No. 05-1222

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LYNETTE M. PETRUSKA,
Plaintiff-Appellant,
v.
GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities,
Defendants-Appellees.

On Rehearing On Appeal From The United States District Court
Of The Western District Of Pennsylvania

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Defendants-Appellees*
supporting affirmance

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a 501c(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 are vitally concerned with the outcome of this case because of its potential impact on its public interest litigation and the importance of the ministerial exception to the issue of religious liberty.

SUMMARY OF THE ARGUMENT

The original panel in this case incorrectly concluded, contrary to the precedent of the Supreme Court and of other courts of appeals, that it is permissible to examine the reasons behind a religious institution's employment decisions regarding clergy before applying the ministerial exception. *Petruska v. Gannon Univ.*, 448 F.3d 615, 635 (3d Cir. 2006). The original panel also concluded that there was no tension between its approach and that of the Supreme Court and the other circuits. The original panel stated that "neither Supreme Court precedent nor the arguments advanced by our sister circuits supports a ministerial exception that applies without regard to the reason for an employment decision." *Id.* However, this brief will demonstrate that this assertion is not true. The district court was correct in applying the ministerial exception and barring the Title VII

suit. It is not permissible to look at a religious institution's motives for ministerial employment decisions.

ARGUMENT

I. THE ORIGINAL PANEL HAS MISINTERPRETED SUPREME COURT PRECEDENT TO CONCLUDE THAT UNDER TITLE VII COURTS MAY EXAMINE A RELIGIOUS ORGANIZATION'S REASONS FOR CHOOSING ITS MINISTERIAL LEADERSHIP.

The original panel used the church autonomy cases and a line of church property dispute cases to conclude that the Supreme Court would not support a ministerial exception that applies without regard to motive. *Id.* at 629. However, the case law that encompasses the ministerial exception does not allow courts to examine a religious organization's motive behind choosing its ministerial leaders. The original panel claimed to be in agreement with this precedent—it is not in agreement, but in tension, with it.

A. The Supreme Court's Church Autonomy Cases Do Not Support the Original Panel's Assertion that the Motive Behind a Ministerial Employment Decision Should Be Examined.

The Supreme Court has not dealt directly with the ministerial exception but the original panel surmised that the other circuits derived the exception from the Supreme Court's church autonomy cases. *Id.* at 628. The original panel opined that the autonomy cases do not prevent courts from examining employment motives involving ministerial leadership. *Id.* at 629. However the autonomy cases do not support this conclusion.

In *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (U.S. 1976), the Supreme Court reversed the Illinois Supreme Court ruling that reinstated a defrocked bishop. The Illinois Supreme Court had ruled that the bishop's removal was arbitrary and not in accord with the church laws and regulations. *Id.* at 698. These issues were determined by the Supreme Court to be outside a civil court's jurisdiction because sensitive issues of church doctrine needed to be examined. *Id.* at 709. The Supreme Court determined that it was the jurisdiction of the church, not the state, to interpret church laws, stating that

> [t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.

Id. at 711. *See also Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929) (refusing to overrule the archbishop's construction of ecclesiastical law). Likewise, after a Presbyterian church split, the parties brought suit to determine which body was the true church. On appeal, the Supreme Court stated that

> [w]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872).

Apparently, the original panel determined, from these autonomy cases, that a religious organization's employment motives in regard to clergy may be examined. The original panel opined that these cases stand only for allowing a religious institution to interpret its own laws free of judicial interference. *Petruska*, 448 F.3d at 628. It opined that, because Title VII is a federal statute and not a church law, the "hands off" approach evident in the autonomy cases is not applicable to the present case. *Id.* The original panel stated that only a particular kind of religious liberty is protected: "the right of a church to construe its own laws, regulations, and beliefs free of judicial interference." *Id.* at 630.

The original panel has failed to see that questions of ecclesiastical rule and custom are precisely the type of liberty at risk in the present case. The right of a religious organization to manage its own ministerial leadership personnel as it sees fit without government interference is at the heart of church autonomy. The Supreme Court has declared that questions of ecclesiastical rule are not for the courts to decide. *Milivojevich*, 426 U.S. at 710; *Watson*, 80 U.S. at 727. Chaplain Petruska's demotion is a question of ecclesiastical rule, and the Supreme Court church autonomy cases relied upon by the original panel do not support examining Gannon University's motivation for making its decision.

