No. 415-2017
National Moot Court Competition in Law & Religion
TOURO COLLEGE JACOB D. FUCHSBERG LAW CENTER

IN THE

Supreme Court of the United States

DAVID R. TURNER,
Petitioners,

v.

ST. FRANCIS CHURCH OF TOUROVIA, ET AL.,
Respondent.

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

BRIEF FOR THE PETITIONER

TEAM 1
Counsel of Record

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

David R. Turner was hired as pastor of the St. Francis Church of Tourovia on July 1, 2009. App. 4. Initially hired for a one-year contract, he had his contract renewed three times, most recently in June 2012. *Id.* The term of that last contract ran from July 1, 2012, through June 30, 2013.

In May 2012, the Church was given a $1.5 million bequest, and Turner—in light of his background as a financial officer for IBM and a treasurer and Chief Financial Officer for another regional office of the Conference—was chosen by the congregation of St. Francis to be the administrator of the bequest. App. 5. The bequest came with instructions that half was to be used for the church's general operations and half was to be used for maintenance of the church's cemetery. *Id.* Turner, however, discovered that St. Francis had sold the cemetery in 2009, and reasoned that it would possibly be fraud and tax evasion to accept the half of the bequest so dedicated. *Id.* Turner reported this to the church's Board of Trustees, advising them to inform Wells Fargo, who was serving as trustee of the bequest, in order to receive guidance. *Id.* The Vice Chairman of the Board, however, directed Turner to request the full bequest and to place it in the Church's general operations account. *Id.* Turner refused to do so, and he took his concerns to Roberta Jones, the area superintendent of churches in the Tourovia Conference of Christian Churches, in August 2012. *Id.* After having done so, Turner realized his efforts to address the possible illegality of receipt of the full bequest by way of the church's leadership were futile, and so in October 2012 he contacted the bank and the IRS to receive guidance as to what he should do. *Id.*

Shortly thereafter, on October 16, 2012, just two weeks after Turner reported the church's conduct to Wells Fargo and the IRS, Jones informed Turner that he was being terminated effective October 31, 2012. *Id*. The only reason Turner was given for his termination was that the church had "lost faith" in Turner's leadership. *Id*.

The State of Tourovia prohibits employee discharge or other "retaliatory adverse employment action" against an employee "because that employee discloses or threatens to disclose information to a public entity or objects or refuses to participate in an action that violates law, rule, or regulation . . . ." TOUROVIA LAB. LAW § 740(1)(A). Tourovia strikes a balance between employer needs and employee safety, requiring that employees "must first report any violation [of law] to his or her supervisor/employer and must allow a reasonable opportunity for the employer to correct" the activity in question. *Id.* § 740(3). Nevertheless, Tourovia affords employees with a cause of action and a range of remedies if employers take proscribed, adverse action against them. *Id.* § 740(5).

On September 12, 2013, Turner filed a complaint in the Tourovia Supreme Court (the state trial court, *see* App. 2 n.1), claiming wrongful termination in breach of contract and retaliatory discharge in violation of TOUROVIA LAB. LAW § 740, and naming the Church, the Conference, and Jones (collectively, "the church") as defendants. App. 5. He sought only monetary damages for both claims. *Id.* The Conference and Jones then filed a Motion to Dismiss on March 31, 2014, asserting that the ministerial exception under the First Amendment barred the suit. *Id.* The Supreme Court, finding that the First Amendment's "ministerial exception . . . bars this suit" based on "the reason stated on the record in open court," summarily

dismissed Turner's complaint with prejudice in a one-paragraph opinion. App. 2. According to the Court of Appeals, the Supreme Court reasoned that "appellant's claims are fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives . . . which is precluded by the ministerial exception." App. 6.

Next, the Tourovia Supreme Court, Appellate Division, Second Department, summarily affirmed the judgment of the Supreme Court in a one-sentence statement and concomitant order. *See* App. 3.

The Tourovia Court of Appeals then reviewed the matter. Reviewing the complaint and the motion to dismiss, the court held "that the First Amendment does protect the church against a wrongful termination claim, even on the types of matters raised in this Complaint." App. 8. For this reason, the court held that the ministerial exception applied to prevent the court from inquiring into the church's reason for terminating Turner. App. 9. Relatedly, the court also held that Turner was not entitled to discovery, as the ministerial exception's applicability to the case was evident on the face of the complaint. App. 10. Two dissenting justices, however, argued both that the ministerial exception did not apply to this case, being a secular suit, and that dismissal at this stage was both wrong and unjust. App. 11–14.

Turner then petitioned for a writ of certiorari with this Court. This Court granted certiorari. App. 15.

JURISDICTIONAL STATEMENT

The Tourovia Court of Appeals entered its judgment on August 16, 2016. App. 4. Appeal to this Court was timely

filed by Turner after final judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

SUMMARY OF THE ARGUMENT

The judgment of the Tourovia Court of Appeals should be reversed.

