No. 19-60293

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 in Case No. 1:17-cv-00080 (Davidson, J.)

DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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August 13, 2020

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Will McRaney, Plaintiff-Appellant
2. William Harvey Barton, II, Counsel for Plaintiff-Appellant
3. Barton Law Firm, PLLC, Counsel for Plaintiff-Appellant
4. The North American Mission Board of the Southern Baptist Convention, Inc., Defendant-Appellee

5. Kathleen Ingram Carrington, Counsel for Defendant-Appellee
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19. Baptist Convention of Maryland/Delaware, Inc., Third-Party Respondent
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/s/ Matthew T. Martens

ATTORNEY OF RECORD FOR DEFENDANT-APPELLEE THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.

RULE 35(B)(1) STATEMENT

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); and *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974), and that reconsideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

It is also our reasoned and studied professional judgment that reconsideration by the full court is necessary because this appeal involves questions of exceptional importance on which the panel's decision conflicts with the authoritative decisions of other United States Courts of Appeals. First, the panel's application of "neutral principles of law" outside the church property dispute context conflicts with *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986). Second, the panel's decision to not address the ministerial exception conflicts with *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015); and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

/s/ Matthew T. Martens
MATTHEW T. MARTENS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

ISSUE WARRANTING REVIEW

This case concerns a religious dispute between a minister and a ministry over matters of internal religious governance and leadership. Secular courts cannot adjudicate such matters. Yet the panel held that they can.

The issue warranting review is: Whether the panel erred in holding that, under the church autonomy doctrine, secular courts are constitutionally permitted to apply "neutral principles of law" to this legal dispute concerning church governance and leadership.

STATEMENT OF THE COURSE OF PROCEEDINGS

A. Factual Background

Defendant-Appellee North American Mission Board of the Southern Baptist Convention, Inc. ("Mission Board") is one of twelve boards and agencies of the Southern Baptist Convention. Its mission is to "work with churches, associations and state conventions in mobilizing Southern Baptists as a missional force to impact North America with the gospel of Jesus Christ through evangelism and church planting." ROA.14, 41. The Mission Board partners with state Baptist conventions that work in cooperation with the Southern Baptist Convention, including the Baptist Convention of Maryland/Delaware ("Baptist Convention"), that is comprised of 560 separate churches. ROA.14, 41, 53. The Baptist Convention and the Mission Board were partnered under a religious ministry

agreement known as a "Strategic Partnership Agreement" ("SPA") in which they jointly agreed to create and execute "a strategic plan for penetrating lostness through church planting and evangelism." ROA.15, 42. The agreement established the internal ministry relationship between the two ministries, setting their "respective oversight, management, and obligation of each to the other." ROA.15.

Plaintiff-Appellant Will McRaney is the former Executive Director of the Baptist Convention. In that position, Dr. McRaney was responsible for the Baptist Convention's "ministry direction" and for—under the terms of the SPA—carrying out the joint religious goals of the Mission Board and the Baptist Convention. ROA.14, 41-43. In 2014, the Mission Board proposed assuming greater control "in the specific area of starting new churches" and in "the selection, assessing, and training and supporting of church planters." ROA.16. Dr. McRaney rejected the Mission Board's proposed change. ROA.15-16.

This led the Mission Board to alter its religious relationship with the Baptist Convention, announcing that it would end their ministry partnership in one year. ROA.195. Mission Board and Baptist Convention leadership then met, and the Mission Board allegedly threatened to withhold funding from the Baptist Convention unless Dr. McRaney was terminated. ROA.17. On June 8, 2015, the Baptist Convention voted to terminate Dr. McRaney, causing him to resign the

next day. ROA.195. The Baptist Convention voted to terminate Dr. McRaney because, among other things, he "openly made known his disdain and hostility toward [the Mission Board's] ministry strategy and its officers." ROA.31.

B. Dr. McRaney's Complaint

Dr. McRaney filed suit against the Mission Board for intentional interference with business relationships, defamation, and intentional infliction of emotional distress. ROA.13-19. All of these claims arise out of and turn on the circumstances of Dr. McRaney's termination from his ministry position. Specifically, Dr. McRaney alleges that the Mission Board "intentionally made false statements about him to [the Baptist Convention] *that resulted in his termination*." Op. 4 (emphasis added). The supposed false statement concerned Dr. McRaney's refusal to meet with the Mission Board's president to discuss a new SPA. *Id.* Dr. McRaney also alleges that the Mission Board "got him uninvited to speak at the mission symposium" and "posted his picture at [Mission Board] headquarters" to communicate that he was untrustworthy. *Id.* Thus, resolution of Dr. McRaney's claims requires a determination as to the reason he was terminated from his ministry position, the reason he was uninvited from speaking at a religious symposium, and the reason he was excluded from ministry headquarters.

