No. 17-3086

In the 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

DEFENDANT-APPELLEE'S RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee represents that it does not have any parent entities and does not issue stock.

/s/ Daniel Blomberg
Daniel Blomberg

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STATEMENT OF JURISDICTION

The district court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332, as the matter in controversy is $2,643,996.40 and there is complete diversity of citizenship between Plaintiff-Appellant Reverend Doctor William David Lee and Defendant-Appellee Sixth Mount Zion Baptist Church. On August 22, 2017, the district court entered final judgment in favor of Defendant-Appellee. Plaintiff-Appellant timely appealed on September 21, 2017. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

This appeal concerns the application of the "ministerial exception," a doctrine recognized by the United States Supreme Court and this Court as required by the First Amendment's Free Exercise and Establishment Clauses. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006). The issue presented on this appeal is whether the ministerial exception bars Rev. Lee's breach of contract claim either because (1) the claim requires courts to question the Church's determination that it had adequate cause to terminate Rev. Lee for failed religious leadership, or

(2) the claim requires resolving the Church's defenses that the contract was a product of both duress and fraud and was materially breached due to his failed religious leadership. Dkts. 76, 86, 89 (raised); A273, Dkts. 91, 92 (objected to); A299 (ruled on).

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Church is unaware of any related cases or proceedings.

STATEMENT OF THE CASE

A. The Parties

The Church. Sixth Mount Zion Baptist Church of Pittsburgh is a house of worship that was founded at the end of the nineteenth century. A104; *see also* Pennsylvania Historical and Museum Commission, African-American Historic Sites Survey of Allegheny County (1994) 122-23.[1] It received its original charter as a Pennsylvania non-profit corporation in 1915. A19, A30. The Church was established for "the support of Public Worship of Almighty God," the "salvation of lost souls, the edification of Christians through the teachings of God's Word, . . . [and] the worldwide proclamation of God's saving grace through the shed

[1] The Church is also at times publicly referred to as the Sixth Mount Zion Missionary Baptist Church.

blood and finished work of the Lord Jesus Christ on Calvary." A30 (Charter); Supp. App. 3 (Dkt. 43-3 at 2, Constitution and Bylaws). The Church is an independent Baptist congregation, and recognizes "no ecclesiastical authority higher than the local assembly." Supp. App. 3 (Dkt. 43-3 at 2).

The Church is located in Pittsburgh's historic Larimer neighborhood, which is one of Pittsburgh's poorest communities: a third of the households are headed by single mothers; for every three people working, one is unemployed; and one of every four houses sits vacant. A110, A249; *see also* Univ. of Pittsburgh, *City of Pittsburgh Neighborhood Profiles Census 2010 Summary File 1 (SF1) Data* (July 2011) https://bit.ly/2GYJqL4 (household, vacancy data); Three Rivers Workforce Investment Bd., *Labor Market Supply and Demand, East End, Pittsburgh* (2014), https://bit.ly/2qvsJkq (unemployment data). The Church thus runs a number of ministries for the poor, including its "SEED" program—Sixth Economic Empowerment Development, Inc.—to provide affordable housing, and its J.C. Hairston Food Pantry. A249-250 (SEED); A267, Supp. App. 24 (Dkt. 43-3 at 23) (noting the Church's food ministry), *see also* Univ. of Pittsburgh, Food Assistance Programs (2018)

https://bit.ly/2vbIkua (listing Church's food pantry, named after previous pastor, Rev. Dr. J.C. Hairston).

In accordance with its independent Baptist polity, the Church's government is "vested in the qualified voting members of the [C]hurch." Supp. App. 7 (Dkt. 43-3 at 6). To vote, members must profess faith in Christ, be baptized, subscribe to the Church's doctrinal statement, and then be received into membership at the decision of the congregation (a decision known as receiving "the right hand of fellowship"). *Id.* at 13. Church membership has declined over 60% in recent years, dropping to under 200 in 2014 in the wake of Rev. Lee's tenure as pastor. A52, A171.[2] It has not yet rebounded.

As required by its Baptist faith, the Church has only two ecclesiastical offices: pastor and deacon. Supp. App. 8 (Dkt. 43-3 at 7); A214. Both offices are responsible for the spiritual well-being of the Church, but the pastor is the lead ecclesial officer, recognized as the "the only leader of the flock." Supp. App. 8 (Dkt. 43-3 at 7); A214. As the Church's "spiritual

[2] Citations to A162-172 are to the Church's Concise Statement of Material Facts. In accordance with the local rules, the district court found that the facts in Paragraphs 6-7, 11, 13, and 23-49 were admitted as true by Rev. Lee because he failed to file a Responsive Concise Statement. A300-01. Rev. Lee has not disputed that finding on appeal.

leader," the pastor is responsible "to maintain a well-rounded spiritual program for the whole church," including "1) baptisms; 2) weddings; 3) funerals; 4) communions; 5) teaching; 6) baby dedications; 7) spiritual counseling; 8) administration of Church affairs; and 9) regular conducting of Church worship services." Supp. App. 8-9 (Dkt. 43-3 at 7-8). The Church also has a Trustee Board, which consults the pastor and the congregation in managing the Church's finances. A171.

Reverend Lee. Rev. Lee received his Bachelor of Arts in business economics from Syracuse University in 1986, his Masters of Divinity from Yale Divinity School in 1993, and his Doctorate of Ministry from Union Theological Seminary in 2001. A22. He pastored at least one church before being selected as the pastor of Sixth Mount Zion. A109-10.

B. The Church's Hiring of Rev. Lee in 2012.

Rev. Lee applied to serve as the Church's pastor in 2012. He was one of 147 applicants, eleven of whom were invited by the Church's Pulpit Committee to preach in person at the Church. A109. After narrowing the list down to two applicants, the committee "sought the guidance of the Holy Spirit" and recommended that the Church select Rev. Lee. The committee was persuaded by his alleged long-time religious calling to

serve as a pastor (which reportedly started at age 10, and deterred him from "the lure of a lucrative salary in business"), his doctrinal training and religious credentials, his experience growing up around poverty and drugs (which would help him minister to the Church's neighbors), and his claimed track record of helping churches "produc[e] record church growth . . . and doubling or tripling the number of new members joining." A109-10.

The Deacon Board unanimously accepted the committee's recommendation and submitted a recommendation to the entire congregation to call Rev. Lee to serve as the Church's pastor. In December 2012, the congregation unanimously elected Rev. Lee as their pastor.

Rev. Lee quickly announced that the Church's financial arrangements, governance boards, corporate status, constitution, and bylaws all needed an overhaul. A197, 200 (telling the Church that its existing constitution and bylaws were an "illegal Constitution" and "illegal By-laws"). He further determined that the Church lacked a sufficient understanding of and respect for his leadership role as pastor. A196. And he felt that the Church should sign an employment contract

with him to clarify his authority and protect him from dismissal without cause. A182, A192; Lee Br. 3. Rev. Lee directed the Church's Deacon Board to retain a new attorney to update the Church's corporate status, constitution, and bylaws; develop a "business plan for Church Campus"; and draft an employment agreement for him. A202; A116 (retainer).

C. The 2013 Employment Contract

In March 2013, three months after he had started holding the Church's senior leadership role, the chairman of the Deacon Board and a joint member of the Trustee and Deacon Boards signed an employment contract with Rev. Lee on behalf of the Church. A226-234. The parties understood that the contract was not valid until it was ratified by a vote of the congregation. A165 ¶ 24.

The contract recognized that Rev. Lee held significant authority within the Church. It stated that the Church "finds its headship under the Lord Jesus Christ and in its pastor," identified the pastor as the Church's "chief executive officer (CEO)," and granted him "sole authority and control of hiring/firing and supervising all CHURCH'S paid staff." A227 at § 2.3. All speakers, teachers, or ministers at any Church meeting or gathering had to be approved by Rev. Lee. *Id.* All Church boards or

committees had to accept Rev. Lee as their ex-officio chairman and permit him to attend all meetings. *Id.* at § 2.4. And Rev. Lee would moderate all member business meetings. *Id.* at § 2.5.

The contract specified that Rev. Lee's duties as pastor included performing "1) baptisms; 2) weddings; 3) funerals; 4) communions; 5) teaching; 6) baby dedications; 7) spiritual counseling; 8) administration of Church affairs; and 9) regular conducting of Church worship services." A226-27 § 2.1.

The contract also spelled out Rev. Lee's salary and benefits. Under the contract, Rev. Lee received a base salary of $80,000 per year, a $25,000 housing allowance, a $12,500 vehicle allowance, a $3,220.80 convention-travel allowance, an annual retirement payment of $17,779, annual health insurance payments of $8,400, and 36 days of paid vacation per year in addition to Church holidays. A227-29. The contract permitted the Church to increase Rev. Lee's compensation, but stated that "decrease in pastor's package is not up for discussion," that the "church or deacon board cannot at anytime [sic] vote on decreasing the salary or benefit package of the pastor," and that any decrease would be subject to Rev. Lee's approval. A227-28 § 4.2.

