

No. 415-2017

**IN THE
SUPREME COURT OF THE UNITED STATES**

DAVID R. TURNER

Petitioner-Appellant,

v.

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

Respondents-Appellees.

**On Writ of Certiorari to the
State of Tourovia Court of Appeals**

BRIEF OF PETITIONER

Team 6

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Under First Amendment ministerial exception case law, are religious employers immune from all secular employment claims brought by ministerial employees, including wrongful termination claims based on breach of contract and retaliatory discharge, when the state has no role in the contract's creation, the contract raises no religious issues, and the minister's behavior against which the employer retaliated was to avoid fraud and tax evasion?
2. Under First Amendment case law, does claiming the ministerial exception completely bar opportunity for discovery when courts could evaluate neutral, generally applicable claims like retaliatory discharge and breach of contract, element-by-element without inquiry into religious doctrine or governance?

JURISDICTIONAL STATEMENT

The State of Tourovia Court of Appeals entered judgment on August 16, 2016.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. CONST. amend. I.

STATEMENT OF THE CASE

A church¹ terminated its minister before his employment contract expired. R. at 3. It asserts immunity under the ministerial exception from the minister’s claims of wrongful termination based on breach of contract and retaliatory discharge. R. at 4.

Petitioner-Appellant David R. Turner sued his religious employer, claiming it wrongfully terminated him by breaching a voluntary employment

¹We recognize not all religious employers or institutions are “churches,” with “ministers” instructing their religious adherents. However, for the purposes of this document we will refer to them as such.

contract in retaliation for reporting the church's potential trust fraud and tax evasion. *Id.*

St. Francis Church of Tourovia employed Turner as a minister,² under the terms of an annually renewed employment contract, for three years and four months. R. at 3. St. Francis is part of a larger organization known as the Tourovia Conference of Christian Churches, with Dr. Reverend Roberta Jones as the superintendent. *Id.* For simplicity, we refer to these Respondents collectively as "the Church."

Five months before advising Turner of his termination, the Church learned a trust designated St. Francis as a beneficiary of \$1.5 million. R. at 4. The trust directed half of this bequest for the general operation and maintenance of St. Francis. *Id.* The trust directed the other half for the upkeep of the Church's cemetery. *Id.*

St. Francis selected Turner to administer the bequest. *Id.* It chose him based on his 25 years' experience as a financial manager for IBM Corporation and his later service as Treasurer and Chief Financial Officer of another regional office of the Tourovia Conference of Christian Churches. *Id.* Turner soon learned St. Francis sold its cemetery three years before. *Id.* He

² Turner concedes that his role as Pastor is a ministerial position.

recognized accepting the full bequest, including the \$750,000 destined for the cemetery the Church no longer owned, would mean a breach of trust and would potentially incriminate the Church with fraud and tax evasion. *Id.*

Turner raised his objections to the Church's local, then regional leaders. *Id.* First, Turner reported his concerns to the Church's local leaders (St. Francis' Board of Trustees, unrelated to the Trust). *Id.* Despite Turner's warning, the Board's Vice-Chairman instructed him to accept the full bequest. *Id.* Turner refused. *Id.* In August 2012, Turner raised his objections to accepting the full bequest to the Church's regional leader, Jones. *Id.*

The Church never corrected its course in the five months after Turner told it that accepting the full bequest could result in potential fraud and tax evasion. *Id.* Turner recognized the Church planned to accept the entire bequest, in violation of the trust. *Id.*

Since Turner recognized the Church planned to keep the entire bequest, he sought outside assistance. *Id.* He left a message with the trustee's representative to report the cemetery's sale and seek guidance. *Id.* He also contacted the IRS to report the situation and discuss possible tax consequences, but did not reach the correct person. *Id.*

Within two weeks after Turner raised red-flags to the trustee and the IRS, Jones told Turner he was terminated as of October 31, 2012 – eight months before his employment contract expired. *Id.*

Turner timely filed a complaint alleging the foregoing facts. R. at 3. In his complaint, Turner also mentioned that Jones said the Church was “transitioning” because it had “lost faith” in his spiritual leadership. R. at 4. He claimed that Jones’ stated reason was pretextual (that is, the Church actually terminated him in retaliation for reporting its potential criminal activity). R. at 3-4.

