [F]irst [A]mendment's prohibition against proceedings that would create excessive entanglements with religious beliefs will make appellant's task at trial more difficult. *But these difficulties do not eliminate appellant's right to enforce his employment contract*." 894 F.2d at 1361 (emphasis added).

As for the claim of retaliatory discharge, an inquiry into whether the church is mishandling funds with the Thomas Trust is not religiously founded. Even if this Court finds that the Respondents' decision to fire Petitioner is protected, his allegations of fraudulent conduct are not equally and automatically barred. Investigation of potentially illegal activity can hardly be considered to intrude on any concept of sanctity. Indeed, courts have shown particular willingness to look past raised shield of the ministerial defense in tort cases, even courts that drew a hard line at investigating a church's decision regarding employment status. *See, e.g.*, *Elvig*, 375 F.3d at 962 (holding that the tort of sexual harassment did not fall under the established Title VII ministerial exception, and allowing plaintiff to pursue that claim against the church).

Respondents' opposition to discovery in this case shows a disregard for any kind of legal obligation, no matter how willingly and affirmatively formed. It also shows that Respondent is content to retreat under the protective arm of government protection, which uncomfortably resembles a kind of qualified immunity. Disputes of contract and tort are litigated every day. Mr. Turner had the misfortune to be involved in such a dispute. The question for this Court is whether his employer will be allowed to shrug off legal inquiries and transform binding contracts into illusory arrangements, as they seek to do today.

CONCLUSION

For the foregoing reasons, the judgment of the Tourovia Court of Appeals should be reversed.