2016

Petition for Writ of Certiorari, Melhorn v. Baltimore Washington Conf. of United Methodist Church

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No. 16-245

In The

Supreme Court of the United States

EDWIN R. MELHORN,

Petitioner,

v.

BALTIMORE-WASHINGTON CONFERENCE OF THE UNITED METHODIST CHURCH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, this Court "express[ed] no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise." 132 S. Ct. 694, 710 (2012).

The time has come for this Court to clarify that, consistent with this Court's other First Amendment precedents, the ministerial exception does not absolutely protect breach of contract and tortious conduct.

The question presented is:

> Whether the ministerial exception of the First Amendment absolutely bars breach of contract and tortious conduct lawsuits in situations of illegal conduct or harm to third parties.

PARTIES TO THE PROCEEDINGS BELOW

The following party was a plaintiff below and is Petitioner here: Edwin R. Melhorn.

Cedar Grove United Methodist Church, the Baltimore-Washington Conference of the United Methodist Church, and Rev. Karin Walker were defendants below and are the Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Edwin R. Melhorn respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals.

OPINIONS BELOW

The May 23, 2016, Court of Appeals of Maryland's order denying certiorari is unpublished. Certiorari Petition Appendix [Pet. App.] 30; *Melhorn v. Baltimore-Washington Conference of United Methodist Church*, No. 2065, Sept. Term 2014, 2016 WL 1065884 (Md. Ct. Spec. App. Mar. 16, 2016), *cert. denied sub nom. Melhorn v. Baltimore-Washington Conference*, 136 A.3d 817 (Md. 2016). The Court of Special Appeals of Maryland's opinion and dismissal of all claims on Mar. 16, 2016, is unreported. Pet. App. 1-15. The Circuit Court of Maryland for Baltimore County's order of final judgment dated Nov. 6, 2014, is unpublished. Pet. App. 16-17. The Circuit Court's order referenced its reasons stated on the record in open court. The transcript of the relevant record in open court is reprinted at Pet. App. 18-29.

JURISDICTION

The Court of Special Appeals of Maryland affirmed dismissal of Petitioner Melhorn's claims in its decision filed Mar. 16, 2016, Pet. App. 1, and the order of the Court of Appeals of Maryland denying review

was entered on May 23, 2016, Pet. App. 30. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment's Free Exercise and Establishment Clauses, which state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

STATEMENT OF THE CASE

Edwin Melhorn worked at the International Business Machines Corporation ("IBM") for nearly twenty-five years as a financial manager. Then he became Treasurer and Chief Financial Officer of the Oregon-Idaho Conference of the United Methodist Church. He brought that financial experience with him to the Cedar Grove United Methodist Church, where he first became pastor in July 2009. The church renewed his contract annually in July 2010, 2011, and 2012. Melhorn's supervisor, Rev. Karin Walker, also assured him orally that he could remain pastor as long as he wanted. Melhorn received excellent evaluations as pastor.

The financial manager in Melhorn alerted in May 2012, when the Senior Trust & Fiduciary Specialist of Wells Fargo Bank informed Melhorn that Cedar Grove

was a named beneficiary to a $1,224,849.34 trust. The specific terms of the trust earmarked half that sum for the church's Cemetery Fund to provide upkeep of the church's cemetery. Melhorn knew, however, that Cedar Grove had sold the cemetery in 2009. If his church took the trust's money, it could not, and would not, be used for the cemetery's maintenance. Worried about fraud and possible tax evasion by Cedar Grove, Melhorn urged church officials to discuss the terms of the trust with Wells Fargo so that no laws would be broken. Nevertheless, church officials wanted the money to go directly to the church so that they could later transfer it to a separate and non-tax-exempt entity, Cedar Grove Cemetery, without tax liability.

Melhorn warned members of the church's Board of Trustees that taking the money was likely fraud, breach of trust, or tax evasion. Nonetheless, church officials ordered him to request the full amount of the trust from Wells Fargo and deposit the check in the church's bank account. Melhorn refused; as a result, church officials fired him despite his recent contract renewal. Melhorn sued the church defendants for wrongful discharge under Maryland state law.

