No. 17-3086

United States Court of Appeals For the Third Circuit

REV. DR. WILLIAM LEE,

Plaintiff-Appellant,

v.

SIXTH MOUNT ZION BAPTIST CHURCH OF PITTSBURGH,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:15-cv-01599-NBF

BRIEF FOR DOUGLAS LAYCOCK, MICHAEL W. MCCONNELL, THOMAS C. BERG, CARL H. ESBECK, RICHARD W. GARNETT, AND ROBERT F. COCHRAN, JR., AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE URGING AFFIRMANCE

Todd R. Geremia
JONES DAY
250 Vesey Street
New York, NY 10281
Telephone: +1.212.326.3939
Facsimile: +1.212.755.7306
trgeremia@jonesday.com

Victoria Dorfman
Counsel of Record
Mark R. Kubisch
Daniel D. Benson
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: +1.202.879.3939
Facsimile: +1.202.626.1700
vdorfman@jonesday.com
mkubisch@jonesday.com
dbenson@jonesday.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici teach and write about the Religion Clauses of the First Amendment in general, and church autonomy and the ministerial exception in particular:

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for four decades at the University of Chicago, the University of Texas, the University of Michigan, and now Virginia. He has testified frequently before Congress and has argued many religious freedom cases in the courts, including the U.S. Supreme Court; he was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). His many writings on religious liberty are being published in a five-volume collection.

Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. He has served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit and has held chaired professorships at the University of Chicago and the University of Utah. He has published widely

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person or entity, other than Amici and their counsel, contributed money intended to fund the preparation or submission of this brief.

in the fields of constitutional law and theory, especially church and state, equal protection, and the founding. In the past decade, his work has been cited in opinions of the Supreme Court second most often of any legal scholar. He is a co-editor of three books: *Religion and the Law*, *Christian Perspectives on Legal Thought*, and *The Constitution of the United States*. He has argued fifteen cases in the Supreme Court.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law. He teaches constitutional law, law and religion, and the religious liberty appellate clinic, where he supervises students writing briefs in major religious liberty cases. Professor Berg is among the nation's leading scholars of law and religion, having written several books, including *Religion and the Constitution* and *The State and Religion in a Nutshell*, and approximately 50 book chapters and journal articles on the topic.

Carl H. Esbeck is the R.B. Price Professor Emeritus of Law and the Isabelle Wade & Paul C. Lyda Professor Emeritus of Law at the University of Missouri School of Law. He has published widely in the area of religious liberty and church-state relations, and has taken the lead in recognizing that the modern Supreme Court has applied the Establishment Clause not as a right, but as a structural limit on the government's authority in explicitly religious matters. Professor Esbeck previously directed the Center for Law & Religious Freedom, a

nonprofit public interest law firm, and served as Senior Counsel to the Deputy Attorney General at the U.S. Department of Justice.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's new Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Robert F. Cochran, Jr., is the Louis D. Brandeis Professor of Law and the founder and director of the Herbert and Elinor Nootbarr Institute on Law, Religion, and Ethics at Pepperdine University School of Law. He teaches courses and lectures internationally on the intersection of law and religion. He has also published extensively on law and religion, including notable works on church autonomy and the role of religion in shaping the law.

As explained in Amici's motion for leave to file, Amici's interest is to provide the Court with a historical perspective of the "ministerial exception" as it applies in this context and a broader doctrinal analysis of the exception. This

broader context makes clear that the exception must apply here, to a dispute over whether a church had adequate cause to discharge its senior minister.

INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012), the Supreme Court unanimously affirmed that there is a "ministerial exception" grounded in the Religion Clauses of the First Amendment. This exception forbids the government from "interfer[ing] with the internal governance of the church" and "depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188.

Reverend Lee nonetheless claims that the ministerial exception does not apply and his breach-of-contract claim should proceed because it differs in kind from the antidiscrimination claim at issue in *Hosanna-Tabor*. Opening Br. 14-15. As shown below, Reverend Lee's position is inconsistent with *Hosanna-Tabor*'s reasoning and the precedent and long history giving rise to the ministerial exception.