1. The ministerial exception does not bar Turner's claims for wrongful termination in breach of contract and retaliatory discharge in violation of TOUROVIA LAB. LAW § 740 against the church. The ministerial exception is a narrow doctrine that prevents the government from impermissibly interfering with the relationship between a church and its ministers. It is not a sword that allows churches to breach voluntarily imposed contract obligations owed to its ministers or immunize itself from harm they may impose on innocent and unrelated third parties.

Throughout this country's history, courts have held that churches are bound by the terms of their valid contracts. Adjudicating Turner's contract claim would not entangle this Court in religious doctrine. Turner's contract claim only asks this Court to evaluate the clear, bargained-for terms of his contract with the church using neutral principles of contract law. Moreover, enforcement of Turner's contract claim would not result in government imposition of an unwanted minister onto the church. The church chose to circumscribe its constitutional rights through a valid contract, phrased in completely secular terms, that civil courts have the authority and obligation to interpret and enforce.

Nor should the ministerial exception bar Turner's retaliatory discharge claim. The protections of the First Amendment are subject to a balancing test. Here, Turner's claims implicate extraordinary interests that are not raised in traditional discrimination or retaliation claims. The Court is not being asked to shield Turner from

discharge simply because he is a minister. It is being asked to permit Turner to proceed in his lawsuit against the church in light of the substantial impact his claim has on the future likelihood of significant third party harm. The government has a compelling interest in encouraging the reporting of tortious or criminal conduct against innocent third parties. Turner's retaliation claim substantially furthers that interest.

Moreover, barring Turner's retaliation claim creates an unjust catch-22. Because of Turner's position as administrator of the Thomas Trust bequest, he would be liable for any tortious or criminal conduct arising out of the church's dealings with the Trust. If he chose to comply with the church's orders, he would be exposed to significant liability and would not be entitled to any religious exemption under this Court's decision in *Employment Division v. Smith*. If he chose to comply with the law, as he did in this case, he would be fired and foreclosed from any avenue of relief.

Finally, the pretext inquiry under Tourovia's retaliation statute employs the same framework as the pretext inquiry under *McDonnell Douglas*. This inquiry is entirely secular, and would only require this Court to determine whether Turner has presented sufficient evidence to show that the proffered religious justification was not the actual motivating cause of Turner's termination. That Turner's contract has been renewed three times and that he was terminated only three months into his final contract, and only two weeks after reporting the church's tortious conduct to external authorities, sufficiently demonstrates that Turner was fired in retaliation for reporting and refusing to participate in tortious conduct. There is no thus need for this Court to entangle itself in any religious doctrine whatsoever.

2. Dismissal for failure to state a claim, solely based on application of the ministerial exception, without giving plaintiffs like Turner a chance to conduct discovery, is erroneous. Turner's Complaint provides enough facts to support his claims for breach of contract and retaliatory discharge to satisfy this Court's pleading standards. And defendants' invocation of the ministerial exception does not prohibit courts from allowing discovery to ascertain whether the exception truly applies or not.

This Court, in *Hosanna-Tabor*, explicitly left open the question whether the exception should apply in circumstances such as Turner's, acknowledging that the facts of each case must be taken into consideration before the exception is applied to dismiss a suit. Discovery is needed to decide whether *Hosanna-Tabor* should be extended to these facts also. The possibility of pretextual invocations of the exception also militates against disposition at the motion to dismiss stage without discovery. Finally, concerns about discovery intruding upon areas shielded by the ministerial exception are misplaced given judicial control and supervision over the discovery process.

Accordingly, the judgment of the Tourovia Court of Appeals should be reversed, and Turner should be permitted to proceed to discovery regarding his claims against the church.

ARGUMENT

The judgment of the Tourovia Court of Appeals should be reversed for two reasons. First, the ministerial exception does not bar Turner's breach of contract and retaliatory discharge claims. Second, the Court of Appeals erred in dismissing Turner's claims before discovery,

incorrectly concluding that the ministerial exception barred the suit from going forward.

I. THE MINISTERIAL EXCEPTION DOES NOT BAR TURNER'S WRONGFUL TERMINATION CLAIMS

The ministerial exception should not be extended to bar Turner's wrongful termination claims against the church. The ministerial exception is a narrow doctrine that precludes secular courts from adjudicating claims that would impose unwanted ministers onto religious institutions. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012). The ministerial exception is rooted in broader First Amendment concerns that preclude secular courts from impermissibly interfering with a church's internal governance or religious doctrine. *Id.* As such, the exception reflects both Free Exercise and Establishment Clause interests to permit a church the freedom to "shape its own faith" and prohibit government entanglement with "ecclesiastical decisions," respectively. *Id.* at 188–89.