The Baltimore County Circuit Court granted the church defendants' motion to dismiss, ruling Melhorn's lawsuit was barred because he is a minister. Pet. App. 16. The Maryland Court of Special Appeals affirmed, Pet. App. 1, and the Maryland Court of Appeals denied certiorari. Pet. App. 30. The courts' reasoning suggested that the ministerial exception provides an absolute defense to contract and tort lawsuits, with the

result that every such lawsuit must be dismissed at the defendants' mention of the word minister.

The circuit court ruled that this Court's *Hosanna-Tabor* language about breach of contract and tort lawsuits "in no way changes the Maryland law up to this point." Pet. App. 27. It then relied on Maryland's case law to grant Respondents' motion to dismiss without further inquiry into Melhorn's allegations of resisting participation in fraud or tax evasion. The Court of Special Appeals relied on the same state law, citing *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 117 (Md. 2011); *Bourne v. Ctr. on Children, Inc.*, 838 A.2d 371 (Md. 2003); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997); and *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701 (D. Md. 2013). *Melhorn*, 2016 WL 1065884 at *3-5; Pet. App. 11-13.

Yet none of those cases involved a situation like Edwin Melhorn's, where church authorities asked a minister to violate laws and thus possibly cause harm to third parties and interfere with the government's interests in combatting illegal conduct, tax evasion, or fraud. The Maryland courts instead read some old cases dismissing a few wrongful discharge lawsuits and interpreted them to ban ministerial wrongful discharge suits no matter what the surrounding circumstances. That approach was inconsistent with this Court's fact- and lawsuit-specific approach to the ministerial exception in *Hosanna-Tabor*.

Given the confusion and conflict in the lower courts over ministerial breach of contract and tortious conduct cases, Petitioner requests this Court to clarify that the First Amendment does not protect fraud, misrepresentation, or illegal acts. *See, e.g.*, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) ("reject[ing] the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice."); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (the "intentional lie" is "no essential part of any exposition of ideas" (internal quotation marks omitted)); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 606 (2003) ("when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim."); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164 (1939) ("Frauds," including "fraudulent appeals . . . made in the name of charity and religion," may be "denounced as offenses and punished by law."); *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 742 (7th Cir.), *cert. denied*, 136 S. Ct. 581 (2015) ("it is unclear whether the intrachurch doctrine is even applicable where fraud is alleged").

This certiorari petition asks this Court to address whether the ministerial exception of the First Amendment absolutely bars breach of contract and tortious

conduct lawsuits in situations of illegal conduct or harm to third parties. This issue is confusing the state and federal courts post-*Hosanna-Tabor*. Petitioner asks this Court to grant certiorari on the question whether the First Amendment's Religion Clauses absolutely bar ministerial breach of contract and tortious conduct lawsuits. In the alternative, Petitioner requests this Court to summarily reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. There Is a Split in Authority Whether the Ministerial Exception Absolutely Bars Breach of Contract and Tortious Conduct Lawsuits.

State and federal courts disagree about the status of breach of contract and tortious conduct cases post-*Hosanna-Tabor*.

Several courts have held that ministers may sue for breach of contract to receive pay and other employment benefits for completed services. *See, e.g.*, *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 813-14 (D.C. 2012) (ministerial exception did not bar Rev. Deloris Prioleau's lawsuit for $39,000 "under the contract covering her final year as pastor"); *Crymes v. Grace Hope Presbyterian Church, Inc.*, No. 2011-CA-000746-MR, 2012 WL 3236290, at *2 (Ky. Ct. App. Aug. 10, 2012) ("A claim for

unpaid wages and benefits for work previously performed under an employment contract is not ecclesiastical and is reviewable by the court."); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (N.C. Ct. App. 2016) (ministerial exception does not apply to minister's lawsuit that "seeks to enforce a contractual obligation regarding his compensation and benefits," specifically a promise to provide payment and disability insurance if pastor became disabled).

