IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1171

YOLANDA G. MIÑAGORRI,

PETITIONER,

VS.

ARCHDIOCESE OF MIAMI, INC.,

RESPONDENT.

ANSWER BRIEF OF ARCHDIOCESE OF MIAMI

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

ROBERTO J. DIAZ, ESQ.
MAURA FITZGERALD JENNINGS, ESQ.
J. PATRICK FITZGERALD &
ASSOCIATES, P.A.
110 MERRICK WAY, SUITE 3-B
CORAL GABLES, FL 33134
305-443-9162

LAW OFFICE OF ROBERT S. GLAZIER
540 BRICKELL KEY DRIVE
SUITE C-1
MIAMI, FL 33131
305-372-5900
GLAZIER@FLA-LAW.COM

TABLE OF CONTENTS

Table of Authorities iii

Introduction 1

Statement of the Case and Facts 1

Summary of the Argument 6

Argument 7

I. THE DISTRICT COURT PROPERLY HELD THAT THE CHURCH AUTONOMY DOCTRINE BARS A MINISTERIAL EMPLOYEE'S WHISTLEBLOWER CLAIM AGAINST HER FORMER RELIGIOUS EMPLOYER, AND PROPERLY REJECTED THE PLAINTIFF'S REQUEST THAT THE RELIGIOUS INSTITUTION BE REQUIRED TO STATE THE REASON FOR HER TERMINATION 7

A. The well-established doctrine of church autonomy 7

B. The doctrine of church autonomy applies in this type of lawsuit, which is a dispute between a religious school principal and her former religious school, and where the principal alleges that she was terminated in violation of a state whistleblower statute 11

C. A religious institution is not required to state a religious basis for its employment decision before the church autonomy doctrine applies to bar a minister's lawsuit against the religious institution 14

D. The Plaintiff's authorities do not support her position 18

II. THE PLAINTIFF'S ARGUMENT THAT A TRIAL COURT'S IMPROPER EXERCISE OF JURISDICTION OVER A DISPUTE BETWEEN A MINISTER AND CHURCH MAY NOT BE REVIEWED BY PROHIBITION WAS NOT PROPERLY PRESERVED; IS CONTRARY TO ABUNDANT FLORIDA CASE LAW AND THE WEIGHT OF AUTHORITY ACROSS THE COUNTRY; AND WOULD NOT CHANGE THE RESULT, SINCE THE ISSUE IS REVIEWABLE BY CERTIORARI 21

III. THE PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES SHOULD BE DENIED 25

IV. BECAUSE THERE IS NO UNSETTLED ISSUE FOR THE COURT TO RESOLVE, THE COURT SHOULD CONCLUDE THAT DISCRETIONARY REVIEW WAS IMPROVIDENTLY GRANTED 26

Conclusion 27

Certificate of Service and Compliance 28

TABLE OF AUTHORITIES

Alicea-Hernandez v. Catholic Bishop of Chicago,
320 F. 3d 698 (7th Cir. 2003) 12, 15

Allstate Insurance Co. v. Barnes Family Chiropractic,
875 So. 2d 14 (Fla. 5th DCA 2004) 26

Anderson v. Watchtower Bible and Tract Society,
2007 WL 161035 (Tenn. Ct. App. Jan. 19, 2007) 19

Archdiocese of Miami v. Miñagorri,
954 So. 2d 640 (Fla. 3d DCA 2007) .... *passim*

Belair v. Drew,
770 So. 2d 1164 (Fla. 2000) 24

Blinn v. Florida Department of Transportation,
781 So. 2d 1103 (Fla. 1st DCA 2000) 22

Central Florida Regional Hospital v. Hill,
721 So. 2d 404 (Fla. 5th DCA 1998) 25

Combs v. Central Texas Annual Conference,
173 F.3d 343 (5th Cir. 1999) 26

Corporation of the Presiding Bishop v. Amos,
483 U.S. 327 (1987) 8

Corbo v. Garcia,
949 So. 2d 366 (Fla. 2d DA 2007) 25

Doe v. Evans,
814 So. 2d 370 (Fla. 2002) 5

EEOC v. Catholic University,
83 F.3d 455 (D.C. Cir. 1996) 12

EEOC v. Roman Catholic Diocese,
213 F.3d 795 (4th Cir. 2000) 12, 15

Epperson v. Myers,
58 So. 2d 150 (Fla. 1952) 9, 22-23

Fassy v. Crowley,
884 So. 2d 359 (Fla. 2d DCA 2004) 25

Fontana v. Diocese of Yakima,
157 P.3d 443 (Wash. App. 2007) 12

Forrester v. Phipps,
643 So. 2d 1109 (Fla. 1st DCA 1994) 4

Gabriel v. Immanuel Evangelical Lutheran Church, Inc.,
640 NE 2d 681 (Ill. App. Ct. 1994) 16-17

Gellington v. Christian Methodist Episcopal Church,
203 F.3d 1299 (11th Cir. 2000) 13, 17

Goldfarb v. Urciuoli,
858 So. 2d 397 (Fla. 1st DCA 2003) 25

Gonzalez v. Roman Catholic Archbishop of Manilla,
280 U.S. 1 (1929) 8

Goodman v. Temple Shir Ami, Inc.,
712 So. 2d 775 (Fla. 3d DCA 1998) 10

Goodman v. Temple Shir Ami, Inc.,
737 So. 2d 1077 (Fla. 1999) 10

Horine v. Vineyard Community Church,
2006 WL 3690309 (Ohio Ct. App. Dec. 15, 2006) 13