The ministerial exception, however, has never been held to be a complete bar to claims by ministers against their religious employers. *See id.*; *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008) ("[A]lthough [the ministerial exception's] name might imply an absolute exception, it is not always a complete barrier to suit."); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002) (concluding that church autonomy doctrine does not apply to purely secular decisions, even when made by churches). Indeed, the Supreme Court has rejected the application of any "rigid formula" to determine when the exception ought to apply. *Hosanna-Tabor*, 565 U.S. at 190. An evaluation of the nature of Turner's claims in this case

demonstrates that the ministerial exception should not bar either his 1) breach of employment contract claim or 2) retaliatory discharge claim.

A. The Ministerial Exception Does Not Permit the Church to Avoid Their Voluntarily Assumed Contractual Obligations

The ministerial exception does not preclude secular courts from enforcing voluntarily assumed contractual obligations against religious institutions. Religious institutions are not categorically "above the law." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Accordingly, religious institutions are not automatically immune to contract claims. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1871) (noting that religious organizations' "rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints"); *id.* ("Like any other person or organization, [churches] may be held liable for their torts and upon their valid contracts."); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615 (Ky. 2014) ("[Petitioner]'s claims based in contract, however, can survive despite our determination that [Petitioner] is a ministerial employee for purposes of the ministerial exception."). Indeed, this Court has so far explicitly refused to extend the exception to breach of contract claims. *Hosanna-Tabor*, 565 U.S. at 188.

In this case, Turner's contract claim involves a straightforward application of contract law. Turner and the church entered into valid yearly employment contracts in good faith and through arm's length negotiation for three consecutive years. The record indicates only that these contracts were designated to run from July 1st through

June 30th. App. 4. There is no indication that the parties negotiated for an early termination clause for good cause or otherwise, nor does the church suggest that the contract provided for such early termination. By firing Turner on October 31, 2012, in the middle of his third consecutive yearly employment contract, the church breached the clear terms of that employment contract. Accordingly, all the trial court would be required to do is interpret the contract by its clear, bargained-for terms and determine whether the church violated the terms of its valid contract with Turner.

Nor should the ministerial exception automatically apply simply because Turner's breach of contract claim is part of a broader wrongful termination suit. The ministerial exception does not depend on the application of per se rules; instead, determining whether the exception applies in a given case requires a more nuanced approach that considers the nature of the claims being brought. *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1205–06 (Conn. 2011). Courts must "look not at the label placed on the action but at the actual issues the court has been asked to decide." *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 816 (D.C. 2012). Accordingly, courts have entertained claims against religious employers where those claims could be adequately resolved by reference to "neutral principles of law," rather than issues of internal church governance or religious doctrine. *Jones v. Wolf*, 443 U.S. 595, 604–05 (1979); *Prioleau*, 49 A.3d at 816; *see also Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 949–950 (9th Cir. 1999). Thus, even where a claim requires a reference to religion, that claim is not necessarily barred where it can be resolved through the application of neutral principles of law. *Kirby*, 426 S.W.3d at 619.

Although the Tourovia Court of Appeals relied on cases such as *Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997), and *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis. 2012), *see* App. 7–8, in finding that wrongful termination claims based on breach of contract are barred by the ministerial exception, these cases are inapposite. In *Bell*, an ordained minister was called to serve as an executive director of a religious non-profit organization comprised of over twenty religious groups, including four national religious organizations. 126 F.3d at 329–30. After the petitioner in that case was terminated from his position due to diminishing financial resources, he sued the major religious organizations involved, alleging that he was fired for other, impermissible reasons. *Id.* at 331–32. The Fourth Circuit rejected the claim because it found that the "resolution of such an accusation would interpose the judiciary into the Presbyterian Church's . . . decision to select their outreach ministry through the granting or withholding of funds." *Id.* at 332.

Similarly, in *DeBruin*, the Wisconsin Supreme Court upheld the dismissal of a breach of employment contract claim where the petitioner had alleged that she was terminated for an improper reason. 816 N.W.2d at 889. There, the petitioner was employed by a church as Director of Faith Formation pursuant to an employment contract that expressly reserved the right of the church to terminate her employment for "good and sufficient cause" as determined by the church. *Id.* at 883. The court found that such a claim would require an inquiry into the actual reasons for the petitioner's termination and an evaluation of whether those reasons properly constituted "good and sufficient cause," within the meaning of the contract. *Id.* at 889. This inquiry, the court held, was prohibited by the First Amendment. *Id.* at 890.

Here, however, Turner's contract claim does not ask the Court to evaluate the reasons for Turner's termination: the current state of the record suggests that the church's proffered justification is ultimately irrelevant to the resolution of Turner's contract claim. Here, unlike in *Bell*, the Court need not inquire into the truth or falsity of the church's stated reasons for terminating Turner's position with the church. Rather, the only issue raised in the pleadings is whether the church complied with its contractual obligations. *See Galetti v. Reeve*, 331 P.3d 997, 1002 (N.M. 2014). Moreover, unlike in *DeBruin*, the Court would not be required to evaluate the sufficiency or correctness of the church's religious doctrine or internal procedures. Absent such an inquiry, there is no risk of a secular court deciding purely ecclesiastical matters. Instead, Turner's contract claim involves "'a fairly direct inquiry' into whether there was an offer, acceptance, consideration, and breach." *Petruska v. Gannon University*, 462 F.3d 294, 311 (3d Cir. 2006) (quoting *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990)).

