No. 19-60293

In the United States Court of Appeals for the Fifth Circuit

WILL MCRANEY,
Plaintiff-Appellant,

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INCORPORATED,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Mississippi

BRIEF FOR THE STATES OF TEXAS, LOUISIANA, AND MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Certificate of Interested Persons

Will McRaney,
Plaintiff-Appellant,

v.

The North American Mission Board of the Southern Baptist Convention, Incorporated,
Defendant-Appellee.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amici curiae, as governmental parties, need not furnish a certificate of interested persons.

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Statement of Interest of Amici Curiae

Amici curiae are the States of Texas, Louisiana, and Mississippi. Amici States are deeply interested in protecting the First Amendment rights of their citizens. They are also interested in freeing their own courts from constitutionally improper involvement in matters of religious doctrine and church governance. The States' courts often look to this Court's precedent as persuasive authority, particularly when it comes to constitutional questions. For that reason, the panel's decision threatens to erode First Amendment protections in the States' own courts.

Introduction

The panel opinion's approach to church autonomy—which is protected from civil-court scrutiny by the First Amendment—threatens to entangle State and federal courts in matters of church governance. As the panel opinion would have it, a church's decisions can be adjudicated in court so long as there is no "religious reason" for the decision. Panel Op. at 6–7. The First Amendment's protections are much broader than that. And because on their face the claims at issue are not susceptible to resolution based on neutral principles of law—even if the panel were correct to extend the "neutral principles" methodology from church property disputes to torts—they must be dismissed.

ARGUMENT

I. The First Amendment Protects Matters of Church Governance Regardless of the Church's Motivation and Regardless of the Dispute's Religious or Secular Character.

Civil courts must respect church autonomy when it comes to their own governance. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Just weeks ago, the Supreme Court reaffirmed the bedrock principle that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). As this Court has put it, the First Amendment's protections are not limited to "differences in church doctrine." in *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).

That means civil courts cannot question a religious organization's decision to terminate, discipline, or cut ties with a minister, regardless of whether its reasons for doing so are doctrinal or secular. *See id.*; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 194 (2012).[1] It also means a civil court cannot question a religious entity's organization, such as the structure of its denomination

[1] The Supreme Court's recent decisions on the "ministerial exception" apply to the broader church-autonomy doctrine of which that exception is a part. *See Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring) (explaining that "the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith."). So even assuming the ministerial exception is not applicable because the Mission Board was not McRaney's employer (*see* Panel Op. at 6 n.3), the principles set out in ministerial exception cases apply to the broader doctrine.

or its partnerships with other church bodies. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1464–65 (1990).

The panel opinion required the Mission Board to prove it acted with "religious" reasons before it could invoke the protections of the First Amendment. Panel Op. at 6–7. That was error. *Compare Hosanna-Tabor*, 565 U.S. at 194 (holding the First Amendment does not "safeguard a church's decision to fire a minister *only when it is made for a religious reason*" (emphasis added)), *with* Panel Op. at 6–7 ("On remand, if NAMB presents evidence of [valid religious] reasons and the district court concludes that it cannot resolve McRaney's claims without addressing these reasons, then there may be cause to dismiss.").[2] Indeed, as *Our Lady of Guadalupe* confirmed earlier this summer, the First Amendment protects Churches' "autonomy with respect to internal management decisions that are essential to the

[2] The panel opinion's "appears certain" approach is doubly troubling because it rests on the defunct *Conley v. Gibson* pleading standard: "[A] claim may not be dismissed unless it *appears certain* that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992) (emphasis added) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *see* Panel Op. at 2 (citing Fifth Circuit precedent that traces to *Conley* through *Benton*). After the 2007–2009 "sea change" in Rule 8's pleading standard, *Gonzales v. Nueces County*, 227 F. Supp. 3d 698, 702 (S.D. Tex. 2017), it is not enough to allege facts that are "merely consistent with" wrongdoing, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Such pleading "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678. So even if the Mission Board did need a religious reason for its alleged actions, McRaney's claim could not survive simply by alleging conduct "consistent with" a non-religious reason.

institution's central mission"—regardless of whether those decisions have a doctrinal rationale. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

Moreover, the First Amendment gives "special solicitude" to the rights of religious organizations. *Hosanna-Tabor*, 565 U.S. at 189. So, contrary to the panel opinion, it is not "impermissibl[e]" to place churches "in a preferred position in our society." Panel Op. at 3 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335–36 (5th Cir. 1998)). To the contrary, it is required. If a claim implicates both secular and doctrinal matters, the First Amendment bars consideration of both. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (explaining "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters." (citation and internal quotation marks omitted)).