There is a split in authority, however, whether breach of contract lawsuits may proceed after ministerial employees are fired. The Supreme Court of Kentucky allowed a minister's lawsuit against a seminary for breach of his tenure contract to proceed because the employer had voluntarily agreed to the terms of the employment contract. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615-18 (Ky. 2014) ("[T]his is a situation in which a religious institution has voluntarily circumscribed its own conduct, arguably in the form of a contractual agreement, and now that agreement, if found to exist, may be enforced according to its own terms."); *see also Cropper v. Saint Augustine Sch.*, No. 2014-CA-001518-MR, 2016 WL 98701, at *3 (Ky. Ct. App. Jan. 8, 2016), *reh'g denied* (Apr. 11, 2016) (Catholic school principal who was told her position had been eliminated could pursue breach of contract claim. "A contract claim such as the one before us is not subject to the ministerial exception."); *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Bd.*, 2016 IL App (1st) 143045 (pastor's breach of oral contract claim proceeds because "where a

complaint alleges that a church has violated its own bylaws, a civil court may exercise jurisdiction to decide whether the church has violated its bylaws."). Indeed, the Kentucky Supreme Court warned that all religious employment contracts "would arguably be illusory," and schools would be unable to pursue their accreditation and hiring goals, if courts refuse to enforce such contracts. *See Kirby*, 426 S.W.3d at 616, n. 71.

In contrast, the Wisconsin Supreme Court dismissed a ministerial employee's breach of contract lawsuit against a Roman Catholic church without reaching a majority rationale for dismissal. The court refused to enforce contract language requiring "good and sufficient cause" for termination, with the lead opinion concluding, "the First Amendment gives St. Patrick the *absolute right to terminate DeBruin for any reason, or for no reason*, as it freely exercises its religious views." *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 888 (Wis. 2012) (emphasis added); *see also Warnick v. All Saints Episcopal Church*, No. 01539, Dec. Term 2011, 2014 WL 11210513, at *1 (Pa. Com. Pl. Apr. 15, 2014), *aff'd*, 116 A.3d 684 (Pa. Super. Ct. 2014) (dismissing breach of contract and interference with contract claim brought by terminated Episcopal priest because court would "have to decide whether the Bishop can be found liable for interfering with alleged contracts – that is, whether he was a third party to those contracts or whether he had to approve those contracts himself. . . ."); *but see DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 905 (Wis. 2012)

(Bradley, J., dissenting) ("DeBruin's contract claims are not precluded by a straightforward application of *Hosanna-Tabor*.").

Justice Bradley's dissent in *DeBruin*, the Wisconsin case, echoed the Kentucky Supreme Court's arguments that churches may voluntarily enter into contracts without running afoul of the First Amendment. She warned; "if courts routinely dismissed this variety of contract claim, they might create an unnecessary roadblock hampering a church's free exercise ability to select its ministers." *Id.* at 907; *see also id.* ("Candidates for ministerial positions might be less inclined to enter into these types of employment arrangements in the first instance. A church's ability to recruit the best and brightest candidates for ministerial positions could be undermined because the church would be unable to offer desirable candidates any contractual assurances regarding job security.").

Thus the split in authority creates the dangerous possibility that "a church's ability to arbitrarily fire ministers is so sacrosanct that the church cannot contract around it," even when it wants to. *DeBruin*, 816 N.W.2d at 907 (Bradley, J., dissenting).

The status of the ministerial exception is even more uncertain, and the state court precedents more split, when contract and tort claims are intertwined in a single lawsuit, as frequently happens in employment disputes. The New Mexico Court of Appeals allowed a teacher at a Seventh-Day Adventist school to proceed with a wrongful termination claim involving breach of

contract, retaliatory discharge, intentional interference with contract, civil conspiracy, and defamation. *See Galetti v. Reeve*, 331 P.3d 997, 999-1000 (N.M. Ct. App. 2014). The teacher alleged her employers had retaliated against her after she reported sexual harassment. Instead of deciding that the ministerial exception absolutely required dismissal of all tort and contract claims, the New Mexico court reviewed the specific allegations connected with each claim, concluding that because all the claims could be "'resolved by the application of purely neutral principles of law and without impermissible government intrusion . . . there is no First Amendment shield to litigation.'" *Id.* at 1001, quoting *McKelvey v. Pierce*, 800 A.2d 840, 856-57 (N.J. 2002) (emphasis, internal quotation marks, and citations omitted). In contrast, although Petitioner's wrongful discharge case could similarly be resolved under neutral principles of law, the Maryland Court of Special Appeals distinguished *Galetti* and dismissed Petitioner's wrongful discharge case as absolutely barred by the ministerial exception. *Melhorn*, 2016 WL 1065884 at *5, Pet. App. 14.