Furthermore, breach of employment contract claims brought by ministers against their former religious employers do not interfere with a religious institution's right to select its own ministers. Courts have long recognized that contracts impose private rather than public obligations, and that private parties may contractually obligate themselves to do things that the state could not impose upon those parties itself. *See Watson*, 80 U.S. (13 Wall.) at 714; *cf. American Airlines v. Wolens*, 115 U.S. 817 (1995) (holding that contract claims survive express federal preemption clause in the Airline Deregulation Act because they are voluntarily assumed obligations the enforcement of which do not impose state

public policy decisions). Accordingly, a church is "always free to burden its activities voluntarily through contracts" which are enforceable in secular courts. *Minker*, 894 F.2d at 1359. In other words, a church is free to circumscribe its own constitutionally protected conduct through contractual arrangements, and a secular court is permitted to interpret those agreements according to their own terms through basic application of the neutral principles of contract law. *See Kirby*, 426 S.W.3d at 616. Accordingly, where, as here, a former minister asserts a breach of contract claim against his religious employer, which does not require the court to evaluate the truth, correctness, or sufficiency of the church's reasons or doctrine, the "[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." *Petruska*, 462 F.3d at 310.

Nor does the monetary damages remedy sought by Turner impose upon the church an unwanted minister. Although this Court in *Hosanna-Tabor* found that monetary damages would impermissibly punish a religious institution for exercising its First Amendment rights in selecting its own ministers, this Court was only analyzing this remedy in the context of employment discrimination claims. In a breach of contract action, however, the damages "penalty" is not imposed by the government for a violation of federal or state law or public policy; instead, the "penalty" is part of the negotiated contract between the church and Turner. In other words, "[t]he enforcement of a religious institution's bargained-for promise" is best viewed as a neutral contract remedy imposed for violating a contract's terms, and not as a penalty for terminating a minister. *Kirby*, 426 S.W.3d at 620. Thus, damages in a

breach of contract claim are not penalties sufficient to violate the church's Free Exercise rights. *Id.*

B. The Ministerial Exception Should Not Bar Claims of Retaliatory Discharge Where Such Claims Implicate Compelling Interests in Preventing Third Party Harm and Do Not Excessively Entangle Government with Religious Doctrine

The ministerial exception should not prohibit a civil court from hearing Turner's retaliatory discharge claim. The unique nature of the facts giving rise to Turner's claim demonstrate that the First Amendment interests underlying the application of the ministerial exception do not outweigh the societal interests in preventing fraud and other tortious conduct directed at third parties. Moreover, applying a limited inquiry to determine whether the reasons for terminating Turner's employment were simply pretext to cover up the church's retaliatory motive would not excessively entangle the courts in religious doctrine or ecclesiastical concerns.

1. The Interests in Encouraging the Reporting of, and Refusal to Participate in, Tortious Conduct Against Third Parties is Sufficient to Overcome the Interests in Applying the Ministerial Exception

The Free Exercise and Establishment Clauses have long been recognized as subject to a "balancing of interests test." *Minker*, 894 F.2d at 1357 (citing *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978)). As such, "the First Amendment does not immunize the church from all temporal claims made against it." *Id.* at 1360. It is true that, notwithstanding the limitations of First Amendment

protection, courts have routinely applied the ministerial exception to bar retaliation and discrimination claims under neutral and generally applicable laws against religious employers. *See, e.g., Petruska*, 462 F.3d at 308–09. In other words, courts have determined that these civil rights claims, "are not sufficiently compelling to overcome certain religious interests." *Minker*, 894 F.2d at 1357.

This case, however, is distinguishable from the traditional retaliation and discrimination cases which courts have disposed of in the past in at least two respects. First, Turner's claim implicates heightened societal interests. Essentially all of the cases relied on by the Touravia Court of Appeals majority, including *Hosanna-Tabor*, involved discrimination, tort, or contract claims raised by individuals against religious employers. *See generally, e.g.*, *Hosanna-Tabor*, 565 U.S. 171; *Petruska*, 462 F.3d 294; *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). While there is certainly a governmental interest in preventing invidious discrimination, as under Title VII, that interest may only be asserted on behalf of the minister. Here, however, Turner's retaliation claim arises not out of his personalized interest in being free from discrimination or sexual harassment, *see, e.g.*, *Bollard*, 196 F.3d at 940, or even out of his reporting to internal or external authorities that such discrimination or harassment took place. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 171. Instead, Turner's claim arises out of a concern for unrelated third parties: precluding review of his claim by secular courts would result in a far greater likelihood that innocent third parties, such as the Thomas Trust, would be victims of tortious or criminal conduct. It was precisely this issue that the Court left open in *Hosanna-Tabor*. Frederick Mark

Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 430 (2013).