Contrary to the original panel's assertion, the Supreme Court does not support examining a religious institution's motivation behind its ministerial

employment decisions. The original panel's decision to examine motive is not supported by Supreme Court precedent and is contrary to the logical inference derived from such precedent.

B. The Supreme Court's Church Property Dispute Cases Do Not Support Examining the Motive Behind a Religious Organizations Ministerial Employment Decisions.

The Supreme Court property cases provide an additional body of case law from which the ministerial exception is discerned. The original panel cited the Supreme Court church property dispute cases that allegedly support its conclusion that examining the motive behind a religious employment decision is allowed. *See Petruska*, 448 F.3d at 635. The original panel determined that motivation should be investigated when applying the ministerial exception if the investigation does not require inquiry into religious doctrine. *Id.* at 631. The original panel noted that the Supreme Court has determined "that churches must adhere to laws, *like Title VII*, that are neutral and of general applicability." *Id*. at 630 (emphasis added). However, the cases the panel cited in support of this assertion do not deal with church employment or Title VII cases. Support for examining a religious institution's motivation behind an employment decision regarding a ministerial employee is not found in the aforementioned cases. *See Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696 (1976); *Maryland & Virginia Eldership of Churches of*

God v. Church of God, Inc., 396 U.S. 367 (1970); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

These cases stand for the proposition that courts cannot resolve a church property dispute that is based on matters of religious doctrine. The Court has ruled that

> [e]ven when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Because of this danger, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.

Milivojevich, 426 U.S. at 709.

For example, the original panel cited one property dispute case, *Jones v. Wolf*, brought about by a schism in the local church, as authority for its assertion that Title VII is a neutral law that applies to everyone. However, that case did not involve employment issues at all. The question before the *Wolf* Court was which faction owned the church's property. 443 U.S. at 598. The court declared that "[t]he neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606. The neutral-principles approach applies neutral principles of property law "which can be applied without 'establishing' churches to which property is

awarded." *Id.* at 599. The neutral-principles approach which the Supreme Court referred to in *dicta* is not a warrant for the original panel to examine the motives for Gannon University's decision regarding its chaplain for at least two reasons. First, *Gannon* is not a church property dispute, as are the abovementioned cases, but a dispute over whether the ministerial exception will bar Petruska's Title VII claim. *Petruska*, 448 F.3d at 620-21. The neutral-principles doctrine is one of several approaches that have been found constitutionally permissible to apply in church property dispute cases. *Wolf*, 443 U.S. at 602. Thus, the panel appears to have reached out and chosen the *Wolf* case for the sole purpose of quoting its *dicta* about church hiring disputes. However, this *dicta* proves too little. To assert that a court may use neutral principles in hiring disputes, tells us nothing about how to determine what those principles are, when they apply, nor what exceptions to them may exist. Thus, invoking the *Wolf* dicta does not really "advance the ball."

Furthermore, the *Wolf* Court's *dicta* addressed "neutral provisions of *state* law." *Id.* (emphasis added). This present case involves Title VII, a federal law. This is significant since the *Wolf* Court, in reaffirming the constitutionality of the neutral-principles approach, based its opinion on the state's "obvious and legitimate interest in the peaceful resolution of property disputes." *Id*. at 602. While the federal government also has interests in fighting discrimination, the dispute-resolution-interests of the state and the discrimination-fighting interests of

the federal government are very different. Thus, again, to state that both the neutral-principles approach to property disputes and states' interests in fighting discrimination in hiring are constitutionally permissible does not "advance the ball." How these two items are similar and how they are different, where the governing principles converge and where they diverge are all vitally important questions. Simply invoking the *Wolf dicta* does not support the original panel's claim that it can examine Gannon's motive.

Thus, just as the Supreme Court's church autonomy cases do not support the original panel's conclusions, neither do the Supreme Court's church property dispute cases.

II. THE OTHER CIRCUITS' RATIONALES BEHIND THE MINISTERIAL EXCEPTION DO NOT ALLOW THE COURT TO JUDGE THE MOTIVE BEHIND THE SELECTION OR REMOVAL OF A CHAPLAIN.

The original panel contradicted its own conclusion reached through its survey of its sister circuits' application of the ministerial exception. The original panel claimed that its sister circuits' arguments do not support applying the ministerial exception without looking at the motive behind a religious organization's ministerial employment decision. *Petruska*, 448 F.3d at 635. However, the other circuits apply the ministerial exception without regard to motive, and this Court's own prior case law is in harmony with this precedent.