Legal authority is also split over pure tort cases filed by ministers. Some courts have dismissed torts connected to entirely internal disputes about a minister's fitness for office. *See, e.g.*, *Warnick v. All Saints Episcopal Church*, No. 01539, Dec. Term 2011, 2014 WL 11210513, at *1 (Pa. Com. Pl. Apr. 15, 2014), *aff'd*, 116 A.3d 684 (Pa. Super. Ct. 2014) (dismissing defamation claim brought by terminated Episcopal priest

because the allegedly defamatory comments involved his fitness for ministry). Yet other courts have warned, "the Free Exercise Clause does not shield church people from any secular court consideration of what happens in church meetings just because of where it happened. If a church meeting is used as a place to plan to commit torts involving third parties," churches may be liable in tort. *See Barrow v. Living Word Church*, No. 3:15-CV-341, 2016 WL 3976515, at *1-3 (S.D. Ohio July 25, 2016) (claim that church officials violated pastor's right to contract because of his race allowed to proceed).

Some church defendants have unsuccessfully argued that *Hosanna-Tabor* bars third-party lawsuits against religious organizations for the tortious conduct of their ministerial employees. Those cases frequently involve victims of sexual abuse suing church employers for negligent supervision of their abusers. *See, e.g.*, *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430, at *3 (Conn. Super. Ct. July 8, 2013) (*Hosanna-Tabor* does not preclude negligence, reckless conduct, failure to warn, and negligent supervision claims of sexual abuse survivor against diocese that failed to prevent sexual abuse by a priest in its employ); *Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 246 Cal. App. 4th 566, 599 (2016), *review denied* (July 27, 2016) ("Watchtower has not cited, nor are we aware of, any decisions extending [the ministerial exception] to preclude a third party action against a religious organization for

the tortious conduct of its agents."). The same principles that correctly compel those cases to be litigated are involved in Petitioner's case, where church officials asked Petitioner to participate in possibly fraudulent conduct with potential harm to third parties like the original donors of the trust. *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 742 (7th Cir.), *cert. denied*, 136 S. Ct. 581 (2015) ("it is unclear whether the intrachurch doctrine is even applicable where fraud is alleged").

In the midst of such disagreements, now is the time for this Court to clarify that the ministerial exception does not ban breach of contract or tortious conduct lawsuits where illegal conduct or harm to third parties is involved.

II. Allowing Absolute Ministerial Immunity in Cases involving Illegal Conduct or Harm to Third Parties Establishes Dangerous First Amendment Precedent.

During this Court's oral argument in *Hosanna-Tabor*, Justice Sotomayor anticipated cases like Petitioner's, where important societal interests other than the purely internal, ecclesial relationship between a church and its ministers are at stake. The Justice asked in particular about teachers who are fired for reporting sexual abuse to the government. Under the Maryland courts' reasoning in Petitioner's case, such lawsuits would be absolutely barred by the ministerial exception. Justice Sotomayor anticipated the serious

problems with that outcome, asking, "Regardless of whether it's a religious belief or not, doesn't society have a right at some point to say certain conduct is unacceptable, even if religious . . . ? And once we say that's unacceptable, can and why shouldn't we protect the people who are doing what the law requires, i.e. reporting it?" Transcript of Oral Argument at *5, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2011) (No. 10-553), 2011 WL 4593953 (U.S.) [hereinafter *Hosanna-Tabor* Oral Arg.]; *see also Ballaban v. Bloomington Jewish Cmty., Inc.*, 982 N.E.2d 329, 339 (Ind. Ct. App. 2013) (struggling with the ministerial exception analysis in a rabbi's case because the "United States Supreme Court has not determined the applicability of the ministerial exception where a minister's employment was terminated or otherwise impacted for reporting or attempting to report child abuse or neglect. . . .").