House of God v. White,
792 So. 2d 491 (Fla. 4th DCA 2001) 23

James v. Wash Depot Holdings,
489 F. Supp. 2d 1336 (Fla. S.D. Fla. 2007) 26

Jaworski v. State,
804 So. 2d 415 (Fla. 4th DCA 2001) 22

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,
344 U.S. 94 (1952) 8

Lemon v. Kurtzman,
403 U.S. 602 (1971) 12-13

Leslie Bros. v. Roope,
148 So. 212 (Fla. 1933) 22

Malichi v. Archdiocese of Miami,
945 So. 2d 526 (Fla. 1st DCA 2006) 10, 20-21, 23

Malicki v. Doe,
814 So. 2d 347 (Fla. 2002) 5, 20-21

McClure v. Salvation Army,
460 F. 2d 553 (5th Cir. 1972) 9

McKelvey v. Pierce,
800 A.2d 840 (N.J. 2002) 19

McCreary v. Florida Residential Property and Casualty Joint Underwriting Ass'n,
758 So. 2d 692 (Fla. 4th DCA 2000) 25

Minker v. Baltimore Annual Conference,
894 F.2d 1354 (D.C. Cir. 1990) 17

Natal v. Christian & Missionary Alliance,
878 F.2d 1575 (1st Cir. 1989) 17

Nelson v. Selden Cypress Door Co.,
83 So. 286 (Fla. 1919) 22

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc,
477 U.S. 619 (1986) 17-18

Pardue v. Center City Consortium Schools of the Archdiocese of Washington,
875 A.2d 669 (D.C. App. 2005) 12, 24

Patton v. Jones,
212 S.W.3d 541 (Tex. Ct. App. 2006) 12, 16

Petruska v. Gannon University,
462 F.3d 294 (3rd Cir. 2006) 17

Rayburn v. General Conference of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 9, 12

Reichenberg v. Davis,
846 So. 2d 1233 (Fla. 5th DCA 2003) 25

Ruiz v. Aerorep Group,
941 So. 2d 505 (Fla. 3d DCA 2006) 4

Scharon v. St. Luke's Episcopal Presbyterian Hospitals,
929 F.2d 360 (8th Cir. 1991) 9, 17

Schmoll v. Chapman University,
83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999) 16

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 8

Southeastern Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis,
862 So. 2d 842 (Fla. 4th DCA 2003) 10, 23

Starkman v. Evans,
198 F.3d 173 (5th Cir. 1999) 12, 13

State v. Young,
33 Fla. L. Weekly D51 (Fla. 1st DCA Dec. 26, 2007) 21, 23

Tomic v. Catholic Diocese,
442 F.3d 1036 (7th Cir. 2006) 17

Tucker v. Resha,
648 So. 2d 1187 (Fla. 1994) 24

Van Osdol v. Vogt,
908 P.2d 1122 (Colo. 1996) 13, 17-19

Watson v. Jones,
80 U.S. 679 (1871) 23

Werft v. Desert Southwest Annual Conference,
377 F.3d 1099 (9th Cir. 2004) 14-15

Westbrook v. Penley,
231 S.W.3d 389 (Tex. 2007) 24

Young v. Northern Illinois Conference of United Methodist Church,
21 F.3d 184 (7th Cir. 1994) 9

Statutes and Rules

Fla. R. App. P. 9.400 25

Fla. Stat. § 448.101 4

Fla. Stat. § 448.102 4

Fla. Stat. § 448.104 25-26

Other authorities cited

Annot., *Construction and Application of Church Autonomy Doctrine*,
123 A.L.R.5th 385 (2004) 11

Annot., *Judicial Review of Termination of Pastor's Employment by Local Church or Temple*, 31 A.L.R.4th 851 (1984) 11

D. Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*,
81 NOTRE DAME L. REV. 1793 (2006) 8

M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*,
44 WM. & MARY L. REV. 2105 (2003) 8

INTRODUCTION

This appeal involves a religious employee's whistleblower claim against the church which employed her. Under well-accepted legal principles, the civil courts may not resolve this type of dispute. The district court concluded that the claim must be dismissed, and the employee has stated no to basis overturn this decision.

STATEMENT OF THE CASE AND FACTS

Plaintiff Yolanda Miñagorri was employed by St. Kevin Catholic School from August 1998 through February 2006. (R. 18). She served as the school's principal. (R. 18).

THE PLAINTIFF SERVED AS CLERGY AT THE RELIGIOUS SCHOOL

As its name suggests, St. Kevin is a Catholic school. (R. 27) It is part of the Archdiocese of Miami. (R. 18). The Plaintiff's job was clearly religious in nature. A church handbook stated that the principal of a Catholic school "sets the tone, creates the atmosphere, nourishes the spirit, and enables the faith dimensions of the school to flourish." (R. 38-39). The employment agreement between the Plaintiff and the school stated that the Plaintiff agreed to "ensure an environment which fosters a Catholic educational community which, in turn, supports the parishes to which the students belong." (R. 25). She agreed to "professionally administer a program of education that is thoroughly Catholic." (R. 25). According to an

affidavit submitted by the Archdiocese, the Plaintiff "occupied a position of religious leadership entrusted with the formation of a Catholic educational community." (R. 39).