Indeed, members of this Court articulated this precise concern during oral argument in *Hosanna-Tabor*. In response to a question from Justice Sotomayor concerning the application of the ministerial exception to retaliation claims by ministers allegedly terminated for reporting instances of sexual abuse, counsel for the church acknowledged that "for cases like child abuse where the government's interest is in protecting the child, not an interest in protecting the minister . . . we think you could carve out that exception." Tr. Oral Arg., *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 4593953, at *6. This inquiry would require an evaluation by the Court whether the "government interest is sufficiently compelling to justify interfering with the relationship between the church and its ministers." *Id.* at *6–7.

The same interest in preventing significant third party harm is implicated by Turner's claims here: The Court is not being asked to protect the interests of a minister *qua* minister, but it is being asked to protect the minister as a means of preventing significant third party harm caused by the conduct of the religious institution itself. The ministerial exception should not ignore these interests merely because they are furthered through a wrongful termination suit.

Second, Turner's own interests in this case are substantially greater than those of ministers who sue for the sole purpose of preventing invidious discrimination against themselves. This is because of the incongruous treatment of religious exemptions to neutral, generally applicable laws between religious individuals and religious groups under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and

Hosanna-Tabor, respectively. Gedicks, *supra*, at 419. Turner was selected by the congregation to administer the bequest by the Thomas Trust and was therefore primarily responsible for dealing with Wells Fargo, the trustee of the Thomas Trust. In that capacity, he would almost surely be implicated in any suit by Wells Fargo or the Thomas Trust regarding tortious conduct committed by the church. Under *Smith*, however, Turner would likely not be exempt either from any reporting requirements that may exist under Tourovia law or from liability for tortious or criminal conduct itself. *See Smith*, 494 U.S. at 879. Thus, to avoid almost certain civil or criminal liability, Turner was required to either report the church's tortious conduct, or at the very least refuse to participate in such conduct.

The Complaint alleges, however, that in retaliation for reporting and refusing to participate in the church's tortious conduct, Turner was terminated in clear violation of Tourovia's retaliation statute. But under *Hosanna-Tabor*, which limited *Smith*'s rejection of mandatory exemptions for neutral and generally applicable laws, the church would be entitled to a mandatory exemption from the retaliation statute insofar as it interferes with the hiring or firing decisions of ministers. *Hosanna-Tabor*, 565 U.S. at 190. In *Hosanna-Tabor*, this Court concluded that *Smith* governs only "outward physical acts" and therefore did not "foreclose recognition of a ministerial exception" precluding "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* Thus, even though Tourovia's retaliation statute is a neutral and generally applicable law, the ministerial exception would preclude liability for violating it. The result is that Turner is forced to either expose himself to civil or criminal liability, or head to the unemployment line

Indeed, this catch-22 has been borne out a handful of times in recent years. For instance, in *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513 (Mich. Ct. App. 2010), the Michigan Court of Appeals held that the ministerial exception applied to Michigan's Whistleblower Protection Act claim. *Id.* at 521. There, the plaintiff had been fired allegedly because she reported suspected child abuse to government authorities, as required by Michigan law. Petition for Writ of Certiorari, *Weishuhn*, 565 U.S. 1155 (2012) (No. 10-760), 2010 WL 5043331, at *18–19. The court, without taking into consideration the significant societal and personal interests at stake beyond the simple discrimination claim, dismissed the whistleblower claim, finding that the exception bars "any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Weishuhn*, 787 N.W.2d at 521 (quoting *Petruska*, 462 F.3d at 307). The court noted that its holding both invited an increased potential for abuse in that it allowed for the First Amendment to provide "a pretextual shield to protect otherwise prohibited employment decisions," and placed ministerial employees in an impossibly unfair situation in which they were not exempt from legislative reporting requirements or liability for the conduct itself nor were they able to protect their careers in the event they actually choose to comply with the law. *Id.* at 521 & n.4, 522; *see also Archdiocese of Miami, Inc. v. Minagorri*, 954 So.2d 640 (Fla. Dist. Ct. App. 2007) (applying ministerial exception to bar whistleblower claim by ministerial employee who alleged archdiocese retaliatorily discharged her for complaining about her supervisor's assaulting and battering her).