This Court should protect the people like Petitioner who are trying to do what the law requires. This Court has repeatedly held that the First Amendment does not protect criminal conduct or fraud. *See, e.g.*, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) ("reject[ing] the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice."); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 606 (2003) ("when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.");

Schneider v. State (Town of Irvington), 308 U.S. 147, 164 (1939) ("Frauds," including "fraudulent appeals . . . made in the name of charity and religion," may be "denounced as offenses and punished by law."). Moreover, this Court has also recognized that the government's interest in the uniformity of its tax system is "very high." *United States v. Lee*, 455 U.S. 252, 259 (1982). Petitioner asks this Court to clarify that, consistent with this Court's interpretation of the First Amendment in other doctrinal areas, the ministerial exception does not ban breach of contract and tortious conduct lawsuits when important societal interests are at stake.

In response to Justice Sotomayor's important question, even counsel for Hosanna-Tabor Lutheran Church and School acknowledged that the ministerial exception should not be absolute: "if you want to carve out an exception for cases like child abuse where the government's interest is in protecting the child, not an interest in protecting the minister, when you get such a case, we think you could carve out that exception." *Hosanna-Tabor* Oral Arg. at *6. Counsel then provided the "theoretical framework" for the exception requested by Justice Sotomayor:

> First, you have to identify the government's interest in regulation. If the government's interest is in protecting ministers from discrimination, we are squarely within the heart of the ministerial exception. If the government's interest is something quite different from that, like protecting the children, then you can

> assess whether that government interest is sufficiently compelling to justify interfering with the relationship between the church and its ministers. But the government's interest is at its nadir when the claim is we want to protect these ministers as such, we want to tell the churches what criteria they should apply for – for selecting and removing ministers.

Id. at *6-7. Petitioner respectfully asks this Court to pursue that framework here, in a case that has nothing to do with Pastor Melhorn's qualifications for ministry and everything to do with protecting the government's interests in combatting illegal conduct, tax evasion, fraud, and possible harm to third parties associated with the Trust, including the original donors of the money to Cedar Grove.

Such a balanced and non-absolute approach to the ministerial exception would be consistent with this Court's Religion Clause precedents, which have never identified religious freedom rights as absolute when important governmental and third-party interests are at stake. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (religious accommodations must take account of third-party interests); *Lee*, 455 U.S. at 261 (same); *Cutter v. Wilkinson*, 544 U.S. 709, 720-22 (2005) (prisoners' demands under RLUIPA must be weighed against the "burden a requested accommodation may impose on nonbeneficiaries" and "measured so that [they do] not override other significant interests."); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct.

2751 (2014) (religious accommodations must consider interests of third-party employees).

This Court has always weighed the proposed actions of First Amendment rights holders against potential harm to third parties because "[a]t some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). Moreover, Free Exercise values are equally at stake in recognizing that religious employers do not enjoy absolute immunity from civil liability. The ministerial exception must not be interpreted inconsistently with this Court's Free Exercise precedents, which require *all citizens*, even religious ones, to obey neutral laws of general applicability. *See Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). This Court has never granted absolute First Amendment immunity from tort liability to a church for violation of a neutral, generally applicable law. Its doctrine is squarely to the contrary. *See Employment Div. v. Smith*, 494 U.S. 872, 881 (1990); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-32 (1993); *Hosanna-Tabor*, 132 S. Ct. at 710 ("express[ing] no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.").

Moreover, this Court has never extended absolute immunity to religious organizations in cases that involve illegal conduct or third party harm and that may be resolved through "neutral principles of law." *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *see also Hosanna-Tabor*, 132 S. Ct. at 710. Neither should the courts of Maryland or any other courts extend absolute immunity to religious organizations. Petitioner Edwin Melhorn respectfully asks this Court to clarify that his employers do not enjoy absolute immunity for his wrongful discharge.

CONCLUSION

Whether the ministerial exception of the First Amendment absolutely bars breach of contract and tortious conduct lawsuits in situations of illegal conduct or harm to third parties is an important issue to ministers like Petitioner, whose lawsuit ended on a motion to dismiss without any consideration of his duties to obey the law and protect third parties. For this reason, Petitioner respectfully asks this Court to grant certiorari in this case.

In the alternative, Petitioner requests that this Court summarily reverse the decision below with a direction that *Hosanna-Tabor* does not authorize absolute immunity from a state's neutral and generally

applicable contract and tort laws, particularly in those situations that involve illegal conduct or possible harm to third parties.

Respectfully submitted,

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