It was thus understandable and proper that in the trial court, the Plaintiff's counsel stated, "I'm going to stipulate, and I told him, for purposes of his argument the principal may be deemed a member of the clergy. . . . I'll stipulate to that, because that's what the case law holds." (R. 82-83).

THE CLAIMED INCIDENTS GIVING RISE TO THE LAWSUIT

We are here on a ruling on a motion for summary judgment. While the Archdiocese does not agree with the facts as alleged by the Plaintiff, we accept them as true for present purposes.

The Plaintiff alleges that on August 19, 2005, she was attacked by the pastor in charge of the school, her direct supervisor, Father Jesus Saldaña. (R. 19). She claims that Father Saldaña "physically assaulted and battered" her. (R. 19). She said that Father Saldaña "intentionally battered [her] by intentionally touching, grabbing, inflicting a harmful and offensive contact, against her will." (R. 18-19).

The Plaintiff alleges that after the incident on August 19, 2005, she "opposed his acts and was constantly harassed by Father Saldaña." (R. 62). She stated that working conditions became intolerable. (R. 62). She claims that the Archdiocese retaliated against her. (R. 20). Six months later, she quit the position:

"On February 14, 2006, I resigned, under protest, a constructive termination." (R. 62).

THE LAWSUIT

The Plaintiff then filed a lawsuit against the Archdiocese. (R. 17-22). Father Saldaña—her supervisor, who she alleged had assaulted her—was *not* sued.

The operative complaint contained four counts. Three of the counts were for assault and battery, negligent hiring and retention, and breach of contract. (R. 17-22). ***These counts are not at issue in this appeal***.

The remaining count was for retaliation under Florida's Whistleblower Act. § 448.102, Fla. Stat. In this count, the Plaintiff alleged that she was retaliated against and/or constructively terminated because of her objections to Father Saldaña's conduct. (R. 19-20). Under this claim, she sought various types of relief, including "front wages" and reinstatement to her position. (R. 21).

Along with its answer, the Archdiocese stated as an affirmative defense its position that the court lacked subject matter jurisdiction over the whistleblower claim. (R. 117). The Archdiocese later filed a motion for summary judgment in which it argued that the constitutional guarantees of religious freedom prevented the courts from exercising jurisdiction over the whistleblower claim. (R. 27).

The trial judge, it is fair to say, was unconvinced by the Archdiocese's constitutional argument. A few moments into the hearing, before the Archdiocese's

attorney began his argument, the judge said, "Do you need me to go further?" (R. 73). The lawyer responded, "I'd like the argument for the record, if you could." (R. 73). The judge responded, "Make your argument for the record. As soon as I deny it I'm sending you to mediation." (R. 73). The trial judge entered an order denying the motion for summary judgment to the extent that it argued that the court lacked subject-matter jurisdiction over the whistleblower claim. (R. 16).[1]

The Archdiocese filed a Petition for Writ of Prohibition in the Third District Court of Appeal. (R. 1). The court eventually held that "ecclesiastical abstention" applied to prevent courts from exercising jurisdiction over the claim under the Florida Whistleblower's Act. *Archdiocese of Miami v. Miñagorri*, 954 So. 2d 640 (Fla. 3d DCA 2007). The Third District's opinion cited to abundant authority from Florida and across the country holding that courts may not exercise subject-matter

---

[1]The trial court did not rule on the Archdiocese's defense that on the merits the Plaintiff's Whistleblower claim is fatally flawed. The Act provides that an employer may not take retaliatory action against an employee because the employee objected to something "in violation of a law, rule, or regulation," which is defined as a law "applicable to the employer and pertaining to the business." §§ 448.102(3), 448.101(4), Fla. Stat. Here, where the Plaintiff alleged that she was discharged for complaining about her supervisor's alleged assault and battery, we argued that the statutory requirements were not satisfied. *See Ruiz v. Aerorep Group*, 941 So. 2d 505, 507 (Fla. 3d DCA 2006) (whistleblower claim premised upon reporting of supervisor's battery not actionable); *Forrester v. Phipps*, 643 So. 2d 1109, 1111-12 (Fla. 1st DCA 1994). The district court noted this issue, but did not rule on it. *Archdiocese v. Miñagorri*, 954 So. 2d 640, 644 n.1 (Fla. 3d DCA 2007).

jurisdiction over wrongful discharge claims brought by those who had performed ministerial functions. (R. 165-173).

The Plaintiff filed a motion for rehearing in the district court, in which she argued for the first time that the trial court's ruling was not reviewable by prohibition. (R. 131). The district court denied the motion for rehearing. (R. 174).

The Plaintiff sought discretionary review in this Court on the basis that the decision of the district court expressly construed a provision of the federal constitution, and that the decision of the district court expressly and directly conflicts with this Court's decisions in *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002), and *Doe v. Evans*, 814 So. 2d 370 (Fla. 2002). This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The district court properly held that the civil courts cannot exercise jurisdiction over the Plaintiff's whistleblower claim.

There is overwhelming authority holding that the courts may not resolve claims brought against religious organizations by ministerial employees. These cases include lawsuits brought by religious school principals, and also include whistleblower and retaliation claims.