The Church filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. R. at 4. Tourovia adopted the Federal Rules of Civil Procedure, and treats these motions as motions for summary judgement. R. at 4, n.3.

The trial court summarily dismissed Turner’s claims with prejudice, reasoning “even if” Turner’s claims were true, “the ministerial exception still bars this suit against [the Church].” R. at 2. The intermediate court agreed, saying the exception protects the Church “even when the claims relate to breach of . . . contract and retaliatory discharge.” R. at 3. The highest court affirmed. R. at 4. The United States Supreme Court granted Turner’s Petition for Writ of Certiorari. R. at 14.

SUMMARY OF THE ARGUMENT

The State of Tourovia Court of Appeals erred in dismissing Turner's complaint for the following reasons:

First, the Court of Appeals broadly applied the ministerial exception to bar all employment claims brought by ministerial employees against their employers. Turner claimed wrongful discharge based on breach of contract and retaliatory discharge because he reported potential criminal activity by the Church. The Court can evaluate both claims without interference in religious matters. The ministerial exception only applies to claims that require decisions based on religious doctrine or interference with religious governance.

Breach of contract claims are not barred by the ministerial exception, because the state plays no role in forming voluntary contracts between private parties. Churches freely negotiate with ministers and willingly burden their activities through contracts. Both parties rely on those contracted promises. Evaluation of breach of contract claims would inquire only into the contracted terms, not church practice.

Retaliatory discharge claims are also not barred by the ministerial exception. The ministerial exception does not bar reporting conduct declared illegal by neutral, generally applicable laws. Turner claims the Church terminated him based on his reporting the Church's fraud and tax evasion. These claims do not relate to religious

practice or governance and an evaluation of the merits of those claims would not require the court to inquire into religious matters.

Second, the state's highest court incorrectly refused to proceed with discovery to develop a factual record. Asserting the ministerial exception does not automatically bar all further procedure for hearing any claim between a church and its minister. Courts should not dismiss a claim when a question of material fact exists. In deciding if discovery can move forward when a material fact exists, courts must review each claim one element at a time. A court should not dismiss secular claims when it can evaluate them element-by-element, without inquiry into religious doctrine or governance. When this Court accepts for analysis all of Turner's allegations, it could plausibly find the Church wrongfully discharged him. A court can review each element of Turner's retaliatory discharge claim without inquiry into religious practice or governance.

Thus, this Court should find the ministerial exception does not extend to wrongful termination claims based on breach of contract and retaliatory discharge, and reverse and remand to the trial court to allow Turner's claims to proceed to discovery.

ARGUMENT

The trial court granted Respondents’ motion to dismiss under 12(b)(6) for failure to state a claim upon which relief can be granted, reasoning that the ministerial exception absolutely bars court involvement in any dispute between a church and its ministers.³ R. at 2. The ministerial exception is an affirmative defense that protects churches against suits that would entangle the state in doctrine or interfere in their choice to select their own leaders. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 184, 195 (2012).

Courts convert 12(b)(6) motions to dismiss into motions for summary judgment when considering matters outside the pleadings. Fed. R. Civ. P. 12(d). When a court evaluates such a motion, it must determine whether the complaint alleges “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotes and citation omitted). This Court accepts all factual allegations in the complaint as true, with inferences construed in a light most favorable to the non-moving party – Turner. *Id.*; *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009). To be entitled to dismissal, a church must prove no genuine issue of material fact exists and no reasonable jury

³ As mentioned in footnote 1, we refer broadly to churches, ministers, and doctrine. We acknowledge terminology of religions may vary in application.

could find that the plaintiff has a plausible claim for relief. *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653, 656 (7th Cir. 2010).

Turner claims he was wrongfully terminated in retaliation for refusing to take part in unlawful activity, and that Jones' statement that the congregation "lost faith" in him is an excuse. R. at 3. It is within reason that Turner's claims of pretextual firing are true because (1) the Church fired him less than a month after he reported the incident, and (2) he disobeyed an order directing him to commit criminal activity. Accepted as true, the facts Turner alleges may allow a reasonable jury to find in his favor.