The original panel acknowledged that seven federal circuit courts recognize the ministerial exception. *Id.* at 623 & n.6. As the panel explained, the Eleventh Circuit has not addressed the issue of motive. *Id.* The remaining six circuits recognize that the exception applies to a church's decision to fire a ministerial employee regardless of the motive. *Id*. at 623 & n.7. The original panel claimed that "where a church discriminates for reasons unrelated to religion . . . the Constitution does not foreclose Title VII suits." *Id.* at 620. However, this case involves a chaplain employed by a religious organization. As will be examined below, a religious organization's choice of governance in regard to its religious leaders is, in itself, a religious decision. Any attempt to look behind that decision, to the institution's reasoning for its choices, is unconstitutional. If the right of a religious institution to choose its chaplain is not a case in which the ministerial exception applies, then the original panel, for all realistic applications, has disregarded the ministerial exception altogether as the following analysis will show. Thus, although the original panel claimed its decision was not foreclosed by the precedent of the other circuits, it manifestly is.

The Fifth Circuit acknowledged the sanctity of the right of a religious organization to choose its leader in the seminal case on the ministerial exception. When a minister for the Salvation Army brought suit under Title VII for employment discrimination, the court decided that

> [t]he 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. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972). The assertions set forth by the original panel do not recognize this sacred relationship between church and clergy.

The original panel classified the rationales of the other circuits into these three categories: the government scrutiny rationale; the selection of clergy rationale; and the inquiry into religious doctrine rationale. *Petruska* 448 F.3d at 624. Contrary to the original panel's indication that the arguments advanced by its sister circuits do not foreclose examining the motive behind a religious organization's ministerial employment decision, none of the alleged rationales stand for that proposition.

A. The "Governmental Scrutiny" Rationale Expressly Prohibits the State From Examining the Motive Behind Ministerial Employment Decisions.

The original panel suggested that the "government scrutiny" rationale protects a religious institution from *excessive* government scrutiny but allows the government, in an employment discrimination case, to ask whether a sincerely held

religious belief motivated the institution's actions. *Id.* at 632. However, the circuits identified by the original panel that employ the "government scrutiny" rationale, do not support looking at the motivation behind a religious institution's ministerial employment decision. The original panel cited *Rayburn v. General Counsel of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) and *Scharon v. Saint Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) as examples of cases from "government scrutiny" rationale circuits. *Petruska*, 448 F.3d at 624 & nn.10, 11. However, these cases foreclose *any* level of government scrutiny when a religious leader is involved.

In *Rayburn*, a female minister applied for a pastoral position and sued when the church did not hire her. 772 F.2d at 1166-68. She claimed it discriminated against her because she was a woman and because of her association with minorities. *Id.* The court ruled that although Title VII did apply to religious institutions, a church's freedom to choose its religious leaders was so important that the ministerial exception would bar the claim. *Id*.

In *Scharon*, a female chaplain of a religious hospital was fired, so she sued for discrimination under the Age Discrimination in Employment Act (ADEA) and Title VII. The hospital stated that it believed she broke a number of church laws. 929 F.2d at 363. The Eighth Circuit dismissed the claim without examining the motivation of the religious institution because allowing the litigation would

involve the state in religious matters. *Id*. The court acknowledged that its holding might invite discrimination by religious institutions but noted a counterbalancing consideration:

> We are mindful of the potential for abuse our holding theoretically may invite; namely, the use of the First Amendment as a pretextual shield to protect otherwise prohibited employment decisions. But we think that saving grace lies in the recognition that courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature.

Id.

The original panel stated that its decision to examine the motivation behind a religious organization's employment decisions is not foreclosed by *Rayburn* and *Scharon*. *Petruska*, 448 F.3d at 635. This is not true. To attempt to show conformity with *Rayburn* and *Sharon*, the original panel contrasted *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), with *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993). But the conclusions the panel derived from *Catholic Bishop* and *Geary* are inapplicable because *Geary* involved lay persons as opposed to ministerial employees.

The panel cited *Catholic Bishop* as an example of a case that turned on excessive government entanglement into religious matters. *Petruska*, 448 F.3d at 631-32. *Catholic Bishop* involved a dispute over the NLRB's

jurisdiction over catholic schools. 440 U.S. at 501-04. Although the Supreme Court actually held that the NLRB did not have jurisdiction over the catholic schools, *id.*, the original panel construed the *Catholic Bishop* decision as turning on excessive entanglement, *Petruska*, 448 F.3d at 632-33. This is curious since the Supreme Court expressly declined to answer the excessive entanglement question. *Catholic Bishop*, 440 U.S. at 501.