The Plaintiff's argument that her whistleblower claim should not be barred unless the religious employer states a non-religious basis for the employment action has repeatedly been rejected by the courts, and should be rejected here. A religious institution has no responsibility to tell a civil court the reason why it terminated a ministerial employee.

The district court did not err in utilizing a petition for writ of prohibition to review the trial court's order. Florida courts have often reviewed similar orders by prohibition. In any event, the order will be reviewable by certiorari, so no basis for reversal has been shown. Also, the Plaintiff did not adequately preserve the issue.

The Plaintiff's motion for fees is both procedurally and substantively incorrect.

The Court should conclude that review was improvidently granted, as there is no substantial, unresolved issue for the Court to decide.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE CHURCH AUTONOMY DOCTRINE BARS A MINISTERIAL EMPLOYEE'S WHISTLEBLOWER CLAIM AGAINST HER FORMER RELIGIOUS EMPLOYER, AND PROPERLY REJECTED THE PLAINTIFF'S REQUEST THAT THE RELIGIOUS INSTITUTION BE REQUIRED TO STATE THE REASON FOR HER TERMINATION

The courts of Florida, and other jurisdictions, have consistently held that the courts may not exercise jurisdiction over lawsuits (including whistleblower claims) by discharged ministers against their former religious employers. Here, the Plaintiff attempts to avoid this settled principle by claiming that the courts may exercise jurisdiction as long as the religious institution has not stated a religious basis for the employment decision. But the law is equally settled that a church may not be required to state why it terminated a ministerial employee. This is an area in which the First Amendment forbids courts to tread. The district court's decision was entirely correct, and there is no basis for reversing it.

A. The well-established doctrine of church autonomy

Courts have long held that they must tread lightly when asked to become involved in the relationship between a religious institution and its clergy.

In a long line of cases, the United States Supreme Court has made clear that it is the function of church authorities to decide the internal affairs of churches. As early as 1929 the United States Supreme Court held that it is the function of church authorities to determine the essential qualifications of ministerial employees, as

well as whether a candidate possesses them. *Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1, 16 (1929). More recently, the Supreme Court stated that "[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). *See Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 696 (1976).[2]

Following these Supreme Court decisions, courts have in recent years been careful to avoid deciding cases which may have the effect of second-guessing the qualification of clergy. A leading and frequently-quoted case explains: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *McLure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

---

[2]The concern over government regulation of the appointment of ministers predates the founding of our country. *See* M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2138 (2003) (reviewing history, and noting that the "power to appoint and remove ministers is the power to control the church."); D. Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006). *See also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (statutory exemption of religious organizations from Title VII does not violate Establishment Clause).

One court flatly stated that "personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts." *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360, 363 (8th Cir. 1991). Another court agreed that "civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (emphasis in original).

Applying this principle that courts will not review the qualifications of clergy, courts will refuse to consider a clergy member's claim that he or she was fired, even if the person claims that the firing was in violation of federal civil rights laws. *McLure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

Florida courts have followed these principles. In *Epperson v. Myers*, 58 So. 2d 150, 151-52 (Fla. 1952), this Court noted the rule that "the matter of calling a pastor . . . is purely ecclesiastical, that the jurisdiction of the church court as to such matters is final and that the civil courts have consistently declined to assume jurisdiction of them."

In recent years, the district courts of appeal have consistently rejected lawsuits by ministerial employees against their churches or former churches. In one case, the Third District refused to exercise jurisdiction over a rabbi's defamation and breach of contract lawsuit against his former synagogue. *Goodman v. Temple Shir Ami*, 712 So. 2d 775 (Fla. 3d DCA 1998). This Court granted review and heard oral argument, but then concluded that review had been improvidently granted. 737 So. 2d 1077 (Fla. 1999).

In another case, a minister sued his church over the church's handling of allegations against the minister, which resulted in the minister's suspension. *Southeastern Conference Ass'n of Seventh-Day Adventists v. Dennis*, 862 So. 2d 842 (Fla. 4th DCA 2003). The Fourth District held that the courts could not exercise jurisdiction over this dispute between clergy and church: "Courts may not consider employment disputes between a religious organization and its clergy because such matters necessarily involve questions of internal church discipline, faith, and organization that are governed by ecclesiastical rule, custom, and law." *Id.* at 844. *See also Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. 1st DCA 2007).

The doctrine at issue in this appeal is referred to by a variety of names. Sometimes it is referred to as the doctrine of "church autonomy," recognizing the

core constitutional principle, which derives from both the Free Exercise and Establishment Clauses. We will generally use this term.

Other times the doctrine is referred to as "ecclesiastical abstention," in reference to the action that courts take in response to the constitutional principle. In some cases, the doctrine is referred to as the "ministerial exception," which refers to the fact that clergy employment decisions are, by the doctrine, excepted from review under the federal civil rights laws.

Whatever the name, this doctrine is frequently and without controversy applied to bar the courts from deciding employment disputes between clergy and religious institutions. *See* Annot., *Construction and Application of Church Autonomy Doctrine*, 123 A.L.R.5TH 385 (2004); Annot., *Judicial Review of Termination of Pastor's Employment by Local Church or Temple*, 31 A.L.R.4TH 851 (1984).