While the Church argues their position as religious employer and Turner's position as minister precludes all employment claims from proceeding, the ministerial exception does not bar all such claims.

A. THE MINISTERIAL EXCEPTION DOES NOT BAR EVERY EMPLOYMENT CLAIM BROUGHT BY MINISTERIAL EMPLOYEES AGAINST THEIR EMPLOYERS.

The ministerial exception only applies to claims requiring decisions based on religious doctrine or interfering with religious governance.

Article I, Section vi of the Tourovia Constitution replicates the language of the First Amendment of the United States Constitution which, as applicable here, reads "Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof...” U.S. CONST. amend. I; R. at 3, n.2. This provides two separate protections applicable to the ministerial exception problem. First, the Establishment Clause protects against state entanglement in interpreting and evaluating church doctrine. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Second, the Free Exercise Clause protects the power of a church to decide matters of church governance without state interference. *Hosanna-Tabor*, 565 U.S. at 184.

Both clauses prevent the government from “interfering with the decision of a religious group to fire one of its ministers.” *Id.* at 181. They “ensure that the authority to select and control who will minister to the faithful . . . is the church's alone.” *Id.* at 195.

Here, the Church would have the ministerial exception expanded to include all cases affecting employment. Yet, it is not a blanket exception applying to every employment action suit. While the Church relies on *Hosanna-Tabor*, in that case the Supreme Court expressly declined to extend the ministerial exception from only employment discrimination cases to any other type of employment case. *Id.*

The Church would have this Court accept that, because the ministerial exception applies to employment discrimination cases, it should apply with equal force to all wrongful termination claims based on breach of contract and retaliatory discharge. This notion is flawed. Courts should not deprive a church of the power to select its

own minister. *Id.* at 196. However, in *Hosanna-Tabor*, the Supreme Court expressly limited the opinion’s future application of the ministerial exception to employment discrimination and refused to bar other types of suits. *Id.*⁴

Churches are not above the law and courts should hold them accountable to their valid contracts and prevent retaliation for reporting or refusing to participate in unlawful activity.

- 1. Breach of contract claims are not barred by the ministerial exception because the state plays no role in creating the contract; the contract does not raise religious issues; and failing to enforce otherwise-valid contracts undermines foundational principles of contract law.**

Religious employers are subject to the same principles of contract law as other organizations. This Court treats contractual rights of religious organizations the same as voluntary associations and non-profit organizations, and “the actions of their members [are] subject to [contractual] restraints.” *Watson v. Jones*, 80 U.S. 679, 714 (1871).

⁴ The Court there stated “Today we hold only that the ministerial exception bars [an employment discrimination] 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.

“A church is always free to burden its activities voluntarily through contracts,” and further that “[a] church, like any other employer, is bound to perform its . . . obligations in accord with contract law.” *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1361 (D.C. Cir. 1990). The ministerial employee is “entitled to rely upon his employer’s representations and to enforce them in a secular court.” *Id.* at 1361. Other state courts agree that secular courts can hear and enforce contractual claims that do not intrude into religious matters. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615 (Ky. 2014); see also *Galetti v. Reeve*, 331 P.3d. 997, 997-98 (N.M. App. 2014).

To rule on Turner’s breach of contract claim would not cause state entanglement in ministerial employment. The applicable law is contract law – the bedrock of which is the ability for parties to voluntarily bind themselves with enforceable agreements. *Watson*, 80 U.S. at 714. A state does not impose on religion by enforcing a contract it had no part in creating, but only holds the contracted parties to their voluntarily self-imposed constraints. *Id.* The ministerial employee relies on the contract and its enforceability. *Minker*, 894 F.2d at 1361. The ministerial exception is inapplicable when church doctrine and governance are not disturbed. *Galetti*, 331 P.3d at 1001.

Here, the state played no role in the Church selecting Turner as its minister:

- The state did not require a written contract.
- The state did not whisper in the Church's ear which terms to include and which terms to exclude.
- The state did not counsel Turner to accept or reject the contract.