While *Hosanna-Tabor* involved a minister's statutory civil rights claim for discrimination on the basis of disability, the Supreme Court's reasoning there applies with equal force to contractual claims over whether a church has fired its minister for cause. This is because both types of claims require an evaluation of a minister's performance and whether there was a sufficient cause for the firing – matters which necessarily intrude into the internal affairs of the church.

The precedent and history giving rise to the ministerial exception further support and reflect this reasoning and the importance of the autonomy of a religious organization, such as a church, over church authority, internal affairs, and doctrine. This principle was espoused by legal philosophers and statesmen such as John Locke, James Madison, and Thomas Jefferson. As the First Amendment's history demonstrates, the First Amendment protects religious organizations' internal governance, including the autonomy to select their leaders and to decide the proper grounds for removing them. That is because the religious organization's leaders speak for that religion and their selection is an inherently religious decision. Over a century of Supreme Court precedent, culminating in the most recent decision, *Hosanna-Tabor*, confirms the autonomy of religious organizations over religious doctrine and authority, free from the state's interference.

Thus, this dispute – the selection of a church's pastor and the church's ability to fire him for cause – is a paradigmatic example of the type of claims that the ministerial exception covers. Because resolving the merits here would improperly intrude into matters of church autonomy and entangle secular courts in religious disputes, the District Court correctly applied the ministerial exception. Accordingly, this Court should affirm.

ARGUMENT

I. RELIGIOUS ORGANIZATIONS HAVE AUTONOMY TO SELECT THOSE WHO PERFORM SIGNIFICANT RELIGIOUS FUNCTIONS, AND ESPECIALLY THEIR LEADERS

A. As The Supreme Court Has Explicitly Recognized In *Hosanna-Tabor*, The First Amendment Protects The Autonomy Of Religious Organizations

In *Hosanna-Tabor*, the Supreme Court confirmed the forty years of precedent in lower courts, which recognized a ministerial exception giving religious organizations autonomy to evaluate and select their leaders and freedom from certain legal liability in connection with those decisions. 565 U.S. at 186-90. That is because a religious organization's selection of its ministers is an inherently religious decision. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 850-51 (2012). Indeed, as the Supreme Court has held, "[t]he exception . . . ensures that the authority to select and control who will minister to the faithful – a matter strictly ecclesiastical – is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (citation omitted). The Supreme Court has clarified that this exception arises from both the Establishment Clause and the Free Exercise Clause: "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the

Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-89. Thus, these two clauses form "a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J. L. & Pub. Pol'y 821, 834 (2012); *see also* Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 Va. L. Rev. 1049, 1058 (2013) ("Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience. . . . [C]hurch autonomy . . . involve[s] a *structural* as well as an individual component, one that recognizes the limits of the state and the separate existence of the church." (emphasis added)).

As Professor Christopher Lund has observed, there are three components to the ministerial exception. *First*, the relational – "[o]rganizations founded on shared religious principles, simply to exist, must have freedom to choose those religious principles." Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 4 (2011); *see also Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (religious groups' "very existence is dedicated to the collective expression and propagation of shared religious ideals"). *Second*, conscience, which allows religious organizations to consider factors such as sex or religion in internal religious decisions, such as some groups' "divinely ordained" imperative to maintain an all-male clergy. Lund, *supra*, at 5. *Third*, autonomy,

which bars those with significant religious duties from bringing employment-based claims against their religious organizations. *Id.*

Here, the autonomy component is most prominently implicated as it "deals with the special importance of religious leaders in religious life. Choosing a minister is an important act of religious exercise," as religious leaders "play fundamental roles in peoples' lives." *Id.* at 35. As the Supreme Court has acknowledged in *Hosanna-Tabor*, "[t]he members of a religious group put their faith in the hands of their ministers." 565 U.S. at 188. Thus, "because selecting a minister is at the heart of religion, the heart of religious freedom lies in having free choice in making that selection." Lund, *supra*, at 35. At the same time, "imposing liability on people because of whom they want (or do not want) as their minister burdens that freedom." *Id.* While the Supreme Court, as Lund notes, has held in the Free Speech Clause context that liability presumptively cannot attach to speech on matters of public concern, *Hosanna-Tabor* has gone even further: It categorically precludes the imposition of liability, "bar[ring]" employment discrimination suits brought by those who teach a church's faith and carry out its mission 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." 565 U.S. at 188, 195.