Taken to its logical conclusion, treating the exception as an absolute bar could even preclude the

enforcement of "homicide statutes against churches that selected their pastors by making them play Russian roulette." *Minker*, 894 F.2d at 1357. The balancing of the interests, including the interests of innocent and unrelated third parties, is the only way to prevent such an absurd result. *Id*. Accordingly, where, as here, a retaliation claim arises from the reporting or refusal to participate in tortious or criminal conduct that would otherwise result in specific and substantial third party harm, the interests in permitting the claim to go forward sufficiently outweigh a religious employer's interest in avoiding government interference with the relationship between a church and its ministers. Applying the ministerial exception in such cases would not only leave the rights and interests of third parties unprotected except in the fortuitous circumstances that a lay employee is in a position to report or prevent tortious or criminal conduct, it would also force ministerial employees to make an unreasonable choice between their careers, and potentially their own fulfillment of a religious calling, and the imposition of civil or criminal liability. *See Weishuhn*, 787 N.W.2d at 225; *see also Goodman v. Archbishop Curley High School*, 149 F. Supp. 3d 577, 587 (D. Md. 2016).

2. Application of the Tourovia Retaliation Statute Would Not Result in Excessive Entanglement into Religious Doctrine

Adjudication of Turner's retaliation claim would not result in the excessive entanglement with religious doctrine prohibited by the Establishment Clause. Entanglement results where "the government is placed in the position of deciding between competing religious views." *Rweyemamu*, 520 F.3d at 208. Moreover, although

courts have routinely applied the ministerial exception as an absolute bar to discrimination and retaliation claims, courts must consider the "nature of the dispute" and the actual issues the court is being asked to decide before the exception ought to apply. *Rojas v. Roman Catholic Diocese of Rochester*, 557 F. Supp. 2d 387, 398–99 (W.D.N.Y. 2008); *Prioleau*, 49 A.3d at 816. As mentioned above, there are no significant entanglement concerns where a claim may be resolved by the application of "neutral principles of law." *Wolf*, 443 U.S. 604–05.

Applying the well-settled framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to uncover pretextual termination decisions is a secular inquiry that, much like Turner's contract claims, would require only the application of "neutral principles of law." *Redhead v. Conference of Seventh-day Adventists*, 566 F. Supp. 2d 125, 136 (E.D.N.Y. 2008); *see also* Gedicks, *supra*, at 426–27. Tourovia's retaliation statute, much like other federal and state antidiscrimination legislation, employs a burden-shifting regime that requires, first, the employee to show that they reported or threatened to report the employer's activity, that a particular law was violated, and that the violation created substantial and specific danger to public health and safety; and second, the employer to assert as a defense any other non-retaliatory grounds for the adverse employment decision. This inquiry would not require a court to answer the "recurring question of whether a particular church actually holds a particular belief." *Catholic High School Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168 (2d Cir. 1985). Instead, all it would require is an examination of the evidence presented by Turner to determine whether it sufficiently demonstrates that the religious reason given by the church for terminating his employment was "not the actual

motivating cause for a discharge." *Redhead*, 566 F. Supp. 2d at 136.

There is overwhelming evidence to suggest that Turner was fired in retaliation for reporting and refusing to participate in the church's tortious conduct rather than for the religious reason they assert. Not only does the record show that his yearly employment contract was renewed three times, but he was deliberately put in charge of administering the bequest by the Thomas Trust on the basis of his experience as a financial manager for IBM and Treasurer and Chief Financial Officer of another regional office of the Conference. Furthermore, Turner was terminated by the church, without any warning or indication of inadequate job performance, a mere three months into his renewed contract, and only two weeks after he reported the misconduct to Wells Fargo and the IRS. Nor does the church allege that either Turner's decision to report or his refusal to participate in the church's tortious conduct was itself a violation of its religious tenets. It is clear, and the church has not even attempted to argue otherwise, that committing fraud is in no way a part of the religious doctrine of the church. *See Hosanna-Tabor*, 565 U.S. at 180 ("[Petitioner] had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."); *cf. Bollard*, 196 F.3d at 950 (permitting sexual harassment claims to go forward because there was no religious justification for subjecting plaintiff to such harassment).

Accordingly, the resolution of Turner's claims would require a court to conduct an entirely secular inquiry into whether there is sufficient evidence to suggest that the stated religious reason given by the church for terminating Turner was in fact the motivating cause of his termination.

This inquiry would not require the courts to determine whether the church's religious doctrine is reasonable, or whether its interpretation of that doctrine is correct. Indeed, such an inquiry is no different from the routine determinations made by courts in determining whether someone is a minister in the first place. *See Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., joined by Kagan, J., concurring) ("But while a ministerial title is undoubtedly relevant in applying the First Amendment rule at issue, such a title is neither necessary nor sufficient."); Tr. Oral Arg., *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 4593953, at *12 ("If [petitioner's] commissioned as a minister *and if that is not a sham*, then we think that makes her a minister.") (emphasis added). Thus, there is no risk of excessive entanglement in religious doctrine by the courts in adjudicating Turner's retaliation claim.