Rather, the Church and Turner voluntarily came together and freely negotiated the terms of the contract, agreeing to be bound by those terms. They relied on the contract and its enforceability.

Although the Church asserts the ministerial exception bars wrongful termination claims based on breach of contract because they involve inquiries into church matters, it does not bar breach of contract claims that do not directly question religious doctrine or governance. R. at 5; *Galetti*, 331 P.3d at 1002.

The Church relies on *Bell* to sustain its argument that all firings are religious matters protected by the exception, but *Bell* is distinguishable from the present facts. In *Bell*, the church terminated the minister because of financial difficulties. *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997). The minister claimed breach of contract based on the improper distribution of funds. *Id.* The Fourth Circuit determined an inquiry into whether the church used funds properly for religious purposes would require a hearing on an “ecclesiastical dispute,” because

it inquired into the “nature, extent, administration, and termination” of a ministerial employee. *Id.* at 331-33.

Unlike *Bell*, where the dispute pivoted around the improper use of funds for religious purposes, here, Turner’s case centers on contract law – not on the “nature, extent, and administration” of a ministerial employee. The question here is whether an employer breached the terms of an undisputedly valid employment contract. So, *Bell* is not applicable and this court should find no violation of the First Amendment.

Enforcing breach of contract claims upholds churches’ right to enter binding contracts. The foundation of contract law is competent parties binding themselves to voluntary agreements enforceable by the courts. Supporting the contract’s enforcement would strengthen the ability for churches to select their own ministers, because the ministers can trust that their employer will follow through with contractual responsibilities.

However, failing to allow Turner’s claim to proceed based solely on a broadened interpretation of the ministerial exception would “unleash hell” on churches’ ability on contract.

Were this court to hold that the ministerial exception bars breach of contract claims, then everyone loses:

The public would lose confidence in religions, and brand them as untrustworthy – able to retreat on their commitments without repercussions.

The ministers would lose any appearance of job security. Their trust in the power of their crippled contracts would collapse. Many ministers may move to alternative secular professions for more stability and predictability.

The churches would lose the capacity to entice the best and brightest religious minds because their promises would mean nothing.

The courts would lose the visage of strength to the reality of impotency, as perfectly enforceable contracts between any worker and his employer would be untouchable just because the worker was a minister. The court would take a leap of faith in expanding a narrow exception to encompass a broad new field.

These losses are too great.

The court must not expand the ministerial exception. Just as contract claims may proceed, so too can retaliatory discharge claims.

2. To protect the public, the Ministerial Exception cannot bar inquiry into certain illegal conduct such as fraud and retaliatory discharge.

To protect the public, this Court has long permitted minor investigations into religion when fraud is alleged. *Cantwell v. Conn.*, 310 U.S. 296, 306 (1940). This Court has said, “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 [so] the State may protect its citizens from injury.” *Id.* When facing claims involving fraud, religions may suffer some “slight inconvenience” so the state can protect the public. *Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 761-62 (2011).

There must be a concession to the ministerial exception for pretextual terminations, where – for public safety and in the interest of justice – courts may superficially inquire into religious matters. The ministerial exception does not bar claims of retaliation for reporting conduct declared illegal by a neutral, generally applicable law. *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 743 (7th Cir. 2015). Laws are neutral if they have a secular purpose and do not refer to any religious matter on their face. *Id.* In *Listecki*, the Seventh Circuit held that the court was not barred from adjudicating a claim involving a fraudulent transfer of funds to a cemetery trust because the court would not have to interpret any religious doctrine

or review any church governance. *Id.* Furthermore, the applicable bankruptcy law was neutral and generally applicable. *Id.*

Here, Turner claims the Church is perpetrating a \$750,000 fraud against the trust benefactor. The laws of fraud and tax evasion are neutral and generally applicable, so they do not require the court to pry into religious matters. Furthermore, investigating fraud allows the trial court to “slight[ly] inconvenience” the Church to protect the public from harm. *Cantwell*, 310 U.S. at 306.