The original panel then contrasted this putative excessive scrutiny case with a case from this Court to show how some government scrutiny into the motivation behind a religious organization's employment decision is allowed. The panel cited this Court's *Geary* opinion, to support this assertion. *Petruska*, 448 F.3d at 632. The panel noted that because *Geary* was a non-ministerial employment case, less government scrutiny was involved than in *Catholic Bishop*'s NLRB supervision of labor negotiations. *Petruska*, 448 F.3d at 631.

Geary did not involve the employment of a minister but of a lay teacher who was fired from her job at a church-operated elementary school. The lay teacher sued for age discrimination under the ADEA. The school claimed the dismissal was due to the teacher's violation of church doctrine. This Court ruled that the ministerial exception did not bar the claim and it examined the motive behind the decision to terminate the teacher's employment. 7 F.3d at 330. *See also DeMarco*

v. Holy Cross High School, 4 F.3d 166, 169 (2d Cir. 1993) (explaining that there is no government entanglement where lay teachers' suits do not involve examining religious doctrine); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (explaining that government entanglement into religion is unconstitutional). Thus, the inquiry in *Geary* was limited to "whether a sincerely held religious belief actually motivated the institution's actions. The institution, at most, is called upon to explain its own doctrines." 7 F.3d at 330.

The original panel stated that it would follow the *Geary* and determine whether an examination into Gannon's motive behind its ministerial employment decision would lead to excessive government scrutiny. *Petruska*, 448 F.3d at 632.

However, *Geary* is inapplicable to the present case since it involved a non-minister. Thus, the original panel's use of *Geary* does not (and, indeed, cannot) refute the rationales of *Rayburn* and *Scharon*. Therefore, contrary to the panel's assertion, the rationale of these cases remains a strong reason not to examine a religious institution's motivation behind its employment decisions. As other circuits have recognized, an employment decision regarding a minister is in itself a *per se* religious determination. *See*, *e.g.*, *Scharon*, 929 F.2d at 363 (8th Cir. 1991).

The original panel also used *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) in passing to make an unrelated point about how Gannon may likely defend its actions. *Petruska*, 448 F.3d at 634. However, *Tomic* makes a

relevant point about "government scrutiny" that the original panel failed to note. The Seventh Circuit saw a significant problem with looking at the motive behind firing a ministerial employee and upheld the lower court's dismissal of an age discrimination case. *Tomic*, 442 F.3d at 1038-39.

The *Tomic* court held that it does not matter that the ministerial employment decision is based in the beliefs and rules of the church. *Id.* Any interference with the governance of a religious institution is unacceptable under the concerns of the First Amendment. *Id.* at 1038-39. The Seventh Circuit asserted that the ministerial exception might not prevent examination of motive in the case of a *non*-ministerial employee. *Id.* For example, a religious institution could not invoke the ministerial exception in regard to its employment practices involving the janitor unless the janitor were determined to be a minister. *Id.* at 1039. But when ministers are involved, "[the religious organization] would not be constrained in its dealings with them by employment laws that would interfere with the church's internal management, including antidiscrimination laws." *Id.* at 1040.

Similarly, the original panel used *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) in its attempt to refute the "government scrutiny" rationale, but failed to note an important distinction. In *Minker*, a sixty-three-year-old Methodist minister brought suit against his church for age discrimination under the ADEA and a claim for breach of contract because

the church failed to give him a more suitable congregation as they had promised. The original panel relied heavily on *Minker* to support its assertion that, in some ministerial employment matters, examining motives is permissible. *Petruska*, 448 F.3d at 633-34. However, the court in *Minker* used this rationale to decide the contract claim, not to decide the minister's discrimination claim. The ADEA claim was dismissed because the plaintiff was a minister and, thus, the ministerial exception barred that claim. 894 F.2d at 1355 (citing several Title VII ministerial exception cases).

For the foregoing reasons and contrary to the claim of the original panel, the reasoning of those circuits employing the "government scrutiny" rationale militates against examining the motive behind a religious organization's ministerial employment decisions.

B. The "Selection of Clergy" Rationale Does Not Allow the Court to Examine a Religious Establishment's Reason Behind Ministerial Employment Decisions.