Further, the contract granted Rev. Lee a 20-year employment term, beginning on December 1, 2012 and ending December 1, 2032, along with an automatic extension for 10 more years until 2042 unless the Church gave Rev. Lee at least 90 days' notice. A227 § 3.

The contract permitted the parties to discharge Rev. Lee without cause. But were the Church to do so, Rev. Lee would receive the salary and benefits to which he would have been entitled had he not been terminated, reduced only after five years by any salary he was receiving in another position. A231 at § 12.2. Were Rev. Lee to terminate his contract without cause, he would be required to make himself available for consultation at reasonable times for the remainder of the term. *Id.*

The contract also permitted the Church and Rev. Lee to terminate their relationship for cause. The for-cause provision identified four different types of adequate cause: (1) material breach of the terms of the contract; (2) a serious moral or criminal offense (such as adultery or fraud), felony conviction, or violations of law; (3) long-term incapacitation of Rev. Lee to fulfill his duties, as determined by the good-faith judgment of the Church; or (4) grounds sufficient for any other rights of termination permitted by the parties' contract or by law. A231 at § 12.3.

Rev. Lee also agreed that, as a "minister of the gospel in compliance with the requirements of the CHURCH," he would "abide by the employment policies and procedures existing or established by the CHURCH from time to time." A229 at § 7(a), (c). The contract specifically identified this agreement as a "material term" of the contract, failure of which would constitute a breach of the contract. A230 at § 11.

D. The Emergency Meeting to Ratify the Contract

Following the Church's worship service on Sunday, April 7, 2013, Rev. Lee called an emergency meeting of the congregation to, among other things, ratify the contract. A196; A211. Rev. Lee began the meeting by telling the congregation that while he should have been enjoying a "honeymoon period" in his "first few months," that wasn't true for him: "I didn't get one week of honeymoon, I came into Hell." A196. The problem, he said, was that the congregation "still refuse[d] to acknowledge who is in charge." *Id.* "So," he said, "let me help you understand." *Id.* Speaking from the front of the congregation and flanked by the Church's Deacon Board, A196, Rev. Lee explained that:

- "The Pastor is in charge with ultimate spiritual care and authority in the life of the congregation." A197.

- "There is nothing in the life of the church that should be beyond . . . the concern, care, responsibility, and leadership of the Pastor." A196.
- "[E]ven in our illegal By-Laws, it says the Pastor is the lead. LEAD not follow. The Pastor [l]eads, every organization." A200.
- "I am accountable to God for what I do. I'm not accountable to the Deacons, I am accountable to God." A197.

Rev. Lee went on to explain that the Church's duty in response to his leadership was to "honor, esteem, and love their Pastor, to pray for him fervently and daily," and to "submit to him in scriptural authority." A204. He suggested that, unless the Church "gets in order as far as who is in charge" and recognized that "I have authority to pastor this church," it would be difficult to imagine how "God will bless us[.]" A205.

After this explanation, Rev. Lee instructed the congregation to vote on a resolution recognizing his authority over the congregation, approving his plan to draft a new constitution and bylaws, and approving his employment contract. A207. This was the first time that the contract came up in the meeting. Rev. Lee prefaced his comments on the contract by stating that the Deacons had already approved it. A207. Then he briefly explained that the contract included a 20-year term and that he could not be fired without cause. *Id.* This prompted the congregation to ask what the Church could do if "for some reason the church does not

want you as pastor?" *Id.* Rev. Lee responded that the Church would have cause to discharge him if it did not believe that his leadership was causing the Church to grow and improve, since it was his pastoral duty and responsibility to ensure growth and improvement. *Id.*

For instance, Rev. Lee started by explaining that:

> If the church is not going in the direction that we think the church ought to go, if the church declines and the church is just dying, that's cause, because it is my Pastor[al] responsibility and duty to make sure that the church grows and the church becomes better than the way I received it.

A165 ¶ 27. He went on to say:

> But if [I] just want to get used to the money, and some do, then you have a right, because there is a clause that says that "just cause," because the church is not growing, the church is stagnant, the church is not a better place. You have a right to call for these Deacons and any member of the church to have me vacate the pulpit.

A166 ¶ 29. In response to another member's concern, Rev. Lee concluded:

> The clause says, if I don't perform my duties well, I'm out. Help me out. I'm giving you a clause to make sure you[ ] [w]on't get stuck with somebody you don't want, it's in there.

A167 ¶ 31; *see also* A207-08 (original church minutes).

Immediately after his explanation, Rev. Lee called for a vote. A208. Over some dissent, the congregation approved the resolution ratifying the contract. *Id.* The resolution explicitly recited the pastor's religious

"duties and responsibilities" as described in the contract and stated that he must "perform all services as Pastor . . . subject at all times to the ultimate control and direction of the Church via its congregation." A113.

The resolution also approved Rev. Lee's plan to revamp the constitution and bylaws. A113. On April 28, when Rev. Lee presented the new bylaws to the congregation for approval, the question of termination came up again. A222. The updated bylaws gave the pastor "unlimited tenure" that could be terminated only by the pastor's "resignation, death, moral or doctrinal departure from the word of God and this constitution and By-laws, or by his inability . . . or unwillingness to fulfill his responsibilities." *Id.* A Church member asked whether this language still ensured that "the church ha[s] the final say" on a pastor's tenure. *Id.* Rev. Lee confirmed that was correct: "If I am not doing my job and the church is suffering, the church has every right to make sure it protects the church, because you don't want the church to die." *Id.*; A168 ¶ 33.

Rev. Lee then went on to directly connect this explanation to the meaning of his employment contract: "Now if you want to [fire me] in spite of the church . . . doing well, no you can't do it, that's where the employment clause came in 'without cause.' . . . [Y]ou can't do it without

cause. What cause is: not doing well, not serving." A222; A168 ¶¶ 33-34. Rev. Lee then connected "without cause" to wrongdoing: if the Church "want[s] to get rid of me and do me wrong, when the church does me wrong, the church must pay. That is without cause." A222. Rev. Lee admitted that he was not aware of any previous pastors that had been fired by the Church without cause. *Id.*

During the April 28 meeting, Rev. Lee again emphasized his central spiritual leadership role as pastor: "The Pastor shall be the only leader of the flock. . . . There can never be two leaders." A214. He also repeated his promise that obeying him would lead to God's blessing for the Church, and that disobeying would prevent God from blessing the Church:

> [W]hen you fight Pastor you actually fight the one who is trying to protect you and cover you, pray for you, call down the Power of God on anything that is trying to hurt you. So if you take away your covering you're exposing yourself. . . . And I promise you if [the Church] follows [a biblical example of respecting spiritual leadership], God is going to bless us. But how can God bless a church when it fights its pastor[?] God is not going to do that, it can't be done.

A215. The Church then voted to ratify Rev. Lee's new bylaws.

E. The Church's Decision to Discharge Rev. Lee

Within a year, the Church had become concerned about problems with Rev. Lee's spiritual and financial leadership. In March 2014, a joint board

of the Church's deacons and trustees began an investigation. A171 ¶ 38. Part of the reason for the investigation—the reason "alarm bells went off"—was that the finances from the SEED program, which were normally used for ministry to the poor, were being redirected to cover Rev. Lee's salary. A247-48. The discovery was a "devastating moment" for the joint board. A252.

In June 2014, the joint board asked Rev. Lee to call a meeting of the Church to discuss their concerns over "financial and ministerial issues" so that they could inform the congregation. A253; A172 ¶ 48. The board felt that sharing this information was "an important part of Baptist policy," since the congregation was ultimately responsible for the Church. A253. But while Rev. Lee scheduled a meeting for June, he then cancelled shortly before the meeting and moved it to July. A253-54. He did the same thing in July, bumping the meeting to September, and then again in September, bumping the meeting to January 2015. *Id.*; A172 ¶ 48.

The joint board believed that the cancellations themselves demonstrated a failure of leadership, and caused their concerns to grow even stronger. A254. The board met with Rev. Lee in early October to warn him that it was considering whether to recommend his removal.

A255. Rev. Lee asked for them to give him two weeks to respond. *Id.* When they met again in two weeks, Rev. Lee brought his attorney to the meeting and reminded the joint board of the 20-year term of his contract. *Id.* The joint board responded that it would "think over it, pray over it," and decide by December "whether to recommend [his] removal." A255.

In December 2014, the joint board's investigation concluded. It determined that under Rev. Lee's leadership, there had been a 61% decrease in registered membership, a 32% decrease in Sunday morning worship attendance, a 39% decrease in tithes and offerings, and a nearly 200% *increase* in expenditures. A171-72 ¶¶ 41-43, 45, 49. It also determined that Rev. Lee had overseen a decrease in the quality of church ministries, such as in the SEED program, and had failed to meet with Church membership on ministerial issues. A172 ¶¶ 46-47.

