TOURO LAW CENTER

National Moot Court Competition in Law & Religion

In the

Supreme Court of the United States

April Term, 2017

No. 415-2017

DAVID R. TURNER

Plaintiff-Petitioner

v.

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

Defendants-Respondents.

ON WRIT OF CERTIORARI TO THE

STATE OF TOUROVIA COURT OF APPEALS

BRIEF OF DEFENDANTS-RESPONDENTS

Team No. 11
Attorneys for Defendants-Respondents

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

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

JURISDICTIONAL STATEMENT

Appellant David R. Turner asserted contract and tort claims which violate the ministerial exception grounded in the First Amendment of the United States Constitution and Article I of the Tourovia Constitution. The Tourovia District Court had jurisdiction to hear the contract and tort claims under state law. Pursuant to 28 U.S.C. § 1257(a), this case is presented for cert from the Tourovia Court of Appeals, the highest state court, to the United States Supreme Court.

STATEMENT OF THE CASE

Appellant David R. Turner (hereinafter "Turner"), was hired as a pastor of St. Francis Church (hereinafter "the Church") in June 2010. R. at 4.

Turner served as a pastor for the Church from June 2010 to October 2012. R. at 4. Unfortunately, Reverend Dr. Robert Jones (hereinafter "the Reverend") soon lost faith in Turner's spiritual leadership. R. at 4. Thus, Turner's employment was terminated. R. at 4.

After Turner was terminated, he sued the Reverend, the Church, and the Tourovia Conference of Christian Churches (hereinafter collectively "Respondents"). R. at 5. Although his claims were framed in contract and tort, the courts consistently held that they were both barred by the ministerial exception, which prohibits inquiry into "the Church's motive for the discharge." R. at 6. The Tourovia Court of Appeals affirmed the decisions of both the Tourovia District Court, but Turner continues to appeal. R. at 2.

SUMMARY OF THE ARGUMENT

The ministerial exception is a constitutional doctrine. It is mandated by the establishment clause and the free exercise clause, by constitutional text and structure. The exception grants churches a constitutional right to fire their ministers for any reason. The converse is true as well; the ministerial exception bars claims, such as those in contract or tort, which implicate churches' constitutional right to fire their ministers. The elements of the exception are simple: was the employer a church and was the terminated employee a minister. While this is often a factual inquiry, these key elements can be revealed on the face of the complaint. When the disgruntled plaintiff himself concedes that his employer was a church and that he was a minister, the need for discovery is obviated. This is especially true when neither fact is challenged on appeal. For these reasons, the ministerial exception bars plaintiff's claims and we respectfully submit that dismissal without discovery was proper.

ARGUMENT

This case turns on the ministerial exception. Respondents have a constitutional right to fire appellant for *any* reason because respondents were a church and appellant was a minister. Appellant's attempt to characterize his termination as a breach of employment contract claim and a retaliation claim implicate the church's constitutional right to fire him without objective merit and without explanation. Furthermore, the complaint was properly dismissed without discovery. Although the ministerial exception is an affirmative defense, Turner admitted every element necessary to establish it in his own complaint. The same policy justifications that affirm the

ministerial exception support dismissal whenever its elements and application are clear on the face of the complaint.

I. THE MINISTERIAL EXCEPTION BARS BREACH OF EMPLOYMENT CONTRACT CLAIMS AND RETALIATORY DISCHARGE CLAIMS THAT IMPLICATE A CHURCH'S CONSTITUTIONAL RIGHT TO FIRE ITS MINISTERS FOR ANY REASON.

Respondents have the right to fire appellant because they meet the ministerial exception: respondent-employer was a church and appellant-employee was a minister. The United States Supreme Court established that the ministerial exception safeguards a church's right to fire its ministers for any reason—even in contravention of neutral, valid laws like Title VII or Tourovia Labor Law § 740. Appellant attempts to circumvent the church's absolute control over its internal hierarchy by characterizing his claims in contract and tort. The Court need not decide which contract or tort claims will always be barred by the ministerial exception. In this case, however, appellant's claims challenge precisely those rights that the First Amendment and the ministerial exception were designed to protect.