B. History Confirms That A Religious Organization's Ability To Select Those Who Hold Leadership Positions Or Perform Significant Religious Functions Is An Essential Part Of The Protection Of Religious Freedom From Governmental Interference

This understanding of the ministerial exception is firmly grounded in history. The broad principle that government has no authority to interfere with a church's internal affairs – espoused by legal philosophers and statesmen such as John Locke, James Madison, and Thomas Jefferson – "has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). More specifically, this autonomy has included the church's right to "control . . . the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. History confirms that ensuring the religious institution's autonomy over the selection of those with significant religious responsibilities, and especially, of its leaders, is an essential component of the religious freedoms enshrined in the First Amendment. Forcing a religious organization to retain an unwanted pastor with important religious duties or to be otherwise liable for terminating that pastor is incompatible with those freedoms. *Id.* at 194.

"The freedom to select religious leaders was a landmark in the development of limited government in the West" as "[t]he very existence of two power

structures competing for men's allegiance instead of only one compelling obedience greatly enhanced the possibilities for human freedom." Berg, *supra*, at 180 (internal quotation marks omitted). This freedom, however, did not come easily. *See id.*

"Virtually every major advance in that tradition [of religious organizations selecting their own leaders] has stemmed from some conflict over the government's intervention in this area of decisionmaking." *Id.* at 179. From the investiture controversy of the eleventh and twelfth centuries between popes and various monarchs to the famous conflict between Henry II and Archbishop Thomas Becket, "each side in these disputes prevailed only in a limited area." *Id.* at 180. This resulted in a "'duality' of jurisdictions that 'profoundly influenced the development of Western constitutionalism'" as it "established a principle that royal jurisdiction was not unlimited" and that "it was not for the secular authority alone to decide where its boundaries should be fixed." *Id.* at 180.

Indeed, the perils of the state overstepping its boundaries were manifest in seventeenth-century England, which was roiled by religious controversy. "A leading source of religious strife . . . involved clashes between Episcopal and Presbyterian views of 'church polity' – the church's internal governance structure." Brief for International Mission Board of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioner at 27-28, *Hosanna-Tabor*, No. 10-553, 565

U.S. 171 (2011) (citing sources). "Episcopal polity, associated with the Roman Catholic and Anglican churches, called for placing ecclesiastical authority principally in bishops." *Id.* "In contrast, Presbyterian polity, inspired by the Reformation and associated with the Puritans and many Protestant churches, called for governance by assemblies of elders – i.e., 'presbyters.'" *Id.* Favoring Episcopal polity, James I attempted to impose it on Presbyterian Scotland, which sparked opposition from Parliament. *Id*. The conflict came to a head in 1640, when Charles I dissolved Parliament and required all clergy to swear an oath upholding the church's episcopal structure. *Id.* at 28. The Scots then invaded England, Parliament executed the king's chief minister, and years of civil war ensued. *Id.* at 28-29.

The worst of England's religious struggles were ultimately resolved by the Glorious Revolution of 1688 and the Act of Toleration. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 355 & n.59 (1984). Writing to justify and secure the fruits of that Revolution, John Locke penned his influential *A Letter Concerning Toleration*, advocating church-state separation as the only path toward peace. *See City of Boerne v. Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part) (noting that Locke supplied "the background political philosophy of the age"); *accord* Nathan S. Chapman, *Disentangling Conscience*

and Religion, 2013 U. Ill. L. Rev. 1457, 1464 (2013) ("Most members of the Founding Generation embraced John Locke's theory of religious toleration."). According to Locke, "it is utterly necessary that we draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." John Locke, *Toleration* 3 (Jonathan Bennett ed. 2010) (1690), *available at* http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf. Otherwise, there will be "no end to the controversies arising between those who have . . . a concern for men's souls and those who have . . . a care for the commonwealth." *Id.*