II. GIVEN THE NATURE OF TURNER'S CLAIMS, 12(B)(6) DISMISSAL WITHOUT OPPORTUNITY FOR DISCOVERY IS INAPPROPRIATE

Where a case is resolved on a motion to dismiss for failure to state a claim, the question for this Court is not whether the plaintiff will "ultimately prevail" but rather whether the complaint "was sufficient to cross the federal court's threshold"—or, in this case, the Tourovia Supreme Court's "threshold." *Skinner v. Switzer*, 562 U.S. 521, 529–30 (2011); *see* App. 4 n.3 (noting that Tourovia has "fully adopted" the Federal Rules of Civil Procedure); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In passing on a motion to dismiss, "the allegations of the

complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236. So long as plaintiffs plead sufficient facts in the Complaint to "nudge[] their claims across the line from conceivable to plausible" and to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," then dismissal is improper and plaintiffs should be permitted to proceed to discovery. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In this case, Turner seeks the chance to obtain discovery to advance his wrongful termination claims after the church he served fired him well before his contract had expired. The ability to obtain discovery and compile a factual record to establish and argue a claim "is of signal importance in modern civil litigation." *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 1011 (N.D. Ill. 2005); *see Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 n.20 (1984) (observing that neither abuses nor occasional inadequate oversight "lessen the importance of discovery in civil litigation"). The Tourovia Court of Appeals, however, affirmed dismissal of Turner's claims without affording him the opportunity for discovery by concluding that inquiry into the church's motivation for Turner's discharge "is precisely the type of inquiry that the ministerial exception bars civil courts from engaging in." App. 9. However, given the foregoing analysis, *see supra* Part I, Turner's claims are not foreclosed as the ministerial exception should not apply in this case.

Accordingly, the judgment of the Tourovia Court of Appeals should be reversed, and Turner should be allowed to proceed to discovery on his claim for the following reasons. First, an absolute bar to suit that thereby prevents any discovery is inappropriate given the fact-

intensive nature of the questions regarding the ministerial exception's applicability. Second, permitting plaintiffs to proceed to discovery can help uncover improper invocations of the ministerial exception in a way that dismissal absent discovery cannot. Finally, judicial control over discovery alleviates concerns that proceeding past the motion to dismiss stage might result in intrusion upon areas protected by the ministerial exception, allowing Turner to pursue his claim while under the supervision of a court to ensure any discovery is properly limited.

A. Dismissing Claims Like Turner's Without Discovery Improperly Expands the Reach of the Ministerial Exception into Secular Matters

As demonstrated by the Court's analysis in *Hosanna-Tabor*, determining the scope and application of the ministerial exception is inherently a fact-intensive inquiry not well-suited to disposition on a motion to dismiss. *See Hosanna-Tabor*, 565 U.S. at 190–92 (discussing the various factors present that made plaintiff a "minister" for purposes of applying the ministerial exception); *see, e.g.*, *Fratello v. Roman Catholic Archdiocese of N.Y.*, 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2016) ("I found that I could not determine whether the ministerial exception applied at the motion to dismiss stage because of the necessarily fact-intensive inquiry that exception necessitates . . . ."). Application of the exception involves consideration of both the nature of the plaintiff's employment, as well as the nature of the legal claims brought by the plaintiff. *Cf. Galetti*, 331 P.3d at 1002 (reversing dismissal premised on application of church autonomy doctrine because that involves "a fact-specific and claim-specific inquiry" requiring further proceedings).

These types of claims require development of some factual record before it can be determined that the ministerial exception prohibits a suit from proceeding.

Turner's claims do not entangle the court in an inquiry into religious matters, as discussed *supra* Part I, and thus they fall within an area of law deliberately left unresolved in *Hosanna-Tabor*. *See Hosanna-Tabor*, 565 U.S. at 196; *see also Rojas*, 557 F. Supp. 2d at 398 n.8 ("[T]he ministerial exception does not necessarily apply to claims involving the hiring or firing of a minister, unless the hiring or firing involves issues of religion."); Andrew Donivan, *Freedom of Breach: The Ministerial Exception Applied to Contract Claims*, 63 DEPAUL L. REV. 1063, 1073 (2014) ("There are significant distinctions between employment claims based on antidiscrimination statutes and claims based on common law breach of contract, which suggests they might interact differently with the ministerial exception."). Where a plaintiff's claims against a religious organization are not clearly and necessarily precluded by the ministerial exception or similar doctrines, the "mere assertion of the 'ministerial exception' . . . does not create a per se discovery privilege." *Dolquist v. Heartland Presbytery*, 221 F.R.D. 564, 568 (D. Kan. 2004); *cf. Collette v. Archdiocese of Chicago*, No. 16 C 2912, 2016 WL 4063167, at *1 (N.D. Ill. July 29, 2016) ("[T]he mere presence of a potential affirmative defense does not render the claim for relief invalid." (quoting *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016))). Instead, discovery should be permitted where "information sought to be discovered" does not "involve any religious belief, practice, or concern." *Dolquist*, 221 F.R.D. at 566. *See, e.g.*, *Gregorio v. Hoover*, --- F. Supp. 3d ---, 2017 WL 780784, at *6 (D.D.C. Feb. 28, 2017) (denying motion to dismiss breach of contract claim brought by individual

against religious institution because "at this early stage it is not entirely clear that resolution of [the] claim will require anything other than 'neutral methods of proof'").