B. The doctrine of church autonomy applies in this type of lawsuit, which is a dispute between a religious school principal and her former religious school, and where the principal alleges that she was terminated in violation of a state whistleblower statute

The church autonomy doctrine applies with full force in a case such as this case—a religious school principal suing under a state whistleblower statute.

The courts have stressed that the church autonomy doctrine applies to all those who perform ministerial functions, regardless of whether the person is

deemed to be a priest, minister, or rabbi. "Our inquiry . . . focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *EEOC v. Roman Catholic Diocese,* 213 F.3d 795, 801 (4th Cir. 2000). The general rule is that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). *See also Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999); *EEOC v. Catholic University*, 83 F.3d 455, 463 (D.C. Cir. 1996); *Fontana v. Diocese of Yakima*, 157 P.3d 443,446 (Wash. App. 2007); *Patton v. Jones*, 212 S.W.3d 541, 549-51 (Tex. Ct. App. 2006); *Pardue v. Center City Consortium Schools*, 875 A.2d 669, 675 (D.C. Ct. App. 2005).

There is no doubt that Plaintiff Miñagorri is deemed to be a minister for purposes of the church autonomy doctrine. The evidence demonstrates it, she has stipulated to it, and the law supports the stipulation. (R. 38-39, 25, 82-83). *See Pardue v. Center City Consortium Schools*, 875 A.2d 669, 675-77 (D.C. Ct. App. 2005) (holding that Catholic school principal is minister for purposes of church autonomy doctrine). *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971) (noting

that parochial schools constitute "an integral part of the religious mission of the Catholic Church.").

There is also no doubt that the church autonomy doctrine applies with full-force when a ministerial employee claims that he or she was constructively terminated out of retaliation (that is, because of "whistleblowing"). For example, where a church's director of music claimed that her termination was in violation of a state retaliatory discharge statute, the court held that the claim was barred by the church autonomy doctrine. *Starkman v. Evans,* 198 F.3d 173 (5th Cir. 1999). *See also Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000) (court bars minister's claim that he was retaliated against and constructively discharged because he assisted another minister in complaining about sexual harassment); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) (court bars minister's claim that she was fired in retaliation for complaint about sexual abuse); *Horine v. Vineyard Community Church*, 2006 WL 3690309 (Ohio Ct. App. Dec. 15, 2006) (court bars ministers' claim that they were retaliated against because they opposed what they believed to be an unlawful discriminatory practice).

The Plaintiff's claim here—a religious school principal who alleges that she was constructively terminated because of her complaints about improper conduct—is thus fully within the scope of the church autonomy doctrine.

C. A religious institution is not required to state a religious basis for its employment decision before the church autonomy doctrine applies to bar a minister's lawsuit against the religious institution

Plaintiff Miñagorri acknowledges that she is a ministerial employee, and acknowledges that lawsuits brought by discharged ministerial employees against religious organizations may be barred by the church autonomy doctrine. (R. 102). Yet she argues that her lawsuit should not be barred because the Archdiocese of Miami has not stated a religious reason for her (constructive) termination. She explains:

> In the instant case the Archdiocese has not claimed that its actions were motivated or even effected by sincerely held religious beliefs or practices. Therefore, . . . the Free Exercise Clause is not implicated in the instant case because the conduct sought to be regulated is not rooted in religious belief.
>
> . . . .
>
> As the Archdiocese has offered no religious-based justification for its actions and has pointed to no internal governance rights that would actually be affected by the Employee's claim, the claim should proceed until such time as the Archdiocese can show how the First Amendment would be invoked in this case.

(Initial brief, at 10,17). This argument—that the church autonomy doctrine does not apply to bar a discharged minister's lawsuit unless the religious institution states a religious basis for its employment decision—is the heart of the Plaintiff's argument. And it is, we respectfully submit, essentially without legal support.

The principle that is uniformly followed is that a clergy employment decision is protected, without regard to the reasons for the decision. "[I]t is the

decision itself which is exempt—the courts may not even look into the reasoning." *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1102-03 (9th Cir. 2004). The court added:

> If allowed to proceed, ***the Church would necessarily be required to provide a religious justification*** for its failure to accommodate [the minister's disability] ***and this is an area into which the First Amendment forbids us to tread***.

Id. at 1103 (emphases added). Another federal appellate court explained that in a lawsuit between a minister and a church, no inquiry is permitted into the church's reasons for terminating the minister:

> Though its range of application is limited to spiritual functions, the ministerial exception to Title VII is robust where it applies. This protection is in keeping with the "spirit of freedom for religious organizations [and] independence from secular control or manipulation" reflected in the Supreme Court's free exercise jurisprudence. ***The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision***, for the Free Exercise Clause "protects the act of a decision rather than a motivation behind it."

EEOC v. Roman Catholic Diocese, 213 F.3d 795, 801 (4th Cir. 2000) (citations omitted, emphasis added). Yet another federal court, after quoting this passage, added that it was not the court's role to determine "whether the Church had a secular or religious reason" for the alleged mistreatment of a minister. *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 703 (7th Cir. 2003).

The Fifth Circuit stated that it "cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church." *Combs v. Central Texas Annual Conference*, 173 F.3d 343, 350 (5th Cir. 1999).