A. Respondents have a Constitutional Right to Fire Appellant because Respondents were a Church and Appellant was a Minister.

The "Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, 565 U.S. 171, 181, 184 (2012). Grounded in the First Amendment, the ministerial exception precludes application of state or federal law "to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. The ministerial exception

applies if, as here, these simple criteria are met: the defendant is a church, and the plaintiff is a minister who has been terminated by the church. *Id.*; R. at 4.

As a threshold matter, but at risk of stating the obvious, respondents are a church. St. Francis Church of Tourovia and the Tourovia Conference of Christian Churches are religious bodies with a spiritual mission. R. at 4. Additionally, Reverend Dr. Roberta Jones was an agent of the church acting in her official capacity. *Id.* The fact that Respondents are a "church" was assumed by the lower courts and is not an issue on appeal. *Id.*

Often, application of the ministerial exception turns on another question: whether the church employee was in fact a minister. Unfortunately, *Hosanna-Tabor* declined to adopt a standard for deciding whether an employee qualifies as a minister. Thomas's concurrence suggested that the church definition should settle the case, while Alito's concurrence advised courts to examine the church definition more critically. *Id.* at 197, 198.

Regardless, an appellant may concede that they are a minister on the face of the complaint. As with question one, in the interests of finality and fairness, appellants cannot contest issues that they failed to preserve on appeal. Fed. Rule. Civ. Proc. 52(b) ("On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. . . .").

In the absence of such a concession, "minister" may require *some* functional meaning. While *Hosanna-Tabor* did not define a minister, the Court implicitly

considered the totality of the facts; it examined whether actual conduct connected the employee's responsibilities to the employer's religious mission. The Court noted that the church held its employee out as a minister—issuing her the title of "Minister of Religion" after sufficient training. Likewise, the Court noted that the employee held herself out to be a minister—taking on certain job duties and even claiming a special housing allowance on taxes. This is unlike a contract that simply has a morals clause in every employment contract. *See Herx v. Diocese of Fort Wayne-South Bend, Inc., et al,* Case No. 1:12-cv-0012-RLM (N.D. Ind. April 12, 2012).

Admittedly, the United States Supreme Court has not foreclosed an employee's ability to argue that a church's definition was fraudulent, collusive, or arbitrary. For instance, a Plaintiff could argue that the church fraudulently identified him as minister in order to circumvent federal law. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) ("In the absence of fraud, collusion, or arbitrariness the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive."). However, whether the church has engaged in fraud more generally does not weigh on the ministerial exception. Fraud is relevant where there was fraud in the characterization of a person as a minister, but not where there was fraud in other church activities.

Finally, it is of no consequence on what grounds a minister was fired, be it defying religious standards or neglecting administrative duties or even becoming disabled. *Hosanna-Tabor*, 565 U.S. at 185. The minister in *Hosanna-Tabor* may have been fired for having epilepsy. But it was not relevant to the Court whether epilepsy

conflicted with the church's religious mission; it was not relevant whether the minister taught secular subjects. To hold otherwise would be to open the door to unconstitutional inquiries into the reasons why a minister was fired.

In our case, appellant was a minister because the record and complaint clearly concede that he was. The appellant was "hired as a pastor of St. Francis Church of Tourovia.." R. at 4. His "pastorship" was subject to a yearly employment contract; he was expected to engage in "spiritual leadership." *Id.* Although the record does not provide much detail, neither side contests that appellant was in fact a minister.

Appellant's own admissions warrant dismissal; however, we address the remaining points to anticipate opposing counsel's arguments and to avoid remand for further proceedings. First, even if a person must function as a minister to some degree in order to be labeled one, that is the case here: appellant was hired as a pastor and worked as a pastor until he was fired. R. at 4. Furthermore, there was no fraud in the characterization of appellant as a minister; any tax fraud committed by respondents may be litigated by the Internal Revenue Service but does not bear on the ministerial exception. Lastly, whether a minister was fired for being disabled or tardy, courts cannot inquire into the relative merits of such an employment decision.

