07-4556

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REV. JOHN PAUL HANKINS,
Plaintiff-Appellant,

v.

THE NEW YORK ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, THE STONY BROOK COMMUNITY CHURCH (UNITED METHODIST), AND BISHOP ERNEST S. LYGHT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of Defendants-Appellees
Supporting Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*, The National Legal Foundation certifies that it has no parent company, subsidiary, or affiliate that has issued shares to the public.

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c)(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters, including those in New York, are vitally concerned with the outcome of this case because of its potential impact on public interest litigation and the importance of the ministerial exception to the issue of religious liberty.

This Brief is filed pursuant to consent by Counsel of Record for the Appellees and a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief expands upon an argument made by the Appellant. While the Appellant touches upon the impact of this Court's opinion in *Rweyemamu*, this Brief shows how the various Circuits have treated the ministerial exception. Furthermore, this Brief explains how this case fits within the precedent from the various Circuits. Your *Amicus* argues that this Court's decision in *Rweyemamu v. Cote* should be followed in this case. This Circuit had not adopted the ministerial exception when it heard this case before, but it has now followed the example of all of the Circuit Courts, with the exception of the Federal Circuit, and should apply the constitutionally required exception recognized in *Rweyemamu*. The Circuits have recognized that this exception is necessitated by both the Free

Exercise Clause and the Establishment Clause, and as such, the Religious Freedom Restoration Act should not supplant this constitutionally required exception.

ARGUMENT

I. THE MINISTERIAL EXCEPTION IS A CONSTITUTIONALLY REQUIRED EXCEPTION TO THE ADEA BECAUSE IF IT WERE NOT APPLIED, THE STATUTE WOULD VIOLATE THE FIRST AMENDMENT.

This Court's previous decision in *Hankins I* assumed without deciding that the ministerial exception was only a doctrine of either statutory interpretation or policy. *Hankins v. Lyght*, 441 F.3d 96, 102 (2d Cir. 2006) (hereinafter *Hankins I*). However, *Hankins I* was decided before this Court adopted the ministerial exception as a constitutional requirement under Title VII to prevent a violation of the First Amendment in *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). For the same reason that this Court held that the ministerial exception was a constitutional requirement for Title VII, the exception is also constitutionally required by the First Amendment for the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 (2006). If a court's interference with a church's employment decision would violate the First Amendment under a Title VII claim of race or sex discrimination, then a court's interference under ADEA for age discrimination would be equally unconstitutional. If this Court were not to apply the ministerial exception, it would have to declare these statutes unconstitutional as

applied to ministers, at the very least,[1] because the statutes would prohibit the Free Exercise rights of the church and/or violate the Establishment Clause by engaging in excessive entanglement with the church under *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

While the Supreme Court has never discussed the ministerial exception, all of the circuit courts of appeals, except for the Federal Circuit Court,[2] have now held that it is constitutionally required. Courts have said that if they were to interfere with the ministerial employment decisions of churches, they would violate the church's autonomy rights under the Free Exercise Clause. *Rweyemamu*, 520 F.3d at 205; *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3rd Cir. 2006), *cert. denied*, 127 S. Ct. 2098; *Werft v. Desert Southwest Annual Conf.*, 377 F.3d 1099 (9th Cir. 2004); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999); *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989). Other courts have additionally held that "taking sides in a religious dispute would lead an Article III court into excessive entanglement in violation of the Establishment

[1] As this Court noted in *Rweyemamu*, the ministerial exception applies to more than just ministers; it also serves to protect churches from lawsuits from other religious oriented employees. 520 F.3d at 206.

[2] The Court of Appeals for the Federal Circuit has not had an opportunity to address the ministerial exception.

Clause." *Rweyemamu*, 520 F.3d at 205. *Accord. Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Scharon v. St. Luke's Episcopal Presbyterian Hosp*., 929 F.2d 360, 363 (8th Cir. 1991); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir 1985).

