2016

Reply to Brief in Opposition, 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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. This Case Can Be Resolved According to Wrongful Discharge Law.

This Court has long endorsed the idea that religious actors are required to obey neutral laws because the rule of law protects everyone. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Consistent with this Court's First Amendment jurisprudence, state and federal courts have abstained from hearing cases under the "ecclesiastical abstention rule" only when the dispute cannot be resolved according to neutral principles of law. *See, e.g.*, *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 618 (Ky. 2014) ("Secular courts may, however, have jurisdiction over a case involving a church if 'neutral principles of law' can be applied in reaching the resolution."). For this reason, the Supreme Court of Kentucky, in its ministerial exception cases, allowed breach-of-contract lawsuits against a Christian seminary to proceed because the litigation could be resolved according to neutral, non-religious principles of law, just like Petitioner's case here. *Id.* at 615; *see also Galetti v. Reeve*, 331 P.3d 997, 1001 (N.M. Ct. App. 2014) (when tort and contract claims can be "'resolved by the application of purely neutral principles of law and without impermissible government intrusion . . . there is no First Amendment shield to litigation'") (*quoting McKelvey v. Pierce*, 800 A.2d 840, 852 (N.J. 2002)) (emphasis, internal quotation marks, and citations omitted).

Respondents and the Maryland courts mischaracterized Petitioner's case as a purely religious dispute that the courts cannot adjudicate. This argument ignores the nature of the wrongful discharge tort. In Maryland, "to establish wrongful discharge, the employee must be discharged, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee." *Wholey v. Sears Roebuck*, 803 A.2d 482, 489 (Md. 2002). The Maryland courts' dismissal of Petitioner's case deprived him of the opportunity to establish that his employer fired him for refusing to ask Wells Fargo Bank to fraudulently disburse trust funds for a cemetery that the church no longer owned.

The trial court, not this Court, is the appropriate place for Respondents to contest the facts of this case, which ended on a motion to dismiss. Respondents' factual response to the Petition confirms the wisdom of a ruling from this Court allowing Petitioner and Respondents to participate in a lawsuit conducted according to the principles of Maryland tort law, which would award him damages for his injury and not reinstatement as a minister.

II. Respondents Support an Absolute Ministerial Exception that Is at Odds with this Court's First Amendment Jurisprudence.

It is Respondents, not Petitioner, who argue that this case should be dismissed on the "face of the complaint" without any consideration of possible fraud, tax evasion, or other illegal conduct. And they erroneously won that argument below. Even though Petitioner's wrongful discharge case involved possibly fraudulent activity that could be resolved under secular legal principles, the Maryland Court of Special Appeals dismissed Petitioner's wrongful discharge case as absolutely barred by the ministerial exception simply because Melhorn is a minister. *Melhorn v. Baltimore Washington Conference of United Methodist Church*, No. 2065 Sept. Term 2014, 2016 WL 1065884, *5 (Md. Ct. Spec. App. Mar. 16, 2016). Dismissal on the face of the complaint even though fraudulent activity has occurred is an absolute rule that will allow ministers to be subjected to endless illegal activity. The lower courts are split on its applicability in ministerial exception circumstances. Nonetheless, even though they won under such an absolute rule, Respondents incorrectly assert that no court has ever recognized the ministerial exception as an absolute defense to liability in all circumstances.

The face of the complaint rule that Respondents require would absolutely immunize church employers from liability, even though this Court has never extended such an 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 Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 710 (2012).

Respondents incorrectly argue that no third-party interests are involved in this case because Pastor Melhorn was the only individual to sue the Respondents. From Respondents' perspective, third parties have interests in the rule of law only when they are litigants. That argument ignores the fact that the neutral application of the rule of law protects everyone's interests and is required by the First Amendment. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (religious accommodations must take account of third-party interests); *United States v. Lee*, 455 U.S. 252, 261 (1982) (same); *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005) (prisoners' demands under RLUIPA must be weighed against the "burdens 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).

Tort law and tax law, like most neutral laws of general applicability, protect third parties' interests even when the third parties are not litigants. Indeed, 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)). Thus, it is appropriate for this Court to consider third-party interests in Petitioner's case.

III. The Cert-Worthy Question Was Left Open in *Hosanna-Tabor* and Needs Clarification Now.

Respondents argue that Petitioner's case is not cert-worthy because it involves wrongful discharge and not breach of contract. Yet it is the conflicting range of tort and contract cases across the country that warrants this Court's attention. Contract and tort claims are frequently intertwined in employment dispute cases. Moreover, this Court suggested that ministerial exception tort and contract cases might be governed by the same principle when it "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." *Hosanna-Tabor*, 132 S. Ct. at 710.

As the cases presented in the Petition demonstrate, various state and federal courts have used very similar ministerial exception arguments in both tort

and contract cases, dismissing some and hearing others. They now require this Court's guidance to avoid the possibility that a church's ability to wrongfully discharge ministers is so "sacrosanct" that no court may ever review it. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 912 (Wis. 2012) (Bradley, J., dissenting). In particular, this Court needs to clarify that the ministerial exception is not a license to defraud.

Petitioner requests this Court to clarify that the First Amendment does not absolutely protect fraud, misrepresentation, or illegal acts in the employment setting. *See, e.g.*, *Smith*, 494 U.S. at 879 ("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 (1974) (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. dismissed*, 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.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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