Accordingly, several members of the Deacon Board met with Rev. Lee on December 19 to discuss the possibility of discharge. According to Rev. Lee, they offered him a severance package that, for ninety days, would provide his salary, car allowance, health insurance, and housing allowance, but asked him to return the keys for the pastoral car, a Mercedes Benz that had been purchased in the Church's name, so that

the Church could sell it. Dkt. 40-7; A271. Rev. Lee declined and told them to speak with his attorney. Dkt. 40-7.

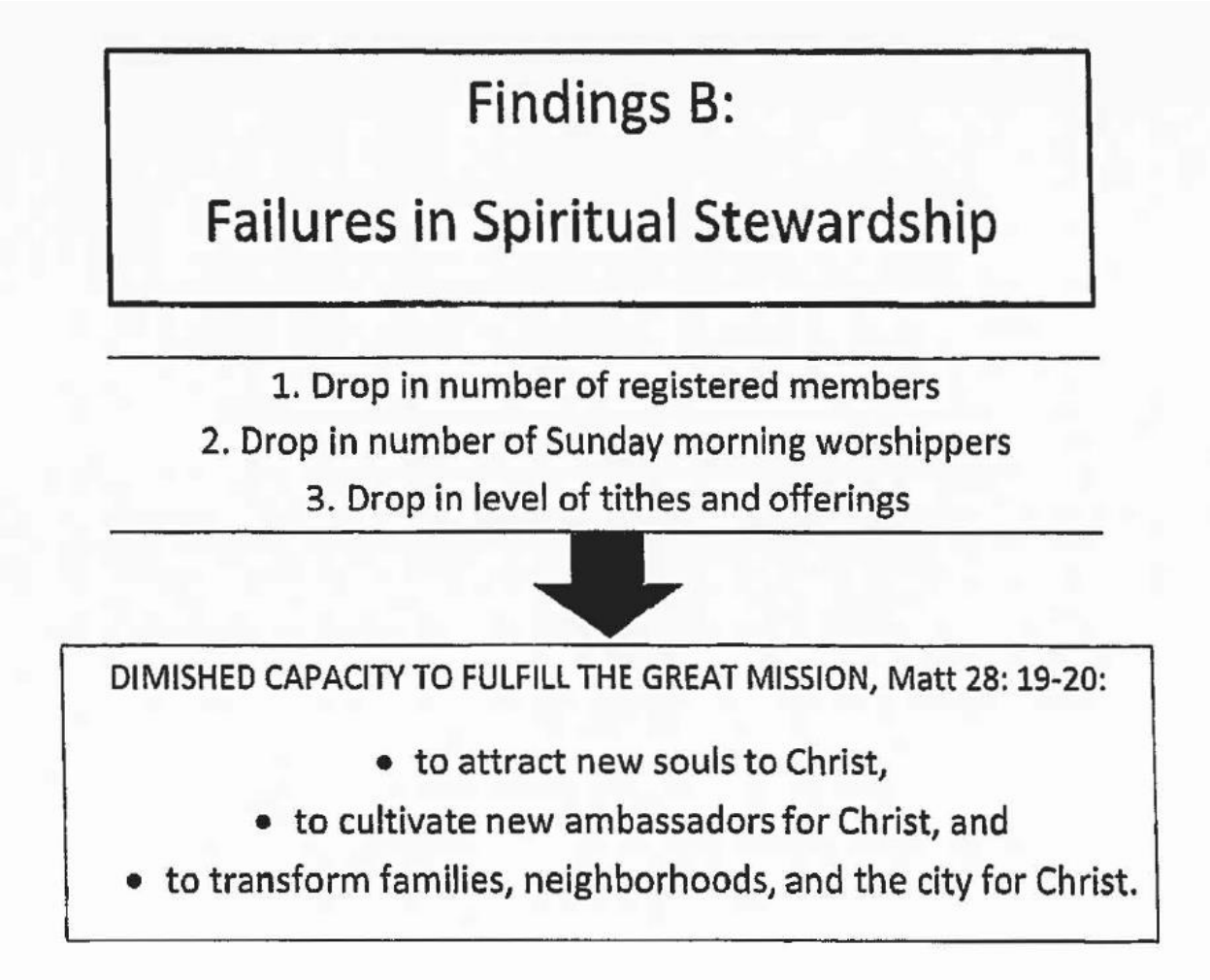
On Sunday, December 21, the joint board presented its findings to the Church membership, along with unanimous recommendation from the Deacon Board and the Trustee Board that the Church schedule a vote to have Rev. Lee vacate the pulpit. A101; A257-58. The Church accepted the recommendation and scheduled the vote. A101; A257-58.

Three weeks later, on January 11, 2015, the Church met again following its morning worship service. A257. The Deacon and Trustee Boards presented the joint board's findings in a sixteen-page report, and called on the Church to vote on three issues: to have Rev. Lee "vacate the pulpit immediately," to void his employment contract, and to approve suggested severance terms. A258.

The deacons and trustees presented three findings supporting their recommendation to discharge Rev. Lee. Finding A was entitled "Failures in Financial Stewardship." A259. The boards found, among other things, that expenses had almost doubled during Rev. Lee's term in office and that the Church's already-extant financial struggles had dramatically worsened. As of December 4, 2014, the Church had only $5,284.36 in its

general account and over $28,000 in debts due. A261-63. This required the Church to divert funding from accounts primarily used for the poor to help cover its expenses. A262.

Finding B was entitled "Failures in Spiritual Stewardship." A264. The report summarized the problem in a chart:



A264.

The findings provided additional charts illustrating the decreases in church attendance and membership noted above—a 61% decrease in registered membership, a 32% decrease in Sunday morning worship attendance, and a 39% decrease in tithes and offerings. *Id*; A171 ¶¶ 41-43. The findings concluded with a 2-page summary:

> REFLECTIONS ON OUR CAPACITY TO FULFILL THE GREAT MISSION, Matt. 28: 19-20:
>
> - to attract new souls to Christ: . . . We would characterize this as a dramatic decline in attracting new souls for Christ.
> - to cultivate new ambassadors for Christ: . . . Our overall judgment is that our capacity to cultivate new ambassadors for Christ has grown progressively more negative than positive over the two years of Pastor Lee's leadership.
> - to transform families, neighborhoods, and the city for Christ: . . . We conclude Pastor Lee has failed during both years to launch and sustain ministries that help to transform local and public places where our children and families live. [3]

[3] Matthew 28:19-20 describes a command from Jesus Christ spoken to his disciples shortly after his crucifixion and resurrection. It states: "Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you."

A267-68 (noting further that "vital" programs for "spiritual formation and development" had suffered, along with "ministries" important to "the spiritual health" of the surrounding community).

Based on these conclusions, the findings predicted that "the future under Pastor Lee's leadership" would continue to reflect failed spiritual leadership, which would lead to continued financial trouble, which would result in a diminished capacity to fulfill the discipleship and evangelism duties placed on them by Matthew 28:19-20. A268.

Finding C listed several instances where Rev. Lee failed to communicate adequately with Church leadership, including refusal to timely answer questions about the timing of church meetings and requests for a plan to address the Church's financial struggles. A269-70.

Based on its three findings, the report recommended immediately instructing Rev. Lee to "vacate the pulpit." A271.

The report also identified three reasons the employment contract did not prevent the Church from asking Rev. Lee to vacate the pulpit:

- the Church had authority to establish its employment policies and procedures, that those policies and procedures required Rev. Lee to provide pastoral leadership, and thus that, given Rev. Lee's failure to provide pastoral leadership, he could be discharged.

- "the church under Baptist polity is sovereign," and so the Church had inherent authority to remove its pastor.
- under Rev. Lee's own explanation to the Church about the terms of the contract, the Church had "due or just cause" to discharge him when "the church declines and . . . is not going in the direction that we think the church ought to go," since it was Rev. Lee's "pastoral responsibility and duty to make sure that the church grows and the church becomes better."

A271.

Finally, the boards recommended that the Church offer Rev. Lee a severance package of $10,314.26, paid out over two months due to the Church's strained finances. *Id.*

The Church voted to accept the recommendations and instructed Rev. Lee to vacate the pulpit on January 11, 2015. A102 ¶ 20.

F. Procedural History

Eight months after the Church voted to remove Rev. Lee, he filed a single-count complaint for breach of contract under Pennsylvania law. A19, 27. He sued the Church and eleven of its deacons in their individual capacities, alleged that he had been terminated without cause, and asked the court to find that the defendants were jointly and severally liable to pay him $2,643,996.40, plus costs and attorney's fees. A27.

Rev. Lee, who resided in New Jersey at the time of filing, brought his lawsuit in federal court as a diversity action. A22. He filed in the Eastern

District of Pennsylvania, but because all of the Defendants were in western Pennsylvania and all of the relevant events had taken place there, venue was transferred to the Western District. A6; Dkt. 4.

On February 12, 2016—just after Rule 26(a) initial disclosures, five months before the close of discovery, and two weeks before a scheduled mediation—Rev. Lee moved for partial summary judgment. Dkt. 40. The district court denied the motion as premature on the same day. Dkt. 41.