The Church relies on *Linklater* to assert that any retaliatory discharge claim entangles the court in church governance. There the plaintiff alleged gender discrimination created a hostile work environment. *Prince of Peace Lutheran Church v. Linklater*, 421 Md. 664, 672 (Md. 2011). The religious employer fired her after she did not report for work. *Id.* at 673. The court found that the ministerial exception barred a retaliatory discharge claim because it would inquire into church employment decisions. *Id.* at 697. The claims there related specifically to the plaintiff’s allegations of discrimination. A determination of the merits of that claim would require the court to pry into church governance. *Id.*

Unlike *Linklater*, here, the catalyst event was not discrimination (which fits under the exception because it applies to church governance), but rather it was a crime that threatened public safety: fraud. An evaluation of the merits of his claims would not force any court inquiry into church governance.

While *E.E.O.C. v The Roman Catholic Diocese of Raleigh, North Carolina* states that the ministerial exception bars all cases that may require “any inquiry whatsoever into the reasons behind a church’s ministerial employment decision,” the court in that case analyzed the church’s decision to determine if it involved religious doctrine or governance. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000). While the ministerial exception bars cases forcing an inquiry into religious doctrine or governance, it does not bar analysis to determine whether discovery procedures would involve religious questions. *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016).

To sweep away all claims by a minister against a church without further procedure and discovery for fear of violating the First Amendment would erode faith in religious institutions.

B. DISCOVERY MAY PROCEED WHEN INQUIRIES INTO THE ELEMENTS OF THE ASSERTED CLAIMS AND DEFENSES WILL NOT INTRUDE ON CHURCH DOCTRINE OR GOVERNANCE.

A party asserting the ministerial exception does not automatically halt all further procedure. *Id.* Discovery may proceed and parties should develop factual records before summary judgement when a question of material fact exists. *Id.* Rather than serving as a complete prohibition, the ministerial exception serves as an affirmative defense that may only prevent claims inquiring into religious doctrine or governance. *See Hosanna-Tabor*, 565 U.S. 195 n.4.

1. The trial court erred in granting the Church's motion to dismiss without allowing opportunity for discovery when a material fact existed.

Dismissal before discovery is only proper when no genuine issue of material fact exists and no reasonable jury could find in favor of the plaintiff. Fed. R. Civ. P. 56(a); *Trinity Homes LLC*, 629 F.3d at 656. In particular to the ministerial exception, pre-discovery dismissal is improper when each element of the claims can be decided without inquiry into church doctrine or governance. *Galetti*, 331 P.3d at 1000-01. A court shall not grant a motion to dismiss if a reasonable fact-finder could find the plaintiff meets each element of a claim, after accepting Plaintiff's allegations and after drawing every reasonable inference in a light most favorable to the plaintiff.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Galetti, 331 P.3d at 1001-02.

When a plaintiff is successful in showing their claims are plausible, based on the allegations in their complaint, the defendant has a hard time proving “unambiguously” every element of their defense. *Hyson USA*, 821 F.3d at 939. Essentially dismissal is possible only when the plaintiff pleads himself out of court. *Id.*

With Turner’s allegations accepted as true, this Court could reasonably infer the Church wrongfully discharged Turner in retaliation for reporting potential fraud and tax evasion, breaching his contract. Turner reported unlawful activity. The Church terminated him shortly thereafter. A fact finder could reasonably infer Turner meets his burden. This Court should reverse the motion to dismiss and remand the case to the state trial court to develop a factual record through discovery.

Turner raised at least one genuine issue of material fact: the reason for his termination. Therefore, he rendered dismissal inappropriate when he alleged the Church fired him because he reported their planned fraud and tax evasion. Accepting his allegations as true, a reasonable jury could find in his favor. Furthermore, dismissal is not appropriate because Turner has not admitted that the

ministerial exception applies to his claims. Rather, Turner asserts that a review of his claims would not entangle a court in church matters.

2. The Court may examine each element of Turner's claims and each element of the Church's affirmative defense without intruding on religious doctrine and governance.

Turner's claims do not unambiguously show that discovery would entangle the court with church matters, so a dismissal under Rule 12(b)(6) would be inappropriate and discovery should proceed.