B. Respondents-Church's Constitutional Right to Fire Appellant-Minister for Any Reason is Absolute.

The ministerial exception applies in the narrow circumstances described above. Once applicable, however, it allows a church to fire its ministers for any reason. Churches can even fire ministers in contravention of neutral, generally applicable laws. This right cannot be abridged.

First, the ministerial exception allows a church to fire its ministers for any reason. For example, refusing to hire a woman on the basis of gender generally violates Title VII, which protects women from employment discrimination. However, the Supreme Court held that it would be unconstitutional to "compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary." *Hosanna-Tabor*, 565 U.S. at 189. Even the Equal Employment Opportunity Commission conceded as much. *Id.* (citing Brief for Federal Respondent 31). Title VII can implicate a church's right to choose its ministers. *Id.* at 188. Thus, the ministerial exception can be viewed as *validating* laws that would be unconstitutional as applied to religious groups.

Furthermore, a church can fire its ministers in contravention of a general, neutral law. *Employment Division v. Smith* may seem to call the ministerial exception into question. *Employment Div. Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). It held that free exercise is not impinged by a law that is generally applicable, religion-neutral, and rationally related to the government interest. *Id.* at 882. However, the Supreme Court explicitly distinguished *Smith*: laws that regulate external physical acts, such as peyote ingestion in *Smith*, are unlike laws that regulate internal church decisions like the hierarchy or discipline within the organization. Besides, the ministerial exception stands on both Religion Clauses, while *Smith* pertains to the Free Exercise Clause, so the ministerial exception would still be justified under the Establishment Clause.

Finally, a church's constitutional right to fire its ministers for any reason is absolute and cannot be abridged. The Supreme Court established that any inquiry into

why a minister was dismissed is unconstitutional: the Establishment Clause "prohibits government involvement in [] ecclesiastical decisions," and the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188. The ministerial exception represents a compromise between church rights and individual rights. At first glance, it is a categorical rule that largely favors church sovereignty. *Id.* at 187. However, this is justified, among other reasons, because the rule is quite narrow in scope. The ministerial exception does not grant churches an absolute right to evade the law; rather, churches have an absolute right to fire their ministers.

C. The Breach of Employment Contract Claims and Retaliation Claims are Indistinguishable from Challenging Respondent-Church's Right to Fire Appellant-Minister for Any Reason.

Appellant's claims are indistinguishable from claims that undermine a church's absolute right to fire its ministers. For textual, historical, and prudential reasons, we should not alter the standard either.

First, ministers cannot challenge church employment decisions; this truth holds whether the challenge is through the lens of a breach of contract claim or a retaliation claim. Appellant's suggestion that the termination must involve religious doctrine (*see, e.g. Galetti v. Reeve*, 331 P. 3d 997, 998 (2014); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615 (2014)) "misses the point of the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 195. This is because the church's reasoning is never relevant: "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is

made for a religious reason. The exception instead ensures that the authority to select and control who will minister . . . is the church's alone." *Id.*

The ministerial exception must bar contract and tort claims that challenge a church's right to terminate its ministers; otherwise, the exception would swallow the rule. While the Court did not decide whether the exception bars suits that allege contract or tort claims by a church, the Court strongly affirmed the validity of the ministerial exception. A minister may be able to sue the church for failing to pay overtime (contract) or for negligently maintaining the property (tort). However, if a church must terminate its ministers within particular substantive limits, then the church is no longer sovereign over its employees and the ministerial exception falls away.

Additionally, the Court should not adopt a standard that allows ministers to challenge their termination. Whether the termination be for a discriminatory reason or a dishonest reason, the courts cannot be the arbiters of church hierarchies. There are no countervailing policy reasons to allow Turner to circumvent the ministerial exception. Unlike child abuse cases, which involve the safety, health, and well-being of minors alongside the corruption of adults, this case involves no such peril.