Locke insisted that religious institutions must be free to control their leadership and internal affairs. In Locke's view, a church is a "free society of men who voluntarily come together to worship God in a way that they think is acceptable to Him and effective in saving their souls." *Id.* at 5. "[S]ince the members of this society . . . join[] it freely and without coercion, . . . it follows that the right of making its laws must belong to the society itself." *Id.* This right of self-governance includes the society's authority to select its own members – particularly the right to disassociate with anyone who declines to follow the society's rules. *Id*. A church's power of excommunication – "the power to remove any of its members who break its rules" – is thus fundamental and immutable, as "the society would collapse" if its members could "break [its] laws with impunity." *Id.* at 7.

A "church's right to make its own religious laws and to expel members for nonconformance" applies, therefore, to appointing and removing individuals with significant religious responsibilities and especially those in positions of religious leadership. Laycock, *supra*, at 857. A church's ability to select its own teachers and messengers, and *a fortiori*, its leaders, is an even more vital component of self-governance than a church's right to control its membership. *Id.*

Ideas similar to Locke's found expression in the colonies. In *The Bloudy Tenet of Persecution for Cause of Conscience*, the theologian Roger Williams made a two-part case for non-interference with religious affairs. "First, it was best for the state because conformity in religious matters was impossible due to its personal nature, and state attempts to compel conformity would lead only to repression and civil discord." Esbeck, *supra*, at 357-58. Second, it "was best for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived." *Id.* at 358. These ideas spread throughout the colonies during the First Great Awakening of 1720-1750. *Id.* at 357. "The leaders of the movement insisted that the Church should be exalted as a spiritual and not a political institution." *Id.* at 358 (internal quotation marks omitted).

The early Congress of the Confederation likewise agreed with the principle of non-interference in matters relating to the organization and polity of the church. In the early 1780s, the French minister to the United States petitioned Congress to

approve a Catholic Bishop for America since the states were no longer under English authority. Carl H. Esbeck, *Religion During the American Revolution and the Early Republic*, in 1 *Law and Religion, An Overview* 57, 72-73 (Silvio Ferrari & Rinaldo Cristofori, eds., Ashgate Pub. Ltd. 2013). After receiving this proposal, Congress passed a resolution directing Benjamin Franklin (then-ambassador to France) to notify the Vatican's representative at Versailles that "the subject of [this] application . . . being purely spiritual[] . . . is without the jurisdiction and powers of Congress." *Id.*

"It was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S. at 183. "Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church." *Id.* "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices." *Id.* at 184.

"This understanding of the Religion Clauses was reflected in two events involving James Madison, the leading architect of the religion clauses of the First Amendment." *Id.* (internal quotation marks omitted). In the wake of the Louisiana Purchase, John Carroll – the first Roman Catholic Bishop in the United States – asked then-Secretary of State Madison for advice on who should be appointed to

head the Catholic Church in the city of New Orleans. McConnell, *supra*, at 830. In his response to Carroll, Madison wrote that, the "selection of [religious] functionaries … is entirely ecclesiastical" and that the government should have nothing to do with such selections. Letter from James Madison to John Carroll (Nov. 20, 1806), in 20 *The Records of the American Catholic Historical Society* 63, 63-64 (1909). "He declined even to express an opinion on whom Carroll should select." McConnell, *supra*, at 830.

Several years later, Congress passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. *Hosanna-Tabor*, 565 U.S. at 184-85. Then-President Madison vetoed the bill "on the ground that it 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'"" *Id.* (quoting 22 Annals of Cong. 982-983 (1811)). Madison explained:

> "The bill enacts into, and establishes by law, sundry *rules and proceedings relative purely to the organization and polity of the church incorporated*, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises."