State courts have reached the same conclusion. A California court explained:

> It matters not whether such an employment decision is based on doctrine or economics. It is irrelevant whether the action involves hiring, firing or discipline or simply changes the terms and conditions of the employment. ***The rule is about as absolute as a rule of law can be: The First Amendment guarantees to a religious institution the right to decide matters affecting its ministers' employment, free from the scrutiny and second-guessing of the civil courts.***

Schmoll v. Chapman University, 83 Cal. Rptr. 2d 426, 427 (Cal. Ct. App. 1999) (emphasis added). The court added that it is "a hard-and-fast rule of law which applies regardless of the employer's motivation." *Id*. at 430. A Texas court agreed:

> [I]f the claim challenges a religious institution's employment decision, the sole jurisdictional inquiry is whether the employee is a member of the clergy or otherwise serves a "ministerial" function. . . . ***If the employee is a minister, then the "ministerial exception" applies, preventing secular review of the employment decision without further question as to whether the claims are ecclesiastical in nature.***

Patton v. Jones, 212 S.W.3d 541, 548 (Tex. App. 2006) (emphasis added). *See also Gabriel v. Immanuel Evangelical Lutheran Church*, 640 N.E.2d 681, 684 (Ill. App. 1994) ("It also does not matter that subjective employment-related decisions

involve no religious beliefs. . . . The factors relied upon by the church need not be independently ecclesiastical in nature; they need only be related to a pastoral appointment determination.").[3]

Courts have noted that it is not possible to evaluate only secular issues concerning the selection of a minister. A "church's decision of who to hire as a minister necessarily involves religious doctrine. The decision may involve non-religious reasons as well, but those reasons cannot be separated from the basic belief that a particular person embodies or does not embody the religious beliefs of the church." *Van Osdol v. Vogt*, 908 P.2d 1122, 1128 (Colo. 1996). The process of attempting to separate arguably impermissible discriminatory grounds for a decision from grounds stemming from church beliefs would itself excessively entangle a court with religion. *Id*. Plaintiffs have sometimes argued that the courts should attempt to determine whether stated religious reasons for a minister's termination are pretextual, but courts have held that they have no business determining whether a church's stated beliefs are pretext. *See, e.g., Scharon v. St. Luke's Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991).

[3]*See also Petruska v. Gannon University*, 462 F.3d 294, 306-07 (3rd Cir. 2006); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1038 (7th Cir. 2006); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989).

The courts have thus agreed: if the employee is a minister, then the minister's lawsuit against the religious institution arising from the employment relationship is barred. This is so without regard for the church's stated or unstated reason for the termination.

D. The Plaintiff's authorities do not support her position

Against this overwhelming authority, what does the Plaintiff rely upon to support her argument that her whistleblower claim against her former church employer can proceed? What is the legal support for her assertion that "the Free Exercise Clause is not implicated in the instant case because the conduct sought to be regulated is not rooted in religious belief"? (Initial brief, at 19).

The Plaintiff relies on dicta in three cases. None of the cases involved a minister's lawsuit against his or her church, and none support her argument that the courts can entertain a discharged minister's employment-related lawsuit against a church.

Lawsuit brought by non-ministerial employee: The Plaintiff relies on *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), which involved a lawsuit against a church brought by a *non*-ministerial employee, a teacher. The authority thus has little if any relevance to a case—such as this one—brought by a ministerial employee. Indeed, the authority has previously been relied upon by ministers suing churches, but courts have found it inapposite. *See Van*

Osdol v. Vogt, 908 P.2d 1122, 1129 (Colo. 1996) (*Dayton Christian Schools* "does not support her position because it involves a teacher and a parochial school, not a minister and a church."); *Anderson v. Watchtower Bible and Tract Society*, 2007 WL 161035 (Tenn. Ct. App. Jan. 19, 2007). Furthermore, the holding in *Dayton Christian* did not involve church autonomy; instead, it involved the authority of federal courts to enjoin a state court administrative proceeding.

Lawsuit brought by seminarian arising from unwanted sexual advances: The Plaintiff relies on *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002), but that case likewise did not involve a minister's lawsuit against a church. It was, rather, a seminarian's lawsuit against a diocese and several ministers. The plaintiff claimed that, while in seminary training, he was subjected to unwanted sexual advances, and was forced to drop out of school. In allowing the lawsuit to proceed, the court noted that that "[n]o choice regarding [the plaintiff's] ordination or employment was exercised by the Diocese." *Id.* at 857-58. The court acknowledged the rule that applies in the present case: "where a minister seeks redress for termination, failure to hire, changes in work schedule, or other similar decisions involving, at their heart, a church's core right to decide who (and in what manner he or she) may propagate its religious beliefs, the Establishment Clause clearly prevents review by a civil court." *Id*. at 849.

Third-party sex abuse case against church: Finally, the Plaintiff relies on *Malicki v. Doe*, 814 So. 2d 347 (2002). This case addressed whether the principle of church autonomy extends to protect religious institutions from sex abuse claims brought by third parties, arising from the religious institution's selection of clergy. After reviewing the conflicting case law across the country, the Court concluded that "the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy." *Id*. at 351.