Finally, any standard that allows Turner to sue in contract or tort will contradict the same clear policy that supports the ministerial exception. The Religion Clauses have intentionally barred government involvement in ecclesiastical decisions since 1789. The First Amendment also safeguards federalism, protecting state and individual rights from undue government interference. Allowing Turner to blatantly challenge his termination because it was not for a discriminatory reason but for some other reason

would require courts to become the arbiters of church hierarchical choices—precisely what the Supreme Court was attempting to avoid.

II. COMPLAINTS ALLEGING WRONGFUL TERMINATION BY A MINISTER ARE SUBJECT TO A 12(b)(6) MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, WITHOUT AN OPPORTUNITY FOR DISCOVERY, BASED SOLELY ON THE APPLICATION OF THE MINISTERIAL EXCEPTION TO THE LAWSUIT WHEN THE APPLICABILITY OF THE MINISTERIAL EXCEPTION IS CLEAR FROM THE FACE OF THE COMPLAINT.

The Court should affirm the holding of the Court of Appeals of Tourovia because Turner's wrongful termination claims were properly held subject to a 12(b)(6) Motion to Dismiss for failure to state a claim, without an opportunity for discovery, based solely on the application of the ministerial exception to this lawsuit. Under Federal Rule of Civil Procedure 12(b)(6), one "defense to a claim for relief in any pleading" is "failure to state a claim upon which relief can be granted"—a motion which, if it succeeds, results in immediate dismissal of the case. Fed. R. Civ. P. 12. In deciding what is necessary for a claim to survive a Motion to Dismiss under rule 12(b)(6), the Court has determined that "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). In clarifying this standard, the Court explained: "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S.). Under *Iqbal*, "a court must accept as true all of the allegations contained in a complaint," but this is "inapplicable to legal conclusions," and then "only a complaint that states a plausible claim for relief survives a motion to

dismiss," the determination of which is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 678-79. This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than 'a sheer possibility.'" *Id.* at 678.

Here, as the Tourovia District Court of Eastview County noted, "even if the claim of wrongful termination due to breach of contract and retaliatory discharge, due to refusal to engage in Church's tortious conduct as stated in Plaintiff's Complaint were proven true, the ministerial exception still bars this suit." (R. at 2). Turner has failed to meet the burden required by *Iqbal* for his complaint. Even accepting all of his factual allegations as true, as required by *Twombly* and *Iqbal*, Turner's claims do not reach the level of plausibility due to the existence and applicability of the ministerial exception. Therefore, the Court should affirm dismissal of Turner's claims before discovery based on the 12(b)(6) Motion to Dismiss.

A. Turner's Complaint Was Properly Dismissed Before an Opportunity for Discovery Under Rule 12(b)(6) For Failure To State a Claim Upon Which Relief Can Be Granted Because Everything Necessary to Satisfy the Affirmative Defense of the Ministerial Exception Was Established By the Allegations of the Complaint Itself.

The *Twombly* and *Iqbal* standards for stating a claim upon which relief can be granted must be analyzed through the lens of the ministerial exception when applied to Turner's claim. While *Hosanna-Tabor* held that "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar," the Court went on to explain that this is because "the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to

hear the case.'" *Hosanna-Tabor*, 565 U.S. at n.4 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 257, 254 (2010)). It is clear by the Court's language in explaining why the ministerial exception operates as an affirmative defense that claims subject to the exception are still subject to 12(b)(6) Motions to Dismiss if the complaint has not established a claim on which relief can be granted.

In *Collette*, the court affirmed this by noting that "under settled Seventh Circuit precedent, the ministerial exception provides a basis for the 'unusual step' of dismissing a discrimination claim under Rule 12(b)(6) 'only where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense.'" *Collette v. Archdiocese of Chicago*, 200 F.Supp.3d 730 (N.D. Ill. 2016) (quoting *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 928 (7th Cir. 2015)). Within *Collette* itself, the court determined that this standard was not satisfied because "[f]undamental to the ministerial exception's application is a determination of whether the plaintiff was 'a minister within the meaning of the exception,'" and the status of the appellant in that regard had not been established on the face of the complaint. *Collette*, 200 F.Supp.3d (quoting *Hosanna-Tabor*, 565 U.S. at 194). In *Hosanna-Tabor*, the seminal case in which this Court officially recognized the ministerial exception, this Court held that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers. *Hosanna-Tabor*, 565 U.S at 181. In *Melhorn v. Baltimore Washington Conference of United Methodist Church*, 2016 WL 1065884 (Md. Ct. Spec. App. 2016), the court articulates the "[t]wo elements" that must be established in order to justify dismissal on a 12(b)(6) motion under *Collette*. The court explains that for