Id. at 185 (emphasis altered) (quoting 22 Annals of Cong. 983 (1811)). This episode demonstrates that the First Amendment's principle of non-interference

extends beyond the appointment of ordained clergy; it broadly forbids the government from interfering in matters relating "purely to the organization and polity of the church." *Id.*

Similarly, Thomas Jefferson saw noninterference as respectful of the autonomy of religious organizations. In response to a letter from the Ursuline Nuns of New Orleans in 1804, Jefferson assured the nuns that the Louisiana Purchase – and the transfer of control over the city from Catholic France to the United States – would not undermine their legal rights. 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950). As Jefferson explained, "[t]he principles of the [C]onstitution . . . are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority.'" *Id.* Thus, "Thomas Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations – not just churches but religious schools as well" as his "statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders." Berg, *supra*, at 182-83.

"What these and other events confirm is that many early American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious*

Freedom, and the Constitutional Structure, 2011-2012 Cato Sup. Ct. Rev. 307, 313. "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*

Because the original Bill of Rights did not apply to the acts of state governments, roughly half of the states maintained established religions after ratification of the First Amendment. McConnell, *supra*, at 829. But "[d]isestablishment occurred on a state-by-state basis through adoption of state constitutional amendments—Massachusetts being the last to dismantle its localized establishment in 1833." *Id.* Importantly, "each of the states that first maintained an establishment and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—adopted at the same time an express provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." *Id.* This history shows that a church's freedom to choose those with significant religious functions and especially its leaders was "part and parcel of disestablishment." *Id.*

In sum, history confirms "a constitutional order in which the institutions of religion – not 'faith,' 'religion,' or 'spirituality,' but the 'church' – are distinct from, other than, and meaningfully independent of, the institutions of

government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment. 515, 523 (2007).[2]

C. Supreme Court Precedent, Going Back Over A Century, Confirms The Importance Of A Religious Organization's Autonomy In Resolving Disputes Over Church Authority And Doctrine, Including In Selecting Its Leadership And Those Who Perform Religious Functions

Supreme Court precedent – stretching back over a century – reflects the view of church autonomy existing at the time of the First Amendment's ratification. To begin, in *Watson v. Jones*, 80 U.S. 679 (1871), the Supreme Court considered a dispute over the property of Walnut Street Presbyterian Church after the church had split into two factions, with each claiming to be the true church. *Id.* at 681, 692. Rather than decide the dispute itself, the Court deferred to the decision of the "General Assembly, . . . the highest judicatory of the Presbyterian Church." *Id.* at 682. The Court reasoned that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Id.* at

[2] In stark contrast to the American approach, religion in the former Soviet Union was highly regulated by the state's Council for Religious Affairs, which selected ministers for various faiths. Successor ministries still exist in several former Soviet republics, such as the State Committee on Religious Associations of the Republic of Azerbaijan. *See, e.g.*, The State Committee of Azerbaijan Republic for the Work with Religious Associations, *available at* http://www.azerbaijan.az/portal/StatePower/Committee/committeeConcern_02_e.html.

727. Hence, *Watson* "explained that federal courts had to do their best to stay out of internal church controversies, as churches had rights to govern themselves and resolve their own disputes." Lund, *supra*, at 13.

Subsequent precedents confirmed that a church's autonomy includes the right to select its own leaders. In *Gonzales v. Roman Catholic Archbishop of Manila*, a fourteen-year-old boy claimed he was legally entitled to be appointed to an endowed Roman Catholic chaplaincy even though he did not satisfy the Roman Catholic Church's chaplaincy requirements. 280 U.S. 1, 13, 16 (1929). In rejecting the boy's claims, the Court reiterated that "it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16. The Court thus accepted "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, . . . as conclusive." *Id.*; *see* Lund, *supra*, at 18.

Likewise, in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, the Court reiterated that religious organizations have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). Thus, in declaring unconstitutional the New York law which "pass[ed] the control of matters strictly ecclesiastical from one church authority to another," the Supreme Court emphasized that the law "directly prohibited the free exercise of an

ecclesiastical right, the Church's choice of its hierarchy." *Hosanna-Tabor*, 565 U.S. at 187 (quoting *Kedroff*, 344 U.S. at 119). And, in doing so, the Court further confirmed the importance of a religious organization's authority to choose its leadership. *Kedroff*, 344 U.S. at 119; *see also Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam) (holding that the First Amendment principles recognized in *Kedroff* also prohibited the New York judiciary from interfering in ecclesiastical governance by ruling in favor of a particular church authority).