It is important to note that *Malicki* addressed a question at the outer reaches of the church autonomy doctrine—whether claims by third parties against the religious institution are barred. But the Court was careful to explain that disputes between ministers and their churches are different. "Intrachurch disputes . . . must be distinguished from disputes between churches and third parties." *Id*. at 356. "[T]his is not an internal church matter. Rather, this is a dispute between church officials and two parishioners who allege that they were injured as a result of the negligence of the church officials." *Id*. at 360. The court was careful to limit its holding to such claims. *Id.* at 365. Following *Malicki*, Florida courts have noted that the holding does not apply to claims brought by ministers against their churches. *Malichi v. Archdiocese of Miami*, 945 So. 2d 526, 532 (Fla. 1st DCA

2007); *State v. Young*, 35 Fla. L. Weekly D51 (Fla. 1st DCA Dec. 26, 2007); *Archdiocese of Miami v. Miñagorri*, 954 So. 2d 640, 641 n.1 (Fla. 3d DCA 2007).

❦ ❦ ❦ ❦

The Plaintiff's authorities thus do not support her position, as they do not involve claims such as the one in this case: a lawsuit by a discharged ministerial employee against her former religious employer. Under these circumstances, the courts must decline to exercise jurisdiction. This is true regardless of the religious institution's reason for the termination. The district court decision, following overwhelming authority, should be affirmed.

II. THE PLAINTIFF'S ARGUMENT THAT A TRIAL COURT'S IMPROPER EXERCISE OF JURISDICTION OVER A DISPUTE BETWEEN A MINISTER AND CHURCH MAY NOT BE REVIEWED BY PROHIBITION WAS NOT PROPERLY PRESERVED; IS CONTRARY TO ABUNDANT FLORIDA CASE LAW AND THE WEIGHT OF AUTHORITY ACROSS THE COUNTRY; AND WOULD NOT CHANGE THE RESULT, SINCE THE ISSUE IS REVIEWABLE BY CERTIORARI

The Plaintiff argues that the district court erred when it reviewed the trial court ruling by a petition for writ of prohibition. According to the Plaintiff, a ruling on ecclesiastical abstention does not go to the jurisdiction of the court, and thus is not reviewable by prohibition.[4]

There are many flaws in this argument.

---

[4] While the Plaintiff complains of the use of a writ of prohibition, the district court did not actually issue a writ. Instead, it stated that it would "grant relief but withhold our writ on the assumption that the court below will comply with this opinion." *Archdiocese of Miami v. Miñagorri*, 954 So. 2d at 641.

Argument not properly presented to the district court. In responding to the Petition for Writ of Prohibition in the district court, the Plaintiff did not argue that the trial court's ruling was not reviewable by prohibition. Instead, she argued the merits of the issue. She first raised the question of whether the issue was reviewable by prohibition *after* the district court had issued its decision, in its motion for rehearing. District courts will generally not consider arguments made for the first time on rehearing. The issue is deemed waived. *Jaworski v. State*, 804 So. 2d 415 (Fla. 4th DCA 2001); *Blinn v. Florida Department of Transportation,* 781 So. 2d 1103 (Fla. 1st DCA 2000). This Court follows a similar principle—if the point was not raised in a brief, it may not be raised on rehearing. *Leslie Bros. v. Roope*, 148 So. 212 (Fla. 1933): *Nelson v. Selden Cypress Door Co.*, 83 So. 286 (Fla. 1919). The Plaintiff thus waived its argument that prohibition is not available for review of the order.

Argument would require the overruling of unchallenged Florida case law. Florida courts have consistently held that issues involving the constitutional right of church autonomy go to the subject-matter jurisdiction of the court. This Court long ago stated that "the matter of calling a pastor . . . is purely ecclesiastical, that the jurisdiction of the church court as to such matters is final and that the civil courts have consistently declined to assume jurisdiction of them." *Epperson v. Myers*, 58 So. 2d 150, 151-52 (Fla. 1952). *Accord State v. Young*, 33 Fla. L.

Weekly D51 (Fla. 1st DCA Dec. 26, 2007); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. 1st DCA 2006). Following this principle, Florida courts have often used prohibition to review trial court orders on church autonomy. *See Archdiocese of Miami v. Miñagorri*, 954 So. 2d 640, 641 (Fla. 3d DCA 2007); *Southeastern Conference of Seventh-Day Adventists v. Dennis*, 862 So. 2d 842 (Fla. 4th DCA 2003); *House of God v. White*, 792 So. 2d 491 (Fla. 4th DCA 2001). No Florida court has reached a different conclusion.

Argument is contrary to the weight of authority across the country. While a few federal courts of appeal have suggested that a church autonomy ruling does not involve the jurisdiction of the court, this is a distinctly minority view.

More than 125 years ago, the United States Supreme Court stated that an ecclesiastical dispute is "a matter over which the civil courts exercise no jurisdiction." *Watson v. Jones*, 80 U.S. 679, 733 (1871). Since then, most federal and state courts have agreed with the Florida courts that the question goes to subject-matter jurisdiction. The Texas Supreme Court recently explained that there is some disagreement as to the precise legal operation of the prohibition of courts adjudicating religious questions. "A few courts conceptualize the general prohibition as a question of justiciability. Some treat the matter as an affirmative defense to liability. But the majority of courts broadly conceptualize the prohibition as a subject-matter bar to jurisdiction." *Westbrook v. Penley*, 231

S.W.3d 389, 394 n.3 (Tex. 2007) (citations omitted, collecting cases). *See also Pardue v. Center City Consortium Schools*, 875 A.2d 669, 674-75 (D.C. 2005). In treating church autonomy as going to subject-matter jurisdiction, Florida thus follows the majority position.