C. Procedural Background

On June 29, 2017, the Mission Board moved for dismissal based on the First Amendment's ministerial exception. ROA.72-99. The district court agreed that Dr. McRaney was a *minister* within the meaning of the exception, and did not dispute that the Mission Board was a *ministry* generally protected by the exception, but nonetheless denied the motion on the legal ground that the exception applied only to disputes between employees and their direct employers and thus did not apply here because the entity that Dr. McRaney sued (the Mission Board) was not his employer (the Baptist Convention). ROA.123-137. The Mission Board moved to certify the district court's order for interlocutory appeal. ROA.138-151. The district court denied the certification motion, ROA.152-156, requiring the parties to proceed with discovery.

On September 11, 2018, the Mission Board served a subpoena on the Baptist Convention for employment records related to Dr. McRaney's job performance and termination, ROA.169-174, which the Baptist Convention moved to quash under the ministerial exception, ROA.189. The Mission Board then asked the court to dismiss certain of Dr. McRaney's claims because it would be impossible for the Mission Board to defend itself without the employment records. ROA.235-244. The Magistrate Judge granted the Baptist Convention's motion to quash under the ministerial exception and ecclesiastical abstention doctrine, ROA.270-

271, and the Mission Board then re-raised its arguments for dismissal, ROA.311-317.

On April 24, 2019, the district court dismissed Dr. McRaney's claims, finding that they were tied either to his termination as Executive Director of the Baptist Convention, a religious organization partnered with the Mission Board in their missional goals of evangelism and church planting, or his troubles with the Mission Board and the Baptist Convention arising from their collective religious work. ROA.321-327.

Dr. McRaney appealed the dismissal to this Court, and a panel reversed and remanded the case, holding that, at this stage, it was not "certain" that resolution of his claims would "require" addressing "purely ecclesiastical questions." Op. 4, 7. The panel concluded that, because Dr. McRaney's claims did not directly "challeng[e] the termination of his employment," a secular court could apply "neutral principles of tort law" to his legal claims, Op. 4-5, notwithstanding that those claims turned on the reasons for his discharge from ministry employment and disinvitation from a religious symposium, Op. 4. In the panel's view, a secular court can adjudicate the reasons for the termination of a minister's employment so long as those reasons are not religious ones. Op. 6. The panel placed the burden on the Mission Board to offer "evidence" that those reasons were religious in nature. Op. 6. The panel warned that ruling otherwise would place religious

employment disputes in a "preferred position" that would violate the Establishment Clause. Op. 3.

On July 8, 2020, the Supreme Court issued its opinion in *Our Lady of Guadalupe School v. Morrissey-Berru* ("*OLG*"), 140 S. Ct. 2049 (2020). The panel did not call for supplemental briefing on the effect of *OLG* on this case, issuing its opinion in this case eight days later.

ARGUMENT AND AUTHORITIES

The panel's holding is enormously consequential, injecting courts into disputes between ministers and religious organizations concerning internal religious governance and leadership and denying religious groups the special solicitude afforded to them by the First Amendment. Indeed, the panel's opinion goes so far as to permit the district court to adjudicate not only the reasons for a religious minister's termination, but also the reasons for speaker selection at a mission symposium.

The panel permitted this judicial intrusion on the ground that the district court might be able to apply "neutral principles of tort law" to this church governance dispute in the event the Mission Board did not advance "valid religious reasons" for its actions. The panel's reasoning misapprehends the church autonomy doctrine, failing to recognize that the subject matter of church governance is beyond the reach of secular courts regardless of the reasons

advanced by a religious organization for a particular governance decision. Because the panel's opinion is deeply flawed, conflicts with precedent both of this Court and the Supreme Court, and has grave implications for religious organizations in this circuit, the Mission Board seeks rehearing en banc.

I. LEGAL CLAIMS CONCERNING CHURCH GOVERNANCE MATTERS ARE NOT JUSTICIABLE IN SECULAR COURTS

En banc review is warranted because the panel's decision improperly inserts courts into disputes they are constitutionally barred from adjudicating. Under the First Amendment's church autonomy doctrine, legal claims concerning matters of church governance and leadership are not justiciable, whether under "neutral principles of law" or otherwise. Church governance and leadership decisions are, as a category, wholly excluded from judicial review by secular courts.

In *OLG*, the Court reiterated that the Religion Clauses of the First Amendment secure "the general principle of church autonomy," which respects religious institutions' "independence in … matters of church government." 140 S. Ct. at 2060 (quotation marks omitted). Church autonomy means, the Court explained, that religious institutions have "autonomy with respect to internal management decisions