the ministerial exception to apply: "[f]irst, the employee making the claim must qualify as a "minister"; and second, the claim must be the type of claim which would substantially entangle the court in the church's doctrinal decision-making and internal self-governance." *Melhorn*, 2016 WL at 3. If each of these elements is established within the allegation of the complaint itself, the case must be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). This is because if the allegations of the complaint itself, which must be taken as true in analyzing a 12(b)(6) motion, establish that the affirmative defense is satisfied, then said claim has failed to assert a "plausible claim for relief" as required by *Iqbal*. If it has already been established that an affirmative defense will block claim from proceeding, the it cannot be "plausibility" that such a complaint will entitle the plaintiff to relief. Additionally, *Collette* affirmatively establishes that this is still the correct standard for determining whether a case can be dismissed on a 12(b)(6) Motion to Dismiss after the proper pleading standards were established by *Twombly* and *Iqbal*, and that this standard applies to the specific affirmative defense of the ministerial exception.

While the Seventh Circuit is the only circuit that has implemented this particular test for allowing an affirmative defense to be the basis for dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6), state and federal courts throughout the nation have created similar standards or implicitly followed this standard by upholding dismissals of cases under Rule 12(b)(6) based on the application of the ministerial exception to those cases. As the Court of Appeals of Tourovia noted in this case, the Pennsylvania Supreme Court in *Connor v. Archdiocese of Philadelphia*, 975

A.2d 1084 (Pa. 2009) "laid out the procedure for determining whether it is appropriate to apply the ministerial exception so as to bar claims from proceeding to discovery." (R. at 8). The court in *Connor* articulated a three-part test for making this determination. Under their formulation,

> the fact-finding court must: (1) examine the elements of each of the plaintiff's claims; (2) identify any defenses forwarded by the defendant; and (3) determine 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."

Connor, 975 A.2d at 1103. This differs slightly from the Seventh Circuit approach of requiring the complaint on its face to establish that all of the elements of the affirmative defense are satisfied by the complainant's own allegations. The Pennsylvania rule is a lower burden on defendants because rather than requiring the plaintiff to establish all of the defense elements for the defense in order for the exception to apply before discovery, it requires a burden on the plaintiff to establish a reasonable likelihood that the fact-finder will be able to look into each of the necessary elements at trial without committing an establishment clause violation.

Here, both the Seventh Circuit and Pennsylvania tests are satisfied by Turner's complaint, justifying the lower court's decision to dismiss the case on a 12(b)(6) Motion to Dismiss. Both elements of the ministerial exception articulated in *Melhorn* are established on the face of Turner's complaint, thereby satisfying the Seventh Circuit test. Turner does not contend that he, as a pastor of the church, was a "minister" of that church. This element is clear from the face of the complaint and is uncontested. Turner even "concedes, in the Complaint, that he was a minister at St. Francis." (R. at 9). The

only remaining inquiry is whether Turner's claim is the "type of claim which would substantially entangle the court in the church's doctrinal decision-making and internal self-governance." *Melhorn*, 2016 WL at 3. For reasons articulated in part I, this has also been established by the complaint itself. As the more demanding Seventh Circuit Test is met by this case, the Pennsylvania test is also definitely satisfied. Looking at the elements of the complaint in light of the affirmative defense of the ministerial exception, the fact-finder at trial would certainly be barred from considering whether the parties carried their burdens for each element of the claims. As articulated in part I, Turner's claim is exactly the type of claim that the ministerial exception is designed to protect against. Additionally, federal and state courts in various jurisdictions have continuously upheld dismissals of these types of claims without allowing for discovery beforehand.