Similarly, in *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, the Court refused to second-guess the decision of the highest body of the Serbian Eastern Orthodox Church over who truly was the Bishop of the Serbian Eastern Orthodox Church in America and thus who had a legal title for all the Church's property in North America. 426 U.S. 696, 709-10 (1976). The Court again explained that "civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Id.* Thus, the Court held that the Serbian Eastern Orthodox Church in Yugoslavia "had the right to choose its bishops." Lund, *supra*, at 19.

Together, these precedents confirm the constitutional importance of respecting a religious organization's autonomy in resolving questions of church

authority and doctrine, especially in choosing its own leadership. And they reinforce *Hosanna-Tabor*'s recognition of the autonomy of religious organizations to evaluate and select their leaders without having to defend their decision in a secular court. 565 U.S. at 186-90.

II. WHATEVER THE OUTER BOUNDS OF THE MINISTERIAL EXCEPTION'S APPLICATION TO BREACH OF CONTRACT CLAIMS, IT APPLIES WHERE A RELIGIOUS ORGANIZATION FIRED ITS SENIOR MINISTER FOR CAUSE

In this case, Reverend Lee contends that his contractual claim is enforceable because it differs from the antidiscrimination claim at issue in *Hosanna-Tabor*. Opening Br. 14-15. This unduly narrow view of the ministerial exception, however, is contrary to *Hosanna-Tabor* and the long history and precedent giving rise to the exception. *See* Part I. Accordingly, we urge the Court to affirm that the ministerial exception can apply to breach of contract claims brought by ministers, and that the ministerial exception applies to contractual claims over a church's termination of a minister for failing to carry out his religious functions.

Hosanna-Tabor's holding makes the application of the ministerial exception to an antidiscrimination claim clear. *Hosanna-Tabor*'s reasoning and the history underlying the ministerial exception make equally clear that whether a minister's breach of contract claim against a religious organization may proceed depends on whether the claim will implicate the religious organization's autonomy over church authority, internal affairs, and doctrine. *See* Laycock, *supra*, at 861; Paul Horwitz,

Act III of the Ministerial Exception, 106 Nw. U. L. Rev. 973, 984 n.50 (2012). Phrased differently, "[w]hether the [ministerial] exception applies in a particular instance will depend on the nature of the state law claim and its associated remedy[.]" *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

Of course, there are some contractual matters involving ministers that do not implicate the ministerial exception. For instance, a church's refusal to provide "agreed-upon insurance coverage or [its] failure to make the annual compensation adjustment" may well be determined on facts that do not involve the court in internal, ecclesiastical matters. *See, e.g.*, *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1027 (N.D. Iowa 2007). So too, "[a] minister's contract claim for unpaid salary or retirement benefits surely can proceed to the merits." Laycock, *supra*, at 861; Horwitz, *supra*, 984 n.50.

By contrast, "[a] minister discharged for cause, suing in contract on the theory that the church lacked adequate cause to discharge him, should be squarely within the rationale of *Hosanna-Tabor*." Laycock, *supra*, at 861.[3] This is because

[3] Likewise, there are other subject matters, not mentioned here, that clearly come under church autonomy, for example, church membership – both who is eligible to enter into membership and who is subject to excommunication. *Cf.* Section I.B; *Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 415 (3d Cir. 2012) (concluding "that the non-entanglement principle embedded in the Religion Clauses shields [a bishop's] membership decisions from civil court review"). Those determinations – whether

the minister "would be directly challenging the church's right to evaluate and select its own ministers, and he would be asking the court to substitute its evaluation of his job performance for the church's evaluation." *Id.* But the government may not lend "its power to one or the other side in controversies over religious authority" by determining who should occupy a particular position of religious authority. *Hosanna-Tabor*, 565 U.S. at 190 (quoting *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)); *see* Sections I.B, I.C.