Discovery should proceed unless it requires the court to decide an element based on religious doctrine or governance. *Galetti*, 331 P.3d at 1001. A court looks to each element of each claim and consider whether discovery would entangle religious doctrine or governance. *Id.*

Turner can inquire into each element of his breach of contract and retaliatory discharge claims without intruding on religious doctrine or governance. Rather than prove each element at this stage, Turner must only show that discovery for each element could move forward without intruding into religious matters. *Minker*, 894 F.2d at 1360.

Breach of Contract claims require the plaintiff to show four things: (1) the existence of a valid contract (requiring offer, acceptance and consideration), (2) performance of the contract, (3) material breach of the contract's terms, and (4) damages for the breach. *ViChip Corp. v. Lee*, 438 F. Supp. 2d 1087, 1098 (N.D. Cal. 2006).

Turner can safely conduct discovery into each of these four elements. The Church and Turner concur on the first two elements: they signed an employment agreement that was respected for more than three years. Discovery into whether there was an offer, acceptance, and consideration have nothing to do with religion. Third, the material breach alleged that the Church fired him before the contract expired. So, gathering documents showing inconsistency between the planned end date and actual end date (a difference of eight months) does not require religious inquiry. Finally, the damages inquiry would focus on the amount of lost income and fringe benefits because of his premature termination. This does not approach religious doctrine or governance. With no religious inquiry stirred by discovery for breach of contract, that claim should proceed to discovery.

Like the breach of contract claim, discovery into Turner's retaliatory discharge claim does not disturb the hornets' nest of religious inquiry. Tourovia's Labor Law states an employer may not retaliate because an employee, "discloses or threatens to

disclose information to a public entity or objects to or refuses to participate in an action that violates law . . . and presents a substantial and specific danger to public . . . safety.” State of Tourovia Labor Law, § 740(1)(A). A plaintiff like Turner must show (1) he reported or threatened to report the employer’s activity, (2) the employers violated law, and (3) the violation created a substantial and specific danger to public health or safety. State of Tourovia Labor Law, § 740(1)(B). Furthermore, a plaintiff must have first reported the violation to his supervisor and allowed a reasonable opportunity to correct. State of Tourovia Labor Law, § 740(3).

Turner could conduct discovery on the first element, reporting the Church’s unlawful activity, without intruding into religious matters. Turner first reported the possible fraud and tax evasion in early October, 2012, when he contacted the trustee. R. at 4. He reported the breach of trust a second time when he contacted the IRS to tell them of the situation. *Id.* Discovery regarding Turner’s reporting actions would not intrude into religious doctrine or governance.

Discovery regarding the second element, that the law was violated, would also not intrude into religious doctrine or governance. With more than 25 years of financial experience, Turner claims that the Church’s planned acceptance of the full amount would create a breach of trust, making it potentially liable for fraud and tax

evasion. *Id.* Discovery into the Church's actions of accepting the bequest for property they no longer owned would not inquire into religious doctrine or governance.

Discovery into the third element, whether the violation created a substantial, specific danger to public health or safety, would not inquire into religious matters. The potential \$750,000 fraud alleged here is sizable and specific.

But even if discovery on the third element required the court to consider religious issues, courts would tolerate the inquiry because fraud is alleged. This Court considers fraud to endanger public safety. *Cantwell v. Conn.*, 310 U.S. at 296, 306 (1940). So even if policing it may "slight[ly] inconvenience" first amendment religious protections, the investigation may continue. *Id.*

Finally, discovery of the fourth element, establishing that he reported the violation to his supervisor and allowed a reasonable opportunity for the matter to be corrected, would not inquire into religious matters. In May 2012, soon after discovering the potential unlawful activity, Turner cautioned the St. Francis Board of Trustee's. R. at 4. He was instructed to proceed with accepting the full bequest, in violation of the trust. *Id.* He refused. *Id.* He then expressed his objections to the planned, unlawful activity to the next level of leadership in the Church. *Id.* He advised Jones, the Church's superintendent. *Id.* Turner determined – after five months of reporting to *both* levels of leadership within the Church – it had no

intention of advising the trust of the cemetery sale. Only then did Turner move forward with reporting the potential fraud and tax evasion to the trustee and IRS. Investigating questions of when Turner told whom does not intrude on religious doctrine or governance.