In May 2016, the district court dismissed the claims against the individual defendants with prejudice because they were not parties to the contract. Dkts. 54 (opinion), 55 (order).

In January 2017, Rev. Lee filed a motion for summary judgment against the Church. Dkt. 76. After the close of briefing on the motion, the district court became skeptical that the case could proceed due to the First Amendment's ministerial exception. A313. In April 2017, the court accordingly ordered the parties to brief the issue, allowed them to file reply briefs, and set the issue for oral argument in May 2017. A364-65. The court cited Federal Rule of Civil Procedure 56(f), which allows district courts to grant summary judgment for a nonmovant after giving notice and a reasonable time to respond. *Id.* Rev. Lee did not file a reply

brief or present any testimony or additional documentary evidence at the hearing. Dkt. 92 (minute entry). Rev. Lee agreed at the hearing that the ministerial exception issue should be resolved before trial. A338.

On August 22, 2017, the district court denied Rev. Lee's summary judgment motion under the ministerial exception, and correspondingly granted summary judgment to the Church. A299 (opinion); A367 (order). As an initial matter, the court found that Rev. Lee had conceded many of the material facts of the case—including his representations to the Church that adequate cause included failed religious leadership, the Church's reliance on those representations to ratify the contract, and the Church's severe decline under Rev. Lee's leadership. A300-01. The lower court also noted Rev. Lee's "utter failure" to address the Church's defenses to his motion for summary judgment, including its defenses of fraud and material breach, and wondered "just how Rev. Lee ever envisioned that his motion for summary judgment could succeed." A338

The district court then relied on *Hosanna-Tabor* to find that Rev. Lee's claim must be rejected because "[r]equiring a church to . . . 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.'" A339 (quoting 565 U.S. at 189). The court held that it would "pierce[ ] the very heart of ecclesiastical matters protected from intrusion by the courts" for it to either second-guess the Church's determination that it had adequate cause to discharge Rev. Lee or to decide the Church's defense that Rev. Lee's failure of religious leadership was a material breach. A361. The court concluded that "any determination of whether Rev. Lee failed in his spiritual and financial stewardship . . . is a matter best left to the Church alone." A359.

Rev. Lee filed a notice of appeal on September 21, 2017. A368. He brought his appeal against only the Church, not the individual defendants below. A368; *see also* Joint Letter of April 6, 2018 (notifying clerk that Church was sole appellee).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Civil courts are not competent to decide whether a minister is doing a good job carrying out the mission of his church. But that is precisely what Rev. Lee would have this Court do, in its first occasion to address the First Amendment's ministerial exception since the Supreme Court

decided *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Rev. Lee's claim to $2.6 million dollars from the Church depends on the theory that the Church fired him without cause. But the Church in fact terminated him for cause: for failed religious leadership. Rev. Lee repeatedly told the Church that failure in his pastoral duties would constitute cause, and the contract itself provided that such a failure would constitute cause. In the face of this language, Rev. Lee's argument now is that the Church's reasons for termination were both insufficient and did "not involve religion directly or significantly." Lee Br. 18. In his current view, his duties as a minister were "identical to those of a sales manager, college president or sports/entertainment manager," and his failure to "attract new souls to Christ" was merely the equivalent of failing to bring "new fans to the game." *Id*. But courts have recognized for decades that those kinds of arguments are foreclosed for the same reason that *Hosanna-Tabor* found that employment discrimination claims are foreclosed: they require the government to evaluate a minister's religious qualifications and performance.

Even if Rev. Lee could overcome that hurdle to make his affirmative case, he cannot overcome the Church's defenses of duress (for using religious instruction and his position as pastor to induce the Church to sign the contract), fraud (for telling the Church that they could dismiss him for failed religious leadership to induce them to sign the contract, but then claiming that they could not), and material breach (for failing to provide the religious leadership that he was required to provide by the terms of the contract). Deciding any of those defenses would require entangling courts in questions of religious doctrine and polity. That the First Amendment does not allow.

ARGUMENT

Most ministerial exception cases turn on whether the employer qualifies as a "religious group" protected by the exception or whether the employee qualifies as "one of the group's ministers." *Hosanna-Tabor*, 565 U.S. at 177. Here there is no disagreement on those points. A275 ("Plaintiff does not dispute that he is a minister and that Defendant is a religious body envisioned by the ministerial exception"). The Church is clearly the kind of organization protected by the exception. And Rev. Lee held the kind of "position" and performed the kind of "spiritual functions"

which prove ministerial status. *Petruska*, 462 F.3d at 307. Indeed, as the senior leader of a church, he was the quintessential ministerial employee.

Lee's only argument on appeal instead concerns whether his particular legal claim is barred by the exception. It is, for at least two reasons recognized by the district court. First, deciding Rev. Lee's claim would force this Court to second-guess the Church's determination that his failure of religious leadership was adequate cause to discharge him. Second, resolving the Church's other defenses concerning, for instance, Rev. Lee's use of his religious authority and pastoral role to induce the Church's ratification of his contract would require evaluating internal religious doctrine, governance, and policy. Courts can resolve neither such claims nor such defenses. Accordingly, the district court's ruling should be affirmed.

STANDARD AND SCOPE OF REVIEW FOR ALL ISSUES

This court "employ[s] a plenary standard in reviewing orders entered on motions for summary judgment, applying the same standard as the district court"—namely, whether there is a genuine dispute of material fact and whether the Church was entitled to judgment as a matter of law. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

With respect to the scope of review, Rev. Lee has abandoned several issues on appeal. He asserts in a footnote, without any legal support, that he is not addressing the construction of the contract on appeal and that he wants a remand to consider that construction if this Court finds it relevant. Lee Br. 12 n.3. But the district court expressly interpreted the meaning of the contract in the opinion he appeals, and the court did so both to resolve Rev. Lee's motion for summary judgment and to squarely present the basis for granting summary judgment to the Church. A337-38. Rev. Lee's refusal to brief the issue on appeal, and his passing mention of it in a footnote, waives the issue now. *In re: Asbestos Products Liab. Litig. (No. VI)*, 873 F.3d 232, 237 (3d Cir. 2017) ("arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived" (internal citations omitted)); *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to . . . argue an issue in his opening brief constitutes waiver of that issue on appeal.").

In another footnote, Rev. Lee states that this Court should not consider the assurances he gave to the Church that it would have cause to discharge him under the contract for a failure of religious leadership.

Lee Br. 7 n.1. But Rev. Lee has already admitted that these statements are true. A300-01; A165-67. Nonetheless, he says this Court should ignore his promises to the Church under the parol evidence rule. Yet, as he concedes, that rule does not apply with respect to a fraud defense. Lee Br. 7 n.1. And the district court found both that the Church had credibly raised fraud defenses, and that Rev. Lee had failed to address them at all in his summary judgment briefing. A337-38. His failure to contest that issue below and his failure to argue it now on appeal constitutes waiver of the issue.

I. Rev. Lee's claim is barred by the ministerial exception.

A. The ministerial exception forbids courts from resolving disputes over whether a church had adequate cause to terminate its minister.

The First Amendment's Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. For many decades, federal courts of appeals, including this Court, have recognized that the First Amendment creates a "ministerial exception" that applies to lawsuits brought by an employee minister against the house of worship that employs the minister. *See McClure v. Salvation Army*, 460 F.2d 553, 560

(5th Cir. 1972) (recognizing ministerial exception); *Petruska*, 462 F.3d at 303-05.

In 2012, the Supreme Court decided its first ministerial exception case, unanimously recognizing that a ministerial exception exists. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The Court held that the Religion Clauses give "special solicitude to the rights of religious organizations," working in tandem to protect the autonomy their internal decisions that "affect[ ] the faith and mission" of the organizations themselves. *Id.* at 189-190. As the Court explained, "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. The Establishment Clause protects anti-establishment interests by keeping the State from becoming entangled in the Church's internal affairs, including the hiring and firing of its ministers. *Id.* at 189. And the Free Exercise Clause correspondingly prevents the State from restricting "the freedom of religious groups" to decide who will convey their "message and carry[ ] out [their] mission." *Id.* at 184, 192. This "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 (quotation and internal citation omitted).

As this Court has held, the ministerial exception thus bars "*any* claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." *Petruska*, 462 F.3d at 299 (emphasis supplied). This bar forecloses all claims which require "any inquiry into a religious organization's underlying motivation for the contested employment decision," since that "is precisely the kind of judicial second-guessing . . . that the Free Exercise Clause forbids." *Id.* at 304 & n.7 (quoting *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991), and collecting cases).