One example is the case most on-point to the facts of this case, *Melhorn*, 2016 WL, in which the Court of Special Appeals of Maryland held that "discovery was not necessary for the circuit court to properly determine that the appellant's claim was barred by the ministerial exception." *Id.* at 6. In *Melhorn*, the facts were practically identical to the facts at issue here. The plaintiff was also a pastor of a church who alleged wrongful termination because he alleged he was dismissed for his "refusal to commit certain unlawful acts in connection with the administration of funds from the Eleanor B. Turnbaugh Trust." *Id.* at 1. However, Melhorn also admitted that, in firing him, the church told him that it was "'transitioning' because it had 'lost faith' in his spiritual leadership." *Id.* Under these facts, the court cited to precedent that "affirmed

pre-discovery dismissals of claims barred by the ministerial exception in cases where it was clear based on the face of the complaint that an inquiry into religious matters would have been necessary." *Id.* at 6. The court also held that *Melhorn* was such a case because "the church has said all along that its decision to terminate the appellant's employment was motivated entirely by reasons of faith." *Id.* at 6. Therefore, this Court should adopt the reasoning of the Maryland Court of Special Appeals in this case on nearly identical facts and affirm the pre-discovery dismissal for the reasons articulated in *Melhorn*.

Similarly, in *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991), the Court of Appeals of Minnesota held that"[i]nquiry into a church's reasons for rejecting an individual for pastorship, even for the purpose of showing pretext, would cause excessive entanglement." *Id.* at 720. In *Black*, the plaintiff had brought a suit for harassment against her employer through the Minnesota Department of Human Rights and then had been fired and therefore was alleging, among other things, retaliatory discharge. However, the court held that "Black's breach of contract, retaliation, and statutory 'whistle blower' claims relate specifically to factors of her appointment as an associate pastor and discharge." *Id.* at 720. Due to this connection, the court held that "[t]hese claims are fundamentally connected to issues of church doctrine and governance that would require court review of the church's motives for discharging Black." *Id.* at 720. In upholding the lower court's dismissal of this suit before discovery, the Court of Appeals of Minnesota took a similar approach to other state and federal courts in determining that no discovery is needed in cases clearly requiring inquiry into

church motives for hiring or firing ministers, because even that discovery would run afoul of the First Amendment.

Even cases Turner cites in support of "the proposition that claims like his should not be dismissed unless the court first permits a factual record to be developed and then determines, based on that record, that the claims would substantially entangle the courts in religious doctrine" actually support the proposition that cases can be dismissed without discovery if the applicability of the ministerial exception is clear from the face of the complaint. (R. at 8). One case Turner cites for this proposition is *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). While the court in *Minker* did overturn a dismissal before discovery on one of the claims raised, and remanded that claim for discovery, their decision to do so was based on a determination that "while the first amendment forecloses any inquiry into the Church's assessment of Minker's suitability for a pastorship, even for the purpose of showing it to be pretextual, it does not prevent the district court from determining whether the contract alleged by Minker in fact exists. *Id.* at 1360-61. In the very sentence in which it explained its order for discovery on Minker's contract claim, the D.C. Circuit Court implicitly supported the proposition that a claim necessarily requiring inquiry into assessments of suitability for a ministerial position would not be subject to the same treatment. Additionally, the court in *Minker* upheld the lower court's decision to grant the Motion to Dismiss for failure to state a claim that occurred before discovery on Minker's age discrimination claims. The court affirmed that "as the district court held, determination of 'whose voice speaks for the church' is per se a religious matter." *Id.* at

1356. Therefore, *Minker* supports the proposition that when the claim at issue is one for which discovery would inquire into "whose voice speaks for the church" rather than "determining whether the contract alleged…in fact exists," pre-discovery dismissal for failure to state a claim is proper.