In defining the "selection of clergy" rationale, the original panel cited several cases that stand for the proposition that religious institutions should be free to select their own ministers without the state judging the motivation. *Petruska*, 448 F.3d at 624 & nn. 12, 13 (citing *Rayburn v. General Counsel of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Werft v. Desert Southwest Annual Conf.*, 377 F.3d 1099 (9th Cir. 2004)). The original panel explicitly admitted that it

agreed only in part with this rationale and is, therefore, at odds with the circuits that employ this rationale. *Petruska* 448 F.3d at 634.

The original panel cited Ninth and Fourth Circuit opinions that it determined used the "selection of clergy" rationale. In the Ninth Circuit case, a minister was fired and brought suit against the church under Title VII for failure to accommodate his disabilities. *Werft v. Desert Southwest Annual Conf.*, 377 F.3d 1099 (9th Cir. 2004). The court applied the ministerial exception and dismissed the case stating that "requiring a church to articulate a religious justification for a personnel decision, such as firing a minister, is one such way in which government may not constitutionally interfere with religion." *Id.* at 1102.

In addition, the original panel used the previously described Fourth Circuit *Rayburn* case in this category as well. Referring to the selection of clergy, *Rayburn* stated that

> [t]he church's selection may at times result from preferences wholly impermissible in the secular sphere. Where goals differ, the temptation for state intrusion becomes apparent. . . . [T]he church has a legitimate claim to autonomy . . . . Where the values of state and church clash . . . the church is entitled to pursue its own path without concession to the views of a federal agency or commission. [Interference] . . . in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority.

772 F.2d at 1170-71.

The original panel attempted to argue that this "selection of clergy" rational does not forbid courts from looking at a religious organization's motives for its ministerial employment decisions. For example, the original panel compared the instant case to *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 949 (9th Cir. 1999), a sexual harassment case, and asserted that the *Bollard* court examined the religious employer's motivation. *Petruska*, 448 F.3d at 634.

However *Bollard* did not involve the selection of clergy. A Jesuit novice was sexually harassed and brought a claim under Title VII. *Bollard*, 196 F.3d at 949. The Ninth Circuit explained that, under its view, the ministerial exception applies only to First Amendment religious issues, such as the unfettered right of a religious institution to choose its leaders. *Id*. The court determined that if the suit had involved the income of the Jesuit, the duties he performed for the church, or the position the Jesuit held in the church, it would have deferred to the church with no further inquiry. *Id.* at 947. The Ninth Circuit stated that

> [t]he ministerial exception insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII. The Free Exercise and Establishment Clauses of the First Amendment compel this exception to the otherwise fully applicable commands of Title VII when the disputed employment practices involve a church's freedom to choose its ministers or to practice its beliefs.

Id. at 944.

The original panel stated that it failed to see how an employment decision based solely on sexism and not on religious content is related to the free exercise of religion. *Petruska*, 448 F.3d at 634. It noted that the Title VII sexual harassment claim in the *Bollard* case was not barred by the ministerial exception. *Id.* But, as stated above, the present case is distinguishable from *Bollard* because the *Bollard* case was not about a constitutionally protected employment decision involving a church choosing its leadership. 196 F.3d at 947. *Bollard* was about sexual harassment. There is no constitutional right to sexually harass another as the *Bollard* court explained and, therefore, the ministerial exception was not applicable to bar the claim. *Id.* In contrast, the original panel's decision to look to the motive behind Petruska's reassignment before applying the ministerial exception interferes with a religious institution's right to choose its clergy.

Ruling that Gannon must offer a religious rationale in order to be exempted by the ministerial exception is not supported under the "selection of clergy" rationale. Courts of appeals that employ the "selection of clergy" rationale do not examine the motivation behind a religious institution's selection of its clergy. Here again, the original panel's decision is in direct conflict with the approach of other circuits. And, more importantly, here again, the original panel's attempted refutation of the rationale flounders because its arguments miss the very point of the rationale it attempts to refute.

C. The "Inquiry Into Religious Doctrine" Rationale Does Not Allow the Court to Look at a Religious Institution's Motive Behind its Ministerial Employment Decisions.

The original panel also discerned an "inquiry into religious doctrine" rationale for the ministerial exception. *Petruska*, 448 F.3d at 624-25. This rationale, it believed, is narrower than the "government scrutiny" rationale, preventing courts from resolving religious controversies that delve into religious issues that are beyond judicial jurisdiction and competence. *Id*. However, upon examining the cases that the original panel cited to support this rationale, these circuits do not stand on this "rationale" alone. Rather, the circuits that mention "religious doctrine" use it as an example of, or in conjunction with, the "government scrutiny" rationale.