The Court would not need to base any discovery decision on religious doctrine or governance for any element of these two claims. Examining affirmative defenses also poses no entanglement problems.

A court must also examine the elements of any affirmative defenses presented. State of Tourovia Labor Law, § 740(4). Here, the Church directs the Court's attention to overly-simplified elements of the ministerial exception. The Church would have the Court define the elements of the ministerial exception only as (1) the defendant employer is a church and (2) the plaintiff employee is its minister. R. at 6. Turner concedes that the Church employed him as a minister. However, as previously discussed in Section A, above, the Church fails to recognize that the ministerial exception is not a complete jurisdictional bar, but an affirmative defense.⁵ *Hosanna-Tabor*, 565 U.S. at 195 n.4. The Church's interpretation of the

⁵The Supreme court determined the ministerial exception is an affirmative defense because the issue it presents is whether plaintiff's allegations entitle him to relief, rather than if the court has power to hear the case. *Hosanna-Tabor*, 565 U.S. at 195 n.4, (2012) (internal quotations and citations omitted).

ministerial exception as only two elements is flawed. The Church must also show Turner's claims would result in excessive entanglement in religious doctrine or governance.

Here, the Church asserts Turner was its ministerial employee. R. at 3. Turner agrees. *Id.* We do not need to re-examine whether he is a minister. But even if we did, discovery needed for this superficial analysis would not be enough to intrude into church matters. This court inquired into religious matters throughout *Hossana-Tabor* without overstepping into religious doctrine or governance. 565 U.S. *passim*.

Churches have a carve-out in the State of Tourovia Labor Law, § 740(4). Under this rule, an employer can defend a 740 claim by showing its adverse employment action was based on “grounds other than the exercise of any rights protected [by § 740].” State of Tourovia Labor Law, § 740(4).

Turner identifies a genuine issue of material fact here. Although the Church claims they terminated Turner because they “lost faith” in his leadership, Turner counters that such reason is pretextual. R. at 3. With the reason for his termination in dispute, (1) summary judgement is not appropriate at his time, and (2) the court is left to make reasonable inferences in Turner's favor. A reasonable fact-finder could

determine that the Church's reason was pretextual and he was wrongfully terminated, in breach of his contract and in retaliation for reporting unlawful behavior.

The question of whether the reason given is pretextual does not demand prying into Church's faith. The Court does not apply a balancing test, weighing the Church's faith against the pretextual reason. Rather, the relevant analysis is whether Turner has alleged enough facts to support his claim. He alleges (1) the Church fired him less than a month after he reported the issue to Jones, and (2) he disobeyed an unlawful order. These allegations, taken as true, would be enough to infer they fired him because of his reporting activities. So, discovery should proceed.

The Church is likely to reason Turner "misses the point of the ministerial exception" when he suggests their "loss of faith" is pretextual. *Hosanna-Tabor*, 565 U.S. at 194; R. at 4. However, this Court stated in the sentences thereafter that the purpose of the ministerial exception is to ensure churches alone have "the authority to select and control who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 175.

Turner recognizes the purpose of the ministerial exception. The Church here had authority to select and control who would be its minister. As addressed above, the

Church chose Turner minister to the faithful when it voluntarily contracted with him. This addresses the purposes of the ministerial exception and nullifies the Church's argument. Also, allowing churches to act unlawfully without fear of liability rewards religious employers for their bad acts.

Furthermore, the trial court can later limit discovery and move forward with summary judgement if it becomes apparent that a particular discovery request inquires into religious doctrine or governance.

CONCLUSION

For the foregoing reasons, this Court should find the ministerial exception does not extend to wrongful termination claims based on breach of contract and retaliatory discharge, and reverse and remand to the trial court to allow Turner's claims to proceed to discovery.

Respectfully submitted,

Dated: March 10, 2017

Team 6

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