The First Amendment "protects the freedom of religious groups to engage in certain key religious activities . . . as well as the critical process of communicating the faith . . . . in its own voice, both to its own members and to the outside world." *Hosanna-Tabor*, 565 U.S. at 199, 201 (Alito, J., concurring). As courts have recognized, "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses," and thus, "a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful.'" *Id.* at 201 (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)). So "[i]f a

---

based on a contract, a statute, or something else – are not subject to civil litigation because they involve the church's autonomy over church authority, internal affairs, and doctrine.

religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position." *Id.* at 199. That means that the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.*

Simply put, the rationale of *Hosanna-Tabor* applies equally to contractual claims that seek to contest a church's determination that it had adequate cause to terminate for failed religious leadership. A dispute over whether a church had adequate cause to fire a minister does not materially differ from the provision of an adequate nondiscriminatory reason for terminating a minister in a discrimination case. Both types of claims require civil courts to decide who should occupy a position of religious authority. Both claims require civil courts to evaluate how well a religious leader performed his religious functions. Both claims typically require civil courts to assess a plaintiff's claim that the church's religious reasons for its employment decision were pretextual. Both claims typically require civil courts to determine the correct application of religious doctrine. But even in the exceptional case in which the religious doctrine is undisputed, the ministerial exception applies because the dispute is over religious authority, *Hosanna-Tabor*,

565 U.S. at 190, and over the performance of religious functions. As such, both inquiries are impermissible because they require the state to rule on internal religious affairs, and thus "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *See Hosanna-Tabor*, 565 U.S. at 188.

A contractual claim may differ in certain respects – for the ministerial exception analysis – from an antidiscrimination claim, given the voluntary nature of a contract. But, even so, a church's agreement that it will not fire its minister without cause does not amount to the church's explicit waiver of its right, protected by the ministerial exception, to determine *what constitutes cause* based on the church's understanding and interpretation of its own doctrine and religious policy. A church can rely on its own internal procedures for assessing cause; in this case, those procedures took more than a year, and involved the Board of Trustees, the Board of Deacons, and a vote of the congregation, which ratified an explicit religious judgment that the plaintiff had failed in his religious duties. *See* Resp. Br. 14-21. For a court to second-guess the church on the adequacy of cause would raise the same concerns as adjudicating the discrimination claim in *Hosanna-Tabor*, where the adjudication would have forced the court to determine whether the church's proffered religious reason "was pretextual." *Hosanna-Tabor*, 565 U.S. at 194. Even assuming that a church could explicitly waive the

ministerial exception in a contract, there is nothing in a for-cause provision that amounts to an explicit consent to adjudication in a secular court.

Hence, to the extent a claim implicates the scope of internal decision-making, especially on the questions of religious authority, by a religious organization, the nature of the writ giving rise to the claim (i.e. a tort, a contract, or a civil rights statute) does not matter. *See* Laycock, *supra*, 861. If it mattered, then avoiding the church autonomy doctrine would become a simple matter of artful pleading by plaintiff's counsel.

The history of the First Amendment and the constitutional principles regarding church autonomy reinforce this view. As explained above, the history of the First Amendment confirms that an essential part of the protection of religious freedom from governmental interference is a religious organization's ability to select those who hold leadership positions or perform significant religious functions. *See* Section I.B. And this freedom necessarily includes a religious organization's ability to fire a minister for failing to satisfy the functions of his or her position without being dragged into court over the religious reasons for the minister's termination. Whether the minister sought reinstatement or damages, adjudicating the wrongful termination claim would "depend on a determination that [the church] was wrong to have relieved [its minister] of her position, and it is

precisely such a ruling that is barred by the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 194.

Similarly, Supreme Court precedent has long recognized the importance of a religious organization's autonomy in resolving disputes over church authority and doctrine, including the selection and termination of its leadership. *See* Section I.C. A religious organization's authority to replace what it perceives to be ineffective leadership naturally follows from that case law. *Hosanna-Tabor*, 565 U.S. at 185 ("Our decisions . . . confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."). Hence, it is clear that contractual claims about whether a minister was fired for cause – where a church claims that he failed to perform his duties as a minister – inherently involve questions of internal governance subject to the ministerial exception recognized in *Hosanna-Tabor*.