The Religion Clauses' solicitude for internal religious autonomy has deep historical roots. *Hosanna-Tabor*, 565 U.S. at 182-85 (citing legal history dating back to Magna Carta in 1215 and caselaw dating back *Watson v. Jones*, 80 U.S. (13 Wall) 679 (1872)). And part of the concern that has long animated the ministerial exception is preventing the government from interfering with a church's for-cause termination of its minister. Courts deciding the sufficiency of cause in the discharge of ministers was a notable feature of state religious establishments, which

have been illegal since the Establishment Clause was incorporated against the States. *See, e.g.*, *Avery v. Inhabitants of Tyringham*, 3 Mass 160, 181-82 (Mass. 1807) (holding that minister could be removed only for cause, and that except for teaching false doctrine, the court was the judge of cause); 2 George MacLaren Brydon, Virginia's Mother Church 324-35 (1952) (noting the inability of local churches in 1760 to remove ministers, including public drunks, who were installed by Virginia's governor). But by "forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have *no role* in filling ecclesiastical offices." *Hosanna-Tabor*, 565 U.S. at 184 (emphasis supplied). This principle was borne out in *Hosanna-Tabor*, where the First Amendment protected the congregation's decision to discharge its minister plaintiff for cause. 565 U.S. at 194.

1. The ministerial exception generally bars contract claims over adequate cause.

While *Hosanna-Tabor* expressly reserved the question of how the ministerial exception applies to contract claims as a general matter, *id.* at 196, both this Court and many others have confirmed that the

exception can operate to bar many such claims. The rationale of *Hosanna-Tabor* squarely supports those decisions.[4]

Ultimately, the most important consideration is not a claim's basis in contract, tort, or nondiscrimination law, but rather its "substance and effect" on the church's freedom to select and control its leadership. *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576-78 (1st Cir. 1989) (applying ministerial exception to reject contract and tort claims). "Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Id.*

Courts have repeatedly applied this principle to dismiss contract claims. For example, in *Friedlander v. Port Jewish Center*, the Second Circuit upheld a district court's decision to reject a for-cause contract claim by a rabbi because the claim would require "impermissible judicial inquiry into religious matters," such as whether the rabbi should have "performed certain pastoral services" or "read more extensively from the Torah." 347 F. App'x 654, 655 (2d Cir. 2009).

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[4] Rev. Lee does not argue otherwise. Lee Br. 15 (claiming only that the exception is not an "automatic" bar to contract claims).

Similarly, in *Pierce v. Iowa-Missouri Conference of Seventh-Day Adventists*, the Iowa Supreme Court rejected an argument that it could review a minister's "secular" contract claim, finding instead that the church had terminated the minister for "ineffectiveness" and that an evaluation of his "effectiveness as a minister" would improperly interfere with "internal church discipline, faith, and organization." 534 N.W.2d 425, 427 (Iowa 1995) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)). Other courts have applied the ministerial exception to dismiss breach of contract claims in a variety of ministerial employment relationships.[5]

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[5] *See, e.g.*, *Werft v. Desert Southwest Annual Conf. of United Methodist Church*, 377 F.3d 1099, 1100 & n.1 (9th Cir. 2004) (upholding dismissal of Methodist minister's breach of contract claim); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942-43 (6th Cir. 1992) (rejecting breach of contract claim brought by an Adventist minister because "the First Amendment bars civil courts from reviewing decisions of religious judicatory bodies relating to the employment of clergy"); *Hutchison*, 789 F.2d at 393 (rejecting Methodist minister's breach of contract claim); *Knuth v. Lutheran Church Mo. Synod*, 643 F. Supp. 444 (D. Kan. 1986) (dismissing Lutheran minister's breach of contract claim); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1209 (Conn. 2011) (rejecting Catholic priest's contract claim that turned on compliance with internal church procedures); *Pilgrim's Rest Baptist Church v. Pearson*, 872 N.W.2d 16, 20 (Mich. Ct. App. 2015), *overruled on other grounds by Winkler by Winkler v. Marist Fathers of Detroit, Inc.*, 901 N.W.2d 566 (Mich. 2017) (rejecting Lutheran minister's

Hosanna-Tabor provides the theoretical framework for understanding why courts have ruled in this way. There, a teacher at a Lutheran school who was also a "called minister" sued her employer, a Lutheran church, for wrongful termination under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* 565 U.S. at 179. The Supreme Court ruled for the church employer.

The Court explained that "[r]equiring a church . . . to retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." *Id.* at 188. Rather, it "interferes with the internal governance of the church." *Id.* This interference violates the Free Exercise Clause because it limits the

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breach of contract claim because it would require review of the church's "ecclesiastical policies"); *Ind. Area Found. of United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174, 1181 (Ind. Ct. App. 2011) (upholding grant of summary judgment against Methodist minister's breach of contract claim because resolving claim would require entanglement with religious doctrine); *Bourne v. Ctr. on Children, Inc.*, 838 A.2d 371, 379 (Md. Ct. App. 2003) (rejecting Nazarene minister's breach of contract claim because it would require determining whether he "was properly performing his job" as a minister); *see also Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, No. 15-13755, 2018 WL 258782, at *2 (11th Cir. Jan. 2, 2018) (rejecting Adventist minister's breach of contract claims because they turned on religious questions).

church's "right to shape its own faith and mission through its appointments," and violates the Establishment Clause by "involv[ing]" the government in "determin[ing] which individuals will minister to the faithful." *Id.* at 188-89. Thus, both clauses together make it "impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185. The prohibition is absolute: the decision "is the church's alone," and government could not look behind it for "pretext" or otherwise second-guess its sufficiency. *Id.* at 194-95.

But judicial second-guessing is what contractual disputes over sufficiency of cause are all about. A minister's breach of contract claim that disputes adequacy of cause always probes too far, because it requires courts to weigh a church's internal religious judgment regarding its minister's performance. That is why such claims are "squarely within the rationale of *Hosanna-Tabor*" and must be rejected. Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 861 (2012). "A minister discharged for cause, suing in contract on the theory that the church lacked adequate cause to discharge him . . . would be directly challenging the church's right to evaluate . . . its own

ministers, and he would be asking the court to substitute its evaluation of his job performance for the church's evaluation." *Id.* Indeed, in *Hosanna-Tabor*, the plaintiff was terminated for cause. 565 U.S. at 177 (plaintiff's call to ministry "could be rescinded only for cause and by a supermajority vote of the congregation"). Yet the Supreme Court rejected the idea that it could look behind the Church's stated reasons for terminating the plaintiff. *Id*. at 194.

Lower court decisions have tracked the Supreme Court's understanding. They have regularly found that ministerial termination-for-cause claims inappropriately probe into a religious group's decision to change its leadership. *See*, *e.g.*, *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 890 (Wis. 2012) (plurality op.) (applying *Hosanna-Tabor* to find that "[p]ermitting . . . this type of breach of contract . . . claim by a ministerial employee, who seeks payment based on an allegedly improper reason for being terminated from her employment, would impermissibly interfere in a religious institution's choice of ministerial employees").[6]

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[6] *See also Bell v. Presbyterian Church (USA)*, 126 F.3d 328, 330-32 (4th Cir. 1997) (affirming dismissal of Presbyterian minister's breach of contract claim arguing that "the motives of the [defendant] churches were not . . . benign"); *Clapper v. Chesapeake Conf. of Seventh-Day Adventists*,

166 F.3d 1208 (4th Cir. 1998) (Table) (rejecting Adventist teacher's breach of contract claim because courts "may not . . . inquire whether the reasons" for termination were sufficiently religious); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1025-28 (N.D. Iowa 2007) (rejecting a breach of contract claim by a rabbi because "heart" of congregation's discharge decision was "dissatisfaction" with "pastoral leadership," and First Amendment places that "beyond a court's ability to adjudicate"); *Nolen v. Diocese of Birmingham in Ala.*, No. 16-cv-238, 2017 WL 3840267, at *4 n.7 (N.D. Ala. Sept. 1, 2017) (applying *Hosanna-Tabor* to dismiss Catholic principal's breach of contract claim alleging insufficient cause); *Nevius v. Afr. Inland Mission Int'l,* 511 F. Supp. 2d 114, 120 (D.D.C. 2007) (finding that Protestant missionary's breach of contract claim must be dismissed because second-guessing for-cause determination "would tread too closely to religious affairs" and "involve inquiring into a core matter of ecclesiastical self-governance" (internal citation omitted)); *Washington v. African Methodist Episcopal Church, Inc.*, No. 11-cv-6087, 2011 WL 4352404, at *4 (W.D.N.Y. September 16, 2011) (dismissing AME pastor's breach of contract claim because the church's employment manual gave the church authority to use "godly judgment," so resolving the dispute "would necessarily have to interpret the . . . Church's spiritual guidance"); *Kraft v. Rector, Churchwardens and Vestry of Grace Church in N.Y.*, No. 01-cv-7871, 2004 WL 540327, at *4 (S.D.N.Y. March 17, 2004) (rejecting Episcopal minister's contract claim, finding ministerial exception categorically protects a church's decision to terminate a minister "for cause"); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1189 (Md. Ct. App. 2011) (rejecting Lutheran music director's claims of breach of contract and breach of implied contract because they turned on "factors of her appointment . . . and discharge" and thus "would necessarily involve judicial inquiry into church governance, and such an inquiry is prohibited by the First Amendment"); *El-Farra v. Sayyed*, 226 S.W.3d 792, 795-96 (Ark. 2006) (rejecting imam's breach of contract claim because court cannot determine "valid grounds" for termination under Islamic law); *Pardue v. Ctr. City Consortium Schs. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 678 (D.C. 2005) (rejecting Catholic school principal's breach of contract claim where it called for inquiry into religious group's reasons

This Court's leading decision, in the pre-*Hosanna-Tabor* case of *Petruska,* buttresses this point. There, the Court emphasized a minister's unique ecclesiastical role as the "embodiment of [the church's] message," its "public representative, its ambassador, and its voice to the faithful." 462 F.3d at 306. Given this role and its inherent religious authority, the Court held that the "process of selecting a minister is *per se* a religious exercise." 462 F.3d at 306-07. Thus, "*any* restriction" on a religious group's decisions related to hiring or firing a minister "infringes upon its free exercise right to profess its beliefs" and its right to "decide matters of governance and internal organization." *Id.* (emphasis supplied). Moreover, these rights protected a religious group's decision to terminate a minister "regardless of its reason[s] for doing so." *Id.* at 309. *Petruska* accordingly forbids judicial second-guessing over ministerial for-cause contract disputes for the same reason that *Hosanna-Tabor* does.