The panel opinion cites *Our Lady of Guadalupe* in passing, without discussing its reasoning or import. *See* Panel Op. at 7.[3] Indeed, the panel appears to have misunderstood *Our Lady of Guadalupe* to stand for the proposition that the church-autonomy doctrine bars review only if the church proves it acted with a religious reason. Panel Op. at 6–7. But *Our Lady of Guadalupe* is not so limited—and neither is the broader church autonomy doctrine. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060. To the contrary, a church is protected from court interference even if it does "not cite or possess a religious reason at all." *id.* at 2072 (Sotomayor, J., dissenting).

[3] The panel issued its decision on July 16, 2020, just eight days after the Supreme Court decided *Our Lady of Guadalupe*. Neither party alerted the Court to the Supreme Court's analysis, and neither party weighed in on its import in this case.

The panel and the en banc Court both have the opportunity to correct this mistaken view to *Our Lady of Guadalupe* before it binds future panels.

II. Even if the "Neutral Principles" Methodology Could Properly Be Extended to Tort claims, McRaney's Claims Cannot Be Resolved by Neutral Principles.

Decades ago, the Supreme Court held that state courts could resolve disputes over church property by applying "neutral principles" of law, but only in cases where it is possible to do so without confronting doctrinal issues. *Jones*, 443 U.S. at 602; *see also Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich*, 426 U.S. 696, 710 (1976). Recent precedent makes clear that "neutral principles" (a term of art standing for this method of resolving church property disputes) is not a general way around the First Amendment's prohibition on court interference in church governance. Rather, it is a "narrowly drawn" exception for certain governance matters: property disputes, *Westbrook v. Penley*, 231 S.W.3d 389, 398 (Tex. 2007), which usually arise out of disagreement between factions or entities within the church.[4]

[4] *See, e.g.*, *Jones*, 443 U.S. at 602 ("The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue."); *Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville*, 240 So. 3d 399, 404 (Miss. 2018) (applying "neutral principles" to a property dispute between a local church congregation and the presbytery, a governing body sitting above the congregation in the church hierarchy); *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 596 (Tex. 2013) ("The question before us is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part.").

In *Our Lady of Guadalupe*, the Supreme Court held that a religious school's decision to remove a teacher for poor performance could not be adjudicated, even where the teacher alleges her termination violated a federal antidiscrimination law. 140 S. Ct. at 2058–59, 2068. Notwithstanding that the elements of the teacher's claim did not implicate church doctrine and the school did not offer a religious reason for firing her, the First Amendment barred "judicial intervention." *Id.* at 2069. *Our Lady of Guadalupe* makes clear that outside of property disputes it's not enough to show that a claim could be decided without reference to doctrine. *See id.* Rather, property disputes are the narrow exception to the First Amendment's bar on court involvement in matters of church governance.

And even if "neutral principles" could be expanded to tort claims, neutral principles could not resolve this case. It's not enough that "the elements of" a claim can be "defined by neutral principles without regard to religion." *Westbrook*, 231 S.W.3d at 400; *see Our Lady of Guadalupe*, 140 S. Ct. at 2069. Rather, the First Amendment bars adjudication wherever "the application of those principles to impose civil tort liability" would "impinge upon [the church's] ability to manage its internal affairs." *Westbrook*, 231 S.W.3d at 400. For this reason, neutral principles matter only if the plaintiff can "override the strong constitutional presumption that favors preserving the church's interest in managing its affairs." *Id.* at 402.

McRaney sued the Mission Board for tortious interference with a business relationship under Mississippi law. As the Mississippi courts have explained it, "[t]ortious interference is based on intermeddling—a tort occurs if *without sufficient reason*, one person intentionally interferes with another's contract . . . when the

purpose was to cause interference and injury results." *Morrison v. Mississippi Enter. For Tech., Inc.*, 798 So. 2d 567, 575 (Miss. Ct. App. 2001) (emphasis added). To prevail, McRaney would have to show:

> (1) that the [Mission Board's] acts were intentional and willful; (2) that they were calculated to cause damage to [McRaney] . . . ; (3) that they were done with the unlawful purpose of causing damage and loss, *without right or justifiable cause on the part of the [Mission Board]* (which acts constitute malice); and (4) that actual damage or loss resulted, and (5) the [Mission Board's] acts were the proximate cause of the loss or damage suffered by [McRaney].