The original panel self-admittedly says virtually nothing about why the "inquiry into religious doctrine" rationale will allow them to consider Gannon's motives in demoting its chaplain except to say that "in light of [its prior] discussion . . . little remains to be said." *Petruska*, 448 F.3d at 635. The original panel stated that it cannot, at this point, "conclude that Petruska's claims will raise questions of a religious nature" requiring them to rule on religious doctrine. *Id*.

The original panel claimed it derived the "religious doctrine" rationale from the Fifth, Eighth, and Eleventh Circuits. *Petruska*, 448 F.3d at 624-25 (citing *Gellington v. Christian Methodist Episcopal Church, Inc*., 203 F.3d 1299 (11th

Cir. 2000); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991)). The Eighth Circuit case is the same *Scharon* case used above under the "government scrutiny" rationale. This makes sense since "religious doctrine" is one of the things that should be insulated from "government scrutiny."

To reiterate, in *Scharon*, a female Episcopal hospital's chaplain was terminated and sued under Title VII for discrimination based on sex. 929 F.2d at 363. She argued that government involvement in religion could be avoided by focusing solely on the sex discrimination claim. *Id*. The court rejected this argument based on the Supreme Court precedent that declared that

> "the resolution of such charges . . . will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators. . . . It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry."

Id. (quoting *Catholic Bishop* 440 U.S. at 502) (ellipses in the original). *Scharon* acknowledged that barring the Title VII claim was necessary to prevent courts from examining and interpreting religious doctrine. *Id*. However, *Scharon* also made clear that it was not only the conclusions that may be reached that violate the Religion Clauses but the very process of inquiry. *Id.* Again, this "protection from

the process of inquiry" is part of the concern of the "government scrutiny" rationale. *See supra* Part II. A.

Similarly, in the Fifth Circuit's *Combs* case, 173 F.3d at 350, the plaintiff minister argued that her suit was about sex discrimination and pregnancy discrimination and, because adjudicating the claims would not involve inquiry into religious doctrine, the suit should be allowed. The court flatly rejected that argument, stating that in

> investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal. . . . This . . . concern alone is enough to bar the involvement of the civil courts.

Id.

The original panel cited the Eleventh Circuit as an additional source for the "religious doctrine" rationale, *Petruska*, 448 F.3d at 624, even though it had also stated that the Eleventh Circuit has not addressed the issue of motive, *id.* at 623 n.7. It is true that the Eleventh Circuit acknowledged that courts could not investigate church doctrine, but it is also true that it disallowed *any* court interference into the governance of the church. *Gellington*, 203 F.3d at 1304. Thus, *Gellington* ultimately invoked the broad "government scrutiny" rationale. *See supra* Part II. A.

Regardless, as the arguments in this brief have shown, it is not true that the Supreme Court and the other circuits support a process of inquiring into the reasons behind a religious organization's ministerial employment decision. The trial court correctly concluded that this process would impinge upon religious liberties. *See Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666 (W.D. Pa. 2004).

CONCLUSION

The original panel's claim that neither the rationales of the other circuits nor the Supreme Court's precedent militate against its decision to examine the religious employer's motive is unsupported by the very cases it cites. All of the other circuits' arguments oppose examining motive. This Court should not, by adopting the reasoning of the original panel, abolish any practical use of the ministerial exception. Rather, this Court should affirm the correct analysis of the District Court. The original panel's decision constitutes a slippery slope into the forbidden land of government entanglement with religion. It contradicts the approach of other circuits and has discarded the ministerial exception. Both Supreme Court precedent and every rationale identified by the original panel

support a ministerial exception to Title VII where a chaplain's employment is concerned. For the foregoing reasons the decision of the District Court should be affirmed.

Respectfully submitted,
This 18th day of July, 2006

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COMBINED CERTIFICATIONS

1. I hereby certify that I am admitted to practice law in the Third Circuit.

2. I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 5,448 words using Microsoft Word 2003 word count function.

3. I hereby certify that the electronic brief and the hard copies that have been filed are identical.

4. I hereby certify that the electronic brief has been scanned for viruses using McAfee VirusScan.

5. I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Petruska v. Gannon University, et al.*, No. 05-1222, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on July 18, 2006, addressed as listed below. The required number of paper copies were filed in the same manner and the electronic version of the brief was e-mailed on the same date.

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