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for termination because "evaluation of that claim would require the very inquiry into the Archdiocese's motivation that the Free Exercise Clause forbids"); *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 n.1 (Va. 2001) (finding that court cannot adjudicate Presbyterian minister's for-cause contract claim because it would require "considering issues regarding the church's governance, faith, and doctrine"); *Black v. Snyder*, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991) (rejecting fired Lutheran pastor's breach of contract claim that "require[d] court review of the church's motives for discharging").

To be sure, *Petruska* permitted a contract claim regarding the conditions of employment to go forward against the defendant, a religious university. The plaintiff, a university chaplain, alleged that she was contractually entitled to serve on the university president's staff and to lead its chaplaincy, but that she had been "demoted" to instead report to the university's Vice-President for Mission and Ministry. *Id.* at 300-302. Reviewing the district court's resolution of the university's motion to dismiss, *Petruska* was constrained to accept the factual claim "on its face" that the college had "willingly" entered a "contractual obligation[ ]" guaranteeing the chaplain her prior presidential staff and leadership positions, and thus had voluntarily chosen the alleged burden on its free exercise rights. *Id.* at 299, 310 (noting that the court "must accept as true . . . the plaintiff's factual allegations").

None of that applies here. The Church has not merely moved Rev. Lee to a different position of spiritual authority, but has entirely discharged him from any role of being its "voice to the faithful." *Id.* at 306. Nor is this Court procedurally constrained to accept Rev. Lee's claim at face value. Here, as demonstrated by the summary judgment record and discussed further below, the Church neither contracted away its right to discharge

Rev. Lee for failed religious leadership, nor could it be considered to have done so "willingly." Rather, the contract permitted the Church to dismiss Rev. Lee for cause, and that is what the Church did.

Thus, unlike in *Petruska*, the contract claim as presented here squarely requires courts to second-guess the Church's determination of cause. Which is precisely what *Petruska* says that they cannot do. *Id.* at 309. Nor would *Hosanna-Tabor* permit a strained reading of *Petruska* that would force courts into answering religious questions about ministerial performance. Rather, *Hosanna-Tabor* emphasized that the ministerial exception acts as an absolute bar on such intrusion into a church's internal affairs. 565 U.S. at 195-96 (the "church[ ] alone" decides "who will guide it on its way"); *see also Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990) (preliminarily permitting contract claim, but warning that "the first amendment forecloses any inquiry into the Church's assessment of [its minister's] suitability for a pastorship, even for the purpose of showing it to be pretextual").

2. The ministerial exception bars Rev. Lee's attempt to dispute whether the Church had adequate cause.

Rev. Lee's contract claim runs straight into the area foreclosed by *Hosanna-Tabor* and *Petruska*. His contract allows discharge for cause and allows the Church to discharge him based on its judgment that it has failed to provide spiritual leadership. That is what the Church did, and his claim to the contrary would require this Court to second-guess the Church's religious judgment.

After a nine-month investigation by a joint board of its Deacons and Trustees, the Church determined that, in its "overall judgment," Rev. Lee had overseen a period of significant spiritual and financial failure. A268. The Church produced and ratified an 16-page report finding that, under Rev. Lee, there had been a 61% decrease in registered membership, a 32% decrease in Sunday morning worship attendance, a 39% decrease in tithes and offerings, and a nearly 200% *increase* in expenditures. A171-172. The Church determined that the quality of its ministries had decreased, as had its ability to "attract new souls to Christ," to "cultivate new ambassadors for Christ," and to "transform families, neighborhoods, and the city for Christ." A172; A267-68. And the Church concluded that

"the future under Pastor Lee's leadership" would continue to reflect failed spiritual and financial leadership. A268.

Rev. Lee's contract explicitly allows discharge based on any "rights of termination allowed to the [Church] by law" and on grounds of a material breach of the terms of the contract, including failure to abide by the Church's employment policies. A39 at § 12.3. The Church's determination that Rev. Lee failed to meet his obligation to provide adequate spiritual leadership is sufficient cause for discharging him under either of these provisions.

First, the contract's preservation of "rights of termination allowed to [the Church] by law," *id.*, must include the fundamental First Amendment right to "fire one of its ministers." *Hosanna-Tabor*, 565 U.S. at 181. As one scholar has noted, "the ministerial exception is a form of constitutionalized at-will employment"—and the parties wrote it into their contract here. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 71-72 (2011).

Notably, nothing in the contract excludes the ministerial exception from being numbered among the "rights of termination allowed . . . by law," A39 at § 12.3, or otherwise demonstrates a knowing, "intentional

relinquishment" of the Church's First Amendment rights. *Petruska*, 462 F.3d at 309 (courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights"). Thus, Rev. Lee's contract preserved the Church's right to terminate him based on its own good-faith "evaluation of the 'gifts and graces'" of Rev. Lee as a minister. *Minker*, 894 F.2d at 1357.

Second, Rev. Lee's failure to provide adequate spiritual leadership to the Church violated the Church's "employment policies" and thus constituted a breach of a "material term" of the contract. *See* A229 at § 7(c) (Rev. Lee's contractual promise to "abide by" Church employment policies as they were "established by the CHURCH from time to time"); A230 at § 11 (identifying this promise as a "material term" of the contract); A222 (Rev. Lee's explanation to the Church that the Church's "Constitution and By-laws" required him to provide adequate spiritual leadership and that he could be terminated if not). Indeed, the district court found that the Church would likely be able to show a material breach by Rev. Lee on precisely those grounds. A359.

Because Rev. Lee failed to contest the issue on summary judgment, the district court deemed Rev. Lee to have admitted that the Church's

approval of his contract was contingent on his representations that poor ministerial performance constituted cause under the contract. A300-01 (district court finding admissions); A163 ¶ 7, A165 ¶ 26. Specifically, he admitted that, as part of inducing the congregation to ratify the contract, he repeatedly assured the Church that it would have "cause" under the contract to discharge him "if the church declines" or is "not going in the direction that we think the church ought to go," or if Rev. Lee simply does not "perform [his] duties well." *See* A300-01; A165 ¶ 27; A166 ¶ 29; A167 ¶ 31; A207-08; *see also* A113 (Church resolution approving contract stating that, under the agreement, Rev. Lee would "perform all services as pastor . . . subject at all times to the ultimate control and direction of the Church"). And he further admitted that, in fact, the "quality of the Church's community outreach and ministries declined" on his watch, as did tithes, worship-service attendance, and registered membership. *See* A300-01; *see also* A171-72. Thus, if Rev. Lee was not intentionally misleading the Church about the meaning of "cause," his only available point of contention is now whether the Church was wrong that it had *sufficient* cause.

But the First Amendment prohibits civil courts from sitting in judgment on the sufficiency of cause for terminating a religious minister. As the Second Circuit put it, "[H]ow are we, as Article III judges, to gainsay the [Church's] conclusion that [its minister] is insufficiently devoted to ministry? How are we to assess the quality of his homilies?" *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008). Courts "are not competent to upset judgments" made by churches in such "doctrinally sensitive area[s]." *Askew v. Trustees of Gen. Assembly Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 420 (3d Cir. 2012) (applying *Hosanna-Tabor* to a church membership dispute and finding that such determinations are "all properly left to the [church], not civil courts").

It makes no difference that Rev. Lee is seeking damages and not reinstatement. *Hosanna-Tabor* expressly closed that potential loophole, finding that whether the claim is for reinstatement or for damages such as frontpay, backpay, or attorney's fees, all "such relief would operate as a penalty on the Church for terminating an unwanted minister" and thus is "no less prohibited by the First Amendment." 565 U.S. at 194; *see also id*. at 188 (ministerial exception forbids "punishing a church for" refusing

to "retain an unwanted minister"). The bottom line is that any "[s]uch relief would depend on a determination that [the Church] was wrong to have relieved [Rev. Lee] of [his] position, and it is precisely such a ruling that is barred." *Id.*; A222 ("when the church does me wrong, the church must pay").