Alfonso v. Gulf Pub. Co., 87 So. 3d 1055, 1060 (Miss. 2012) (emphasis added) (citation and internal quotation marks omitted). Moreover, McRaney would have to "prove that the contract would have been performed but for the alleged interference." *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1099 (Miss. 2005) (citation and internal quotation marks omitted).

A civil court cannot adjudicate McRaney's tortious interference claim without determining whether, but for the Mission Board's alleged interference, the Baptist Convention would have retained McRaney as executive director, *see id.*, and whether the Mission Board had "sufficient reason" to act, *Morrison*, 798 So. 2d at 575. The First Amendment bars it from inquiring into either.

First, a civil court cannot inquire into a religious entity's reasons for removing a minister from office. *See Our Lady of Guadalupe*, 140 S. Ct. at 2069; *Hosanna-Tabor*, 565 U.S. at 194 (holding that the First Amendment bars a civil court from ruling that a religious entity "was wrong to have relieved [a minister] of her position"). McRaney cannot establish but-for causation without putting the Baptist

Convention's rationale at issue. That very inquiry is improper. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 194. Indeed, the court below correctly recognized that a federal court lacks authority to inquire into the Baptist Convention's reasons for terminating McRaney's employment. *See* ROA.270–71. And a court cannot adjudicate his claims against the Mission Board without engaging in that improper inquiry. *See Scruggs*, 910 So. 2d at 1099.

Second, the church autonomy doctrine bars court interreference with all matters of church governance, not just the decision to remove a minister. *See Our Lady of Guadalupe*, 140 S. Ct. at 2055 ("The First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." (internal quotation marks omitted)). McRaney alleges someone at the Mission Board made statements to the Baptist Convention that caused the Baptist Convention to fire him. Communications between two constituent parts of the Southern Baptist Convention about structure and personnel are church governance matters. And a religious body is free to determine how it will be structured, so a civil court cannot rule that it was wrong to place conditions on its future relationships with other religious entities. *See id.*[5] Even assuming the truth of all McRaney's allegations, his theory confirms that the First Amendment bars his claims.

[5] As the Mission Board's petition points out (at 15), it would be troubling indeed if First Amendment doctrine treated the constituent parts of the Southern Baptist Convention differently than hierarchical religious organizations because of its distinct structure.

McRaney also alleges he was improperly "uninvited [from] speak[ing] at a large mission symposium." Panel Op. at 4. Civil courts cannot interfere with a religious entity's decision as to "who will personify its beliefs," *Hosanna-Tabor*, 565 U.S. at 188, or "serve[] as a messenger or teacher of its faith," *Our Lady of Guadalupe*, 140 S. Ct. at 2063 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). That includes who will speak at conferences and symposia like the one at issue here.

Finally, McRaney alleges intentional infliction of emotional distress based on allegations that the Mission Board put up his photo to "communicate that [McRaney] was not to be trusted and [was] public enemy #1." Panel Op. at 4. Even assuming he has stated a plausible claim under Mississippi law, resolving it would interfere with matters of church governance. Precedent has long held that a religious body is free to decide not only who its members are, but who its members can associate with. *See, e.g.*, *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 420 (3d Cir. 2012) (explaining that second-guessing a bishop who "declared [the plaintiff] a nonmember on multiple occasions" for associating with a dissident faction would be improper under the First Amendment). In the same way, civil courts cannot second-guess the Mission Board here.

Because McRaney's claims turn on matters of church governance, the church autonomy doctrine prevents civil courts from adjudicating them. Contrary to the panel opinion's assumption (at 4), McRaney's claims turn on the reasons he was terminated even though his suit is not directly against his employer.

Conclusion

Amici States urge the Court to grant the petition for rehearing en banc and affirm the judgment of the district court.

Respectfully submitted.

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Certificate of Service

On August 20, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,581 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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