Turner also cites *Galetti, v. Reeve*, 331 P.3d 997 (N.M. Ct. App. 2014) to support his contention. However, in *Galetti*, the breach of contract claim was based on an alleged breach of contract in the form of "'failure to timely notify [Plaintiff] of non-renewal and [the] failure to timely terminate her…teaching contract year with just cause." *Id.* at 1001. Therefore, "[t]he district court does not need to determine whether the Conference had cause to terminate Plaintiff's employment, but only whether the Conference complied with its contractual obligation with respect to the timeliness of the notice." *Id.* at 1001. Similarly to the court in *Minker*, by emphasizing the importance of the lack of clear applicability of the ministerial exception to the specific claim at issue within the decision to remand for discovery, the *Galetti* court actually provides support for the proposition that claims to which the ministerial exception clearly applies from the face of the complaint itself can be dismissed for failure to state a claim without allowing discovery.

All of these cases in aggregate demonstrate a consensus among the courts that—whether applying the Seventh Circuit test, the Pennsylvania test, or a less firmly articulated analysis—when the applicability of the ministerial exception is clearly established on the face of the complaint, the case is properly held subject to a 12(b)(6) Motion to Dismiss for failure to state a claim without a need to allow for discovery first.

Here, for reasons articulated in Part I, both necessary elements of the ministerial exception are established by the allegations within Turner's complaint. This satisfies even the high bar of the Seventh Circuit's test for when a case may be dismissed without an opportunity for discovery on a 12(b)(6) motion solely based on the application of the ministerial exception to that case.

B. The Constitutional and Policy Reasons Supporting the Existence of the Ministerial Exception Require That Cases Implicating the Exception Be Subject to Dismissal Before Discovery Where the Applicability of the Exception is Clear From the Face of the Complaint.

The ministerial exception exists in order to protect "the freedom of a religious organization to select its ministers." *Hosanna-Tabor*, 565 U.S. at 188. This Court determined that this exception should be recognized because "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so…interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* Questions of ministerial hiring and firing decisions also implicate Constitutional concerns because "[a]ccording the state the power to determine which individuals will minister to the faithful…violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.*

However, these same concerns are implicated long before the government gets to the point of actually forcing a minister upon a church. As the court noted in *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000), the ministerial exception "is in keeping with the 'spirit of freedom for religious organizations [and] independence from secular control or manipulation' reflected in the Supreme Court's

free exercise jurisprudence." In keeping with this "spirit," the court declares that "[t]he exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision." *Id.* This broad articulation of what the ministerial exception precludes supports a preclusion of even initial discovery that would inquire into "a church's ministerial employment decision," because the discovery itself would still be a form of government inquiry into this realm that is supposed to be kept free from "secular control or manipulation."

In *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.1972), the Fifth Circuit articulated the Constitutionally-based policy concern implicated even by the allowance of discovery in cases like this case:

> Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.

If the government is allowed to investigate and delve into religious organizations' employment considerations and policies for choosing their ministers, the separation of church and state will already have been eroded whether or not the court proceeds to trial or attempts to direct the church as to those employment decisions. The judiciary has no more right than any other branch of the government to involve itself in matters of religious organizations' administration, and if they can order discovery into issues that it is clear from the face of the complaint will implicate these ecclesiastical matters, that "investigation and review" in and of itself is already "coercive" to the religious

organization in a way that is incompatible with the Establishment Clause. It is necessary to fully protect the interests behind the existence of the ministerial exception to refuse to permit discovery in cases where the ministerial exception clearly bars the claims at issue.

Given these Constitutionally-based policy considerations and the consistent cross-jurisdictional and cross-state precedent establishing that cases implicating the ministerial exception can be dismissed on a 12(b)(6) Motion to Dismiss when it is clear on the face of the complaint that the ministerial exception bars the claim(s) at issue, this Court should affirm the decision of the Court of Appeals of Tourovia.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the Tourovia Court of Appeals' dismissal of Turner's breach of contract and retaliation claims.

Respectfully Submitted,

Dated: March 10, 2017

Team No. 11
Attorneys for Defendants-Respondents