Turner here seeks discovery to corroborate his claim that he was terminated in breach of his employment contract, a question of "civil law . . . not predicated on any religious doctrine." *Presbytery of Beaver-Butler of United Presbyterian Church U.S. v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1321 (Pa. 1985); *see Gargano v. Diocese of Rockville Centre*, 80 F.3d 87, 90 (2d Cir. 1996) (noting that application of "state employment contract law . . . requires little intrusion into the functioning of religious institutions"). Questions regarding the meaning and enforceability of the contract "are not doctrinal and can be solved without intruding into the sacred precincts." *Presbytery of Beaver-Butler*, 489 A.2d at 1321. Likewise, Turner's retaliatory discharge claim can be resolved based on application of state law without need to inquire into matters of religious doctrine or governance. *See supra* Part I. *A fortiori*, simply allowing discovery regarding these claims also does not present a risk that Turner will "intrud[e] into the sacred precincts."

Turner's claims are secular in nature, and they do not require a court to divine the motivations behind the termination, only requiring the court to ascertain the meaning of the contract and whether or not it was breached. As such, Turner should be permitted to proceed to discovery.

B. Permitting Discovery Ensures That the Ministerial Exception Is Not Misapplied to Shield Religious Entities from Liability to Which They Are Unquestionably Subject

The ministerial exception does not provide religious entities with a blanket exemption from all secular laws. *See Hosanna-Tabor*, 565 U.S. at 195 n.4 (holding that the exception is an affirmative defense rather than a "jurisdictional bar"). "[C]hurches are not . . . above the law" and they "may be held liable for their torts and upon their valid contracts." *Rayburn*, 772 F.2d at 1171. The ministerial exception only shields a church from liability for legal claims "that are rooted in religious belief." *Galetti*, 331 P.3d at 999. The First Amendment does not "immunize[], without exception, a religious institution from liability arising out of a contract between the religious institution and its ministerial employees." *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 366 (N.C. Ct. App. 2016). And, in the context of breach of contract claims, courts have found that "[t]he existence of a contract and its terms remains questions of material fact that are sufficient to defeat summary judgment and warrant further proceedings," ministerial exception notwithstanding. *Kirby*, 426 S.W.3d at 602.

Invocations of the ministerial exception are prone to abuse. *See Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 n.3 (8th Cir. 1991) (being "mindful of the potential for abuse" of the exception "as a pretextual shield to protect otherwise prohibited employment decisions"). Where such exceptions are prone to abuse, discovery should be permitted so courts might properly ascertain the applicability of the exception as well as whether invocation is pretextual. *See id.* (recommending "case-by-case" treatment to allow plaintiffs to show their claims "can be adjudicated without entangling the court in matters of religion"); *see also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (observing that there is room for review "when church tribunals act in bad

faith for secular purposes"); *Askew v. Trustees of General Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 418 (3d Cir. 2012) (noting that church autonomy doctrine may not apply where decisions made are "tainted by fraud or collusion"). As Turner's claims are rooted in contract law such that application of the exception is not obvious on the face of the Complaint, the mere possibility that the exception may apply is outweighed by the potentially pretextual invocation of the exception by the church. Turner should be permitted to proceed to discovery to have the chance to demonstrate that the exception does not apply here. *See Minker*, 894 F.2d at 1361 (reversing 12(b)(6) dismissal to permit plaintiff "to prove up his claim of breach of an oral contract to the extent that he can divine a course clear of the Church's ecclesiastical domain").

C. Existing Safeguards on the Scope of Discovery Reduce the Risk of Intrusion into Areas Protected by the Ministerial Exception

If Turner's claims are permitted to go forward, nothing prohibits the Tourovia Supreme Court from monitoring the case to prevent excessive entanglement in religious doctrine. *See Herbert v. Lando*, 441 U.S. 153, 176–77 (1979) (discussing the "ample powers of the district judge to prevent abuse" in discovery). If, after an opportunity for discovery, it appears that the adjudication of Turner's claims would require an inquiry into the church's reasoning, the "trial judge has adequate discretion to control discovery and the flow of evidence," and the case can be dismissed through summary judgment at that time, if need be. *Kirby*, 426 S.W.3d at 620; *see Minker*, 894 F.2d at 1360; *Galetti*, 331 P.3d at 1002. However, given "[t]he

limited nature of the inquiry" coupled with "the ability of the [trial] court to control discovery," concern over "intrusion into sensitive religious matters" at this stage in the litigation does not merit dismissal. *Bollard*, 196 F.3d at 947. Accordingly, the ministerial exception should not be extended to bar Turner's claims at this point, and he should be permitted to proceed to discovery.

CONCLUSION

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

Respectfully Submitted,
TEAM 1

March 10, 2017