* * * * *

Rev. Lee's claim sits in the heartland of the ministerial exception. "This case involves the fundamental question of who will preach from the pulpit of a church. . . . The bare statement of the question should make obvious . . . [that t]he answer to that question must come from the church." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974). Whatever the reach of the exception in the context of other contractual claims, it must bar a claim that, as Rev. Lee admitted below, "turn[s] on . . . what reason" the Church had for rescinding his ministerial office. A275. The contract at issue undisputedly allowed the Church to terminate Rev. Lee for cause, and it reserved the Church's right to exercise all rights of termination afforded by law—to include the ministerial exception. Thus, the ministerial exception bars the claim that Rev. Lee brings here.

B. Resolving the Church's defenses to Rev. Lee's claim would entangle the Court in religious matters in violation of the ministerial exception.

Rev. Lee's claim also fails for a separate reason: resolving the Church's defenses would necessarily entangle federal courts in ecclesiastical matters. Rev. Lee used his position of spiritual authority and specific religious instructions to induce the Church to accept his employment contract. He also described the meaning of that contract to the Church during Church governance meetings in ways that—according to his position on appeal—were apparently false. The Church has accordingly asserted defenses of duress and fraud. Resolving those defenses will necessarily require considering Rev. Lee's religious authority, the religious instruction that he provided, his and the congregation's respective religious roles in Baptist polity, the Church's understanding of what its pastor meant when he said that it could dismiss him for failing his "Pastor[al] duty and responsibility" to make the Church "better," and why the Church's 16-page explanation of why its diminished capacity to "transform families, neighborhoods, and the city for Christ" is inconsistent with what Rev. Lee meant. A165 ¶ 27; A166 ¶ 29; A267-68; A271. None of that is permissible under the ministerial exception.

Where "resolution of [a] claim" will "turn on an ecclesiastical inquiry," the claim must be dismissed to avoid "unconstitutionally entangl[ing] the court in religion." *Petruska*, 462 F.3d at 311-12. This entanglement problem can arise from the face of a breach of contract claim, or it can come up in the defendant's response to the claim. Where the entanglement problem comes up in response, the appropriate remedy is summary judgment. *Id.* at 312 ("If Gannon's response to Petruska's allegations raises issues which would result in excessive entanglement, the claims may be dismissed on that basis on summary judgment."); *Minker*, 894 F.2d at 1360 (if "in attempting to prove his case, [plaintiff] will be forced to inquire into matters of ecclesiastical policy . . . as to his contract claim," then the "court may grant summary judgment" to defendant).

Entanglement can come up in several ways. It can be "substantive—where the government is placed in the position of deciding between competing religious views" or "procedural—where the state and church are pitted against one another in a protracted legal battle." *Petruska*, 462 F.3d at 311. Or it can arise more broadly where the claims and defenses require "government involvement in . . . ecclesiastical decisions"

concerning "which individuals will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 189; *accord Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 426 (2d Cir. 2018) (recognizing that *Hosanna-Tabor* forbids "excessive entanglement with 'ecclesiastical decisions'").

A clear-cut example of "excessive entanglement" arises from "any inquiry into the Church's reasons for asserting that [its minister] was not suited for a particular pastorship." *Minker*, 894 F.2d at 1360; *accord Hosanna-Tabor*, 565 U.S. at 194 (ministerial exception forbids any pretext inquiry). For the government to use its power to influence "employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985.

The Church raises at least three defenses that, on the undisputed facts of this case, would entangle courts in ecclesiastical decisions over ministerial employment. First, duress. Rev. Lee requested and obtained his employment contract after taking pastoral office and immediately after holding an emergency governance meeting wherein he explicitly

instructed the congregation that he was its spiritual head, that God wanted the Church to obey his leadership, and that God would only bless the Church if it did so. A196-97, A200, A204-05. Rev. Lee grounded his position in his inherent authority as pastor, in the teaching of the Church's Holy Scripture, and in Baptist policy. *Id.*; *see also* A214-15. The Church raised this defense in its amended answer, A73, and noted that Rev. Lee completely failed to address it in his summary judgment papers, A148.

Second, fraud. At both the emergency meeting and in a subsequent governance meeting, Rev. Lee expressly told the Church that it could dismiss him if he failed his "Pastor[al] duty and responsibility" to ensure that the church grows, improves, and heads in the "direction" that they think is best. A165 ¶ 27. The district court found that the Church's approval of his contract was contingent on these representations. A300-301 (district court finding factual admissions); A162 ¶¶ 6-7, 165 ¶ 26. The Church pleaded both fraud in the execution—that it was led to believe that the contract contained terms reflecting Rev. Lee's statements—and fraud in the inducement—that but for Rev. Lee's representations, it would not have agreed to accepting a 20-year employment term. A72. The

lower court noted Rev. Lee's "utter failure" to address these defenses, and wondered "just how Rev. Lee ever envisioned that his motion for summary judgment could succeed." A338.

Third, material breach. The Church raised the defense that Rev. Lee failed to perform under the contract because he failed to provide the required pastoral religious leadership that was memorialized in the contract and promised to the congregation. A73. Here, not only did Rev. Lee fail to address this defense, but the district court found that Rev. Lee's alleged leadership deficiencies would, if proven, "constitute a material breach of the Employment Agreement." A359. Nor, as shown above, could he have tried to directly gainsay the Church's good-faith claim that it asked him to vacate the pulpit for a failure of religious leadership.

These defenses are "all indisputably necessary to the adjudication" of Rev. Lee's claim, and thus would both "plunge the Court into a maelstrom of Church policy, administration, and governance," and "risk government involvement in ecclesiastical decisions." *Penn*, 884 F.3d at 428 (internal citations and edits omitted). "[A] civil court—and perhaps a jury—would be required to make a judgment about church doctrine," the resolution of

which would "require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment." *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., joined by Kagan, J., concurring). Hence the lower court's conclusion that "any determination whether Rev. Lee failed in his spiritual and financial stewardship and responsiveness to Church leaders is a matter best left to the Church alone." A359.

Moreover, the kind of intrusive judicial inquiries necessary to resolve Rev. Lee's claim would also produce impermissible procedural entanglement. *Petruska*, 462 F.3d at 311. The "very process of inquiry" into Rev. Lee's claim and the Church's defenses would "impinge on rights guaranteed by the Religion Clauses." *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)). Rev. Lee is now over halfway through the third year of using a "protracted legal process" to "probe the mind of the church in the selection of its minister," and he wants to go back down for more. *Rayburn*, 772 F.2d at 1170-71; Lee Br. 22 n.6. That is the kind of "process of review" that "itself" can constitute "excessive entanglement." *Little*, 929 F.2d at 949 ("churches have a constitutionally protected interest in

managing their own institutions free of government interference," quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy,* 81 Colum. L. Rev. 1373, 1373 (1981)). Indeed, courts strive to resolve ministerial exception questions "early in litigation" precisely to "avoid excessive entanglement in church matters." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 n.1 (10th Cir. 2002); *accord Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (unnecessary discovery can "only produce by [its] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment"); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("It is well established . . . that courts should refrain from trolling through [an] institution's religious beliefs").[7]

Rev. Lee argues that some contract claims can be adjudicated. Lee Br. 20-21. But the Court need not decide in this case which church-minister employment contract claims, if any, can be decided by a civil court despite

[7] *See also Dayner*, 23 A.3d at 1198-1200 (the "very act" of unnecessarily "litigating a dispute that is subject to the ministerial exception . . . result[s] in the entanglement of the civil justice system with matters of religious policy," making "the discovery and trial process itself a first amendment violation").

the ministerial exception. Every ministerial case Rev. Lee points to concerns contract claims that do not go to questions of sufficiency of cause. Rather, they go to far different questions, such as whether the contract even existed or whether the contract granted a particular person a particular position. Whether such claims can in fact be decided by civil courts is very much an open question. *See*, *e.g.*, *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (trust could not require a church to give a particular person a particular ecclesiastical position). But the Court need not decide the outer bounds of the ministerial exception as applied to ministerial employment contracts in order to decide this appeal.

Another relevant distinction is that the cases on which Rev. Lee relies were decided at the motion to dismiss stage, which factored prominently into the courts' decisions. Lee Br. 24-27; *see*, *e.g.*, *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1096 (Pa. 2009) (motion to dismiss stage; membership dispute); *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 801 (Pa. Super. 2009) (motion to dismiss stage; "this case . . . turns upon whether a contract existed at all and not the predicate for the termination"); *Minker*, 894 F.2d at 1360 (motion to dismiss stage;

existence of contract); *Petruska*, 462 F.3d at 311 (motion to dismiss stage). Even then, courts warned that the alleged contracts "threaten[ed] to touch the core of the rights protected by the free exercise clause," and accordingly instructed against allowing the cases to proceed to the point of entanglement with religious matters. *Minker*, 894 F.2d at 1360.