Accordingly, Reverend Lee's breach of contract claim falls squarely within the ministerial exception because whether Sixth Mount Zion Baptist Church of Pittsburgh fired him for cause necessarily implicates questions of internal governance. As the District Court aptly explained, "any determination whether [Reverend] Lee failed in his spiritual and financial stewardship and responsiveness to Church leaders is a matter best left to the Church alone." *Lee v. Sixth Mount Zion Baptist Church of Pittsburg*, No. cv-15-1599, 2017 WL 3608140, at *35

(W.D. Pa. Aug. 22, 2017). "Otherwise, the Court and jury would need to probe how the Church evaluated spiritual success and leadership under its doctrine, which both the Agreement and By-laws reference in doctrinal terms." *Id.* For instance, "the financial stewardship issue . . . would require considering whether members and Church attendees decreased their giving . . . for spiritual reasons and whether and to what extent they were led by the Spirit in the great commission to bring souls to Christ[.]" *Id.* Likewise, the "failures in spiritual stewardship" reason for termination directly implicates the Church's mission to "attract new souls to Christ," "cultivate new ambassadors for Christ," and "transform family, neighborhoods, and the city for Christ." *Id.* at *7, 35. Finally, "[p]rohibited considerations of ecclesiastical hierarchy are directly implicated in the assessment that Reverend Lee did not adequately respond to Church leadership." *Id.* at *35.

Once it became clear that the Church's defense to the firing was Reverend Lee's failures in leading the Church, the District Court was prohibited from evaluating whether this reason "was pretextual." *Hosanna-Tabor*, 565 U.S. at 194. "The 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 to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-95 (citation omitted); *see* John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and*

Association, 99 Minn. L. Rev. 485, 504 (2014) ("The unanimous decision [in *Hosanna-Tabor*] made clear that the ministerial exception provided an absolute protection for churches to hire and fire ministers on whatever basis they would like."). Thus the District Court could not – and this Court cannot – entertain Reverend Lee's arguments that he was fired for secular, not religious, reasons. "[T]he mere adjudication" of the Church's reasons for firing Reverend Lee "would pose grave problems for religious autonomy" by placing "a civil factfinder . . . in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring).

In sum, Reverend Lee's claim implicates matters of internal governance at the heart of the ministerial exception, and the District Court correctly applied the ministerial exception to this case.

CONCLUSION

For the reasons stated here and in Appellee's brief, this Court should affirm the District Court's judgment.

Dated: April 25, 2018

Respectfully submitted,

/s/ Victoria Dorfman
Victoria Dorfman

Victoria Dorfman
Counsel of Record
Mark R. Kubisch
Daniel D. Benson
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: +1.202.879.3939
Facsimile: +1.202.626.1700
vdorfman@jonesday.com
mkubisch@jonesday.com
dbenson@jonesday.com

Todd R. Geremia
JONES DAY
250 Vesey Street
New York, NY 10281
Telephone: +1.212.326.3939
Facsimile: +1.212.755.7306
trgeremia@jonesday.com

Attorneys for Amici Curiae

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Executed this 25th day of April 2018.

/s/ Victoria Dorfman

Victoria Dorfman
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: +1.202.879.3939
Facsimile: +1.202.626.1700
vdorfman@jonesday.com

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 29 AND 32 AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). It contains 6,045 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

3. This brief complies with the electronic filing requirements of 3d Cir. L.A.R. 31.1(c) (2011). The text of this electronic brief is identical to the text of the paper copies. Windows Defender (virus definition version 1.267.267.0) has been run on the file containing the electronic version of this brief, and no virus has been detected.

Executed this 25th day of April 2018.

/s/ Victoria Dorfman
Victoria Dorfman

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on the date indicted below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 25th day of April 2018.

/s/ Victoria Dorfman
Victoria Dorfman

Attorney for Amici Curiae