Argument would not change the result, since the trial court ruling would still be reviewable by certiorari. Even if the Court were to conclude that rulings on church autonomy are not reviewable by prohibition, the orders would still be reviewable by certiorari.

There are a number of circumstances in which a party claims a constitutional right to be free from having to litigate an issue. In these circumstances, the courts have recognized that immediate review of the ruling is proper by certiorari in order to determine whether the litigation should continue. This Court approved certiorari where there is "an alleged continuing violation of constitutional rights during the trial proceedings." *Belair v. Drew*, 770 So. 2d 1164, 1167 (Fla. 2000). Having to continue with the litigation, in violation of constitutional rights, constitutes irreparable harm sufficient to justify certiorari review. *See Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994) (government officials' qualified immunity against suit). This principle even applies where the claimed right to be free of litigation derives from statute, rather than constitution, as in the case of medical malpractice presuit requirements. *See Goldfarb v. Urciuoli*, 858 So. 2d 397 (Fla. 1st DCA 2003);

Corbo v. Garcia, 949 So. 2d 366 (Fla. 2d DA 2007); *Fassy v. Crowley*, 884 So. 2d 359 (Fla. 2d DCA 2004); *Central Florida Regional Hospital v. Hill*, 721 So. 2d 404 (Fla. 5th DCA 1998).

Since the substantive issue in this case concerns the Archdiocese's constitutional right to not have the courts review its selection of ministerial employees, the issue would be reviewable by certiorari, even if it were not reviewable by prohibition.

Argument is bad law. For the reasons stated above, the argument urged by the Plaintiff is bad law. If the exercise of jurisdiction over a lawsuit against a church violates the church's constitutional rights to religious freedom, then there should be avenues for immediate appellate review of the issue.

III. THE PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES SHOULD BE DENIED

The Plaintiff's request for attorneys' fees should be denied.

First, the request is procedurally improper. A request for fees may not be made as a point on appeal in the brief. *Reichenberg v. Davis*, 846 So. 2d 1233 (Fla. 5th DCA 2003); *McCreary v. Florida Residential Property and Casualty Joint Underwriting Ass'n*, 758 So. 2d 692 (Fla. 4th DCA 2000); Fla. R. App. P. 9.400(b).

Second, under the statute a "prevailing party" may request attorney's fees. § 448.104, Fla. Stat. The Plaintiff is not a prevailing party now, and will not be at the

end of this appeal. The best relief she can hope for is a remand for further proceedings, and under this circumstance would be entitled to only a provisional award of fees. *See Allstate Insurance Co. v. Barnes Family Chiropractic*, 875 So. 2d 14 (Fla. 5th DCA 2004). Even then, an award of fees is discretionary. A court "may" award fees. *See James v. Wash Depot Holdings*, 489 F. Supp. 2d 1336 (Fla. S.D. Fla. 2007). At this early point in the litigation, there is not a record sufficient to justify exercising the discretion in favor of an award of fees.

IV. BECAUSE THERE IS NO UNSETTLED ISSUE FOR THE COURT TO RESOLVE, THE COURT SHOULD CONCLUDE THAT DISCRETIONARY REVIEW WAS IMPROVIDENTLY GRANTED

We recognize that this Court has concluded that it will exercise its discretionary jurisdiction over this case. But now, with more extensive briefing, we hope that the Court will reconsider its decision.

As we have explained, there is no substantial issue for the Court to review. The district court's decision was the application of well-established law. There is no Florida case in conflict with the district court decision. There is no significant unsettled issue for the Court to decide in this case. The Court should conclude that review was improvidently granted.

CONCLUSION

For the above-stated reasons, the Archdiocese respectfully requests that the Court declare that review was improvidently granted. If the Court addresses the merits, we respectfully request that the Court` approve the decision of the Third District Court of Appeal.

Respectfully submitted,

ROBERTO J. DIAZ, ESQ.
MAURA FITZGERALD JENNINGS, ESQ.
J. Patrick Fitzgerald & Associates
110 Merrick Way, Suite 3-B
Coral Gables, FL 33134
305-443-9162

LAW OFFICE OF ROBERT S. GLAZIER
540 Brickell Key Drive
Suite C-1
Miami, Florida 33131
(305) 372-5900
glazier@fla-law.com

By: ________________________
Roberto J. Diaz
Fla. Bar No. 84890

By: ________________________
Robert S. Glazier
Fla. Bar No. 0724289

By: ________________________
Maura Fitzgerald Jennings
Fla. Bar No. 836591

CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify that a copy of this document was served by U.S. Mail on this 14th day of February, 2008, to Gaebe Mullen Antonelli Esco & DeMatteo, 420 South Dixie Highway, Third Floor, Coral Gables, FL 33146; George T. Reeves, Esq., Davis, Schnitker, Reeves & Browning, P.A., P.O. Drawer 652, Madison, FL 32341; Eddy O. Marban, Esq., Law Offices of Eddy O. Marban, Ocean Bank Building, Suite 350, 782 N.W. LeJeune Road, Miami, FL 33126; and Andrew Joseph Decker, IV, Esq., The Decker Law Firm, P.O. Box 1288, Live Oak, FL 32064.

We hereby certify that this brief has been submitted in Times New Roman 14-point font, and in compliance with the typeface requirements of the Florida Rules of Appellate Procedure.

____