Finally, the excessive entanglement concerns discussed here make particular sense given the nature of church-minister relationships. Ministerial employment decisions are "*per se* a religious exercise." *Petruska*, 462 F.3d at 306. And in the context of the lead pastor of a church, the nature of the position's duties and inherent authority are such that governmental interference with the church-minister relationship always poses some risk of entanglement. *Hosanna-Tabor*, 565 U.S. at 188 ("The members of a religious group put their faith in the hands of their ministers"); *Petruska*, 462 F.3d at 306-07 ("A minister is not merely an employee of the church; she is the embodiment of its message"). Here, on the facts of this case, deciding the affirmative defenses would inevitably lead to entanglement.

II. Rev. Lee's arguments for ignoring the ministerial exception are wrong.

Rev. Lee makes two express arguments for why the ministerial exception does not apply. First, he says that Rev. Lee's ministry at the Church was in fact just secular activity. Second, he tries to press church property case law into service in the ministerial exception context. Rev. Lee also implies—but does not argue—that the lower court's decision to request ministerial exception briefing was improper. All of these arguments fail.

A. "[A]ttract[ing] new souls to Christ" is not a "secular" matter akin to a "sports . . . general manager" attracting "new fans to the game."

Rev. Lee admits that the Church's stated reason for discharging him included the Church's "overall judgment" that Rev. Lee's leadership had left it with a "diminished capacity" to "attract new souls to Christ, . . . cultivate new ambassadors for Christ, and . . . transform the families, neighborhoods, and the city for Christ." Lee Br. 18. He then argues that *none* of those matters "involve religion directly or significantly," but rather are "all secular." *Id.*

According to Rev. Lee, "the matters complained of by the [Church] are identical to those of a sales manager, college president or

sports/entertainment manager." *Id.* at 19. Failing to "attract new souls to Christ" is the equivalent of "fail[ing]" to bring "new fans to the game" or "new students" to the school. *Id.* "[C]ultivat[ing] new ambassadors for Christ" is like "cultivat[ing] new ambassadors for the team." *Id.* And though the Church stated "their determination that Rev. Lee 'Fail[ed] in Spiritual Stewardship," it is "clear" that this was really based on the "secular matters" of decreased membership, "Sunday morning worshippers," and reduced tithes. *Id.* In Rev. Lee's view, the court should just ignore that this case concerns the pastor of a Church and instead allow the case to proceed to trial "without mentioning religion, a church or a minister in any way." *Id.*

Lee's argument would do serious damage to the First Amendment. Attracting, cultivating, and transforming souls "for Christ" is by definition a religious endeavor. But under Rev. Lee's approach, Jesus Christ was just a sales manager, the Pope a mere administrator, and the Dalai Lama only a motivational speaker.

Rev. Lee's argument is a dressed-up version of the pretext inquiry that *Hosanna-Tabor* and *Petruska* forbid. As in a pretext inquiry, Rev. Lee argues that the Court should look behind the Church's stated religious

reasons for the firing to the "*real reason* for [plaintiff's] firing." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., joined by Kagan, J., concurring); *see also Petruska*, 462 F.3d at 309. And, like pretext, that is forbidden. *Hosanna-Tabor*, 565 U.S. at 194. Rev. Lee's argument "misses the point of the ministerial exception"—it is not merely to "safeguard a church's decision to fire a minister only when it is made for a religious reason," but to ensure that "the authority to select and control who will minister to the faithful . . . is the church's alone." *Id.* at 194-95.

The plaintiff and EEOC in *Hosanna-Tabor* likewise made the "remarkable" and "untenable" argument that ministerial positions should be treated no differently than leadership roles in secular associations. *Hosanna-Tabor*, 565 U.S. at 189. That argument, the Court found, "is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.*

Indeed, refusing to treat religious organizations as religious would flip the First Amendment on its head and expressly *disadvantage* religious groups. *Id.* At a practical level, it would mean that churches would find their religious reasons for decision ignored, discounted, or distorted to match secular analogues—as Rev. Lee seeks to do here. The First

Amendment forbids that kind of "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

To be sure, a plaintiff could argue that a group's religion is a sham, an insincere fraud. *See Askew*, 684 F.3d at 420 (fraudulent or bad-faith actions by churches unprotected); *accord Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (plaintiff challenging ministerial exception could submit "proof that the church is a fake"). And Rev. Lee makes a halfhearted argument to that effect in a footnote, arguing that the Church's dire financial straits and its religious reasons for termination were designed as a litigation position. Lee Br. 17 n.4. But here too Rev. Lee admitted all of the facts he now suggests might not be true. A300-01 (holding that Rev. Lee admitted facts by not contesting them); A162-172 (reciting admitted facts). He cannot claw back those admissions now.[8]

[8] Rev. Lee also mentions several times that he did not take additional discovery. Lee Br. 9, 11, 17 n.4, 22 n.5. But he fails to mention that he did not take the opportunities that the lower court provided to develop his position on the ministerial exception. *Compare* A364 (allowing Rev. Lee to file a reply brief) *with* A15 (Rev. Lee failed to file a reply brief); *see also* Dkt. 92 (Rev. Lee declined to present new evidence or witnesses at

Nor would his alleged new facts help him now. At most, he merely claims that *some* families withheld tithes or worshipped elsewhere in a bizarre attempt to make him look bad. Lee Br. 22 n.6. But that would merely show that he was not a successful spiritual leader.

B. The law of church property disputes does not apply here.

Rev. Lee next argues that caselaw developed in church property dispute cases should determine the outcome in this ministerial exception case. Lee Br. 24-25. Not so.

First, the two doctrines are distinct and deal with "two fundamentally different types of dispute." Michael McConnell & Luke Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 335-36 (2016). Courts have accordingly repeatedly refused to conflate the two doctrines. *Hutchinson*, 789 F.2d at 393-96 (declining to extend the "'neutral principles' doctrine" to determine a plaintiff's "status and employment as a minister of the church"); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) (same); *DeBruin*, 816 N.W.2d

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hearing). And in his supplemental brief below on the ministerial exception issue, Rev. Lee made no suggestion that more discovery would be necessary or helpful in resolving the issue. A271-282; *Bradley v. United States*, 299 F.3d 197, 207 (3d Cir. 2002) (failure to file Fed. R. Civ. P. 56(d) affidavit "fatal to a claim of insufficient discovery on appeal").

at 888 n.8 (observing that "the [church-property] approach has never been employed in cases where a minister was terminated"); *El-Farra*, 226 S.W.3d at 795 (holding in a contract case concerning a minister's employment that the "neutral-principles exception does not apply").

Second, there is a practical reason not to blend the two doctrines: as many judges and scholars have noted, the case law governing church-property disputes "is in disarray." McConnell & Goodrich, 58 Ariz. L. Rev. at 307 (collecting comments). There is no need to spread confusion from the realm of church property disputes to that of the ministerial exception.

Third, by its own terms, neutral-principles doctrine cannot apply here. The leading case, *Jones v. Wolf*, holds that courts apply neutral principles of law only if they can do so without deciding questions of "religious doctrine or polity." 443 U.S. 595, 602 (1979). Here, resolving Rev. Lee's claim requires consideration of religious doctrine *and* polity. There are simply "no neutral principles of law that shed light on" a leadership decision made "for the good of the Church." *Askew*, 684 F.3d at 420.

C. Rev. Lee waived any argument that the ministerial exception was not properly before the district court.

Rev. Lee repeatedly mentions that the lower court "*sua sponte*" raised the ministerial exception. Lee Br. 1, 3, 11, 22 n.5. But he makes no

argument explaining why the district court's action has any import or requires reversal. He has therefore waived any such objection. *Pelullo*, 399 F.3d at 222 (failure to argue a point in brief constitutes waiver).

Indeed, at the May 12, 2017 hearing that the district court held on the ministerial exception, Rev. Lee agreed that the district court needed to resolve the exception question before trial. A338 (ministerial exception issue "must be fleshed out . . . prior to any possible trial, as admitted by the parties"); *see also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (a "federal court [should] not allow itself to get dragged into religious controversy"). The ministerial exception issue was thus properly before the district court.[9]

[9] Although not at issue here, other courts have held that the ministerial exception defense is not waivable. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (court could consider ministerial exception even if not raised by the parties, since its constitutional protection is "not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes."). This Court has affirmed a district court's *sua sponte* dismissal of a minister's employment dispute against his house of worship, recognizing the dismissal as within the district court's power. *See Bethea v. Nation of Islam*, 248 F. App'x 331, 333 (3d Cir. 2007) (citing *Petruska*, 462 F.3d at 307).

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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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 18th day of April 2018.

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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 32(a)(7)(B). It contains 12,036 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 Century Schoolbook 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, and Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 18th day of April 2018.

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CERTIFICATE OF SERVICE

I certify that on the date indicated 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 18th day of April 2018.

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