As this Court noted in *Rweyemamu*, 520 F.3d at 206 n.4, while the Circuits agree that the ministerial exception is required, they do vary in how they treat this exception. Three Circuits have stated that the ministerial exception deprives courts of subject matter jurisdiction. *Hollins*, 474 F.3d at 225 (6th Cir) ("The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees."); *Combs*, 173 F.3d at 350 (5th Cir.) (affirming the Circuit's precedent in light of *Employment Div., Dep't of*

Human Res. of Oregon v. Smith, 494 U.S. 872 (1990))[3]; *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 185, 188 (7th Cir. 1994) (affirming the District Court's dismissal for lack of subject matter jurisdiction). Four Circuits have held that the ministerial exception bars employment discrimination claims under Rule 12(b)(6) for failure to state claim upon which relief can be granted, two of these courts rejected the subject matter jurisdiction argument in so holding. *Petruska*, 462 F.3d at 299 n.1 (3rd Cir. 2006) (holding that the process by which a court is prevented from hearing an employment discrimination claim under the ministerial exception "is most properly construed as a Rule 12(b)(6) motion."); *Werft*, 377 F.3d at 1104 (9th Cir. 2004) (affirming the district court's grant of a 12(b)(6) motion); *Bryce*, 289 F.3d at 659 (10th Cir. 2002) (affirming the district court's conversion of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, into a Rule 12(b)(6) motion to dismiss for

[3] Your Amicus respectfully disagrees with the *Rweyemamu* Court's reading of the Fifth Circuit's holding in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). *Rweyemamu*, 520 F.3d at 206. While it is true that the *McClure* Court confusingly stated "'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *McClure* 460 F.2d at 560 *quoting Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936). However, the Fifth Circuit explicitly affirmed the district court's dismissal for want of jurisdiction. *Id.* at 561. In addition, everything else in the case speaks in terms of jurisdiction. *Id.* at 559-61 Furthermore, when the Fifth Circuit reaffirmed *McClure* after *Smith* it explicitly stated that the question on appeal was "whether the Free Exercise Clause of the First Amendment deprives a federal court of *jurisdiction* to hear a Title VII employment discrimination suit brought against a church by a member of its clergy . . . ." *Combs*, 173 F.3d at 345 (emphasis added).

failure to state a claim upon which relief can be granted); *Natal*, 878 F.2d at 1578 (1st Cir. 1989) (affirming the district court's grant of a 12(b)(6) motion). Finally, four Circuits have held that the ministerial exception is a constitutionally required exception to bar an employment discrimination suit against a church. *Gellington*, 203 F.3d at 1304 (11th Cir.); *Scharon*, 929 F.2d at 363 (8th Cir.); *Minker*, 894 F.2d at 1358 (D.C. Cir.); *Rayburn*, 772 F.2d at 1168-69 (4th Cir.).

This Court seems to have applied the constitutionally required exception form of the ministerial exception. *Rweyemamu*, 520 F.3d at 209. In *dicta*, it stated that the exception is not an absolute bar and it may exercise jurisdiction in limited circumstances without violating the First Amendment religion clauses by a controlled use of discovery. *Id.* at 207, quoting *Bollard*, 196 F.3d at 950. This Court should follow *Rweyemamu*, and the precedent of all of the other circuits[4], and bar Hankins' employment discrimination claim against the Church under the ministerial exception.

Furthermore, to apply the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006) (RFRA), in this case as *Hankins I* would, would be a needlessly intensive analysis when the case presents a simple question of constitutional law that has already been decided. As noted above at 3, many Circuits have also held that the ministerial exception is constitutionally required by the Establishment

[4] Except, as noted above, the Federal Circuit which has never addressed the issue.

Clause. This is significant because RFRA only addresses Free Exercise concerns, not Establishment Clause concerns. If this Court were to decide the instant case under RFRA and hold that ADEA does not violate the substantial burden test, it would nevertheless be required to apply the constitutionally required ministerial exception to block the application of ADEA, in order to prevent a violation of the First Amendment. Not only would this be a waste of judicial resources, but such an extended analysis would drag the church through an expensive lawsuit–a lawsuit that it would win in the end regardless of the outcome under RFRA. The purpose of RFRA is to increase protection for religious freedom, not to subject churches to more litigation than ever.

CONCLUSION

For the foregoing reasons this Court should affirm the judgment of the District Court, on the grounds that the ministerial exception is controlling in this case. Alternately, this Court could affirm for the additional reasons submitted by Appellant.

Respectfully submitted,
this 16th day of May, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the Brief *Amicus Curiae* of The National Legal Foundation in the case of *Hankins v. The New York Annual Conference of the United Methodist Church*, *et al.*, No. 07-4556, on all required parties by sending the required number of paper copies by overnight commercial carrier on May 29, 2008, addressed as listed below.

I also certify that I have filed and served a digital copy of the Brief via e-mail as required by Interim Local Rule 25, effective Tuesday, May 27, 2008.

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CERTIFICATE OF ANTI-VIRUS SCANNING

Pursuant to Second Circuit Interim Local Rule 25(a)(6)

CASE NAME: *Hankins v. The New York Annual Conference of the United Methodist Church, et al.*

DOCKET NUMBER: 07-4556

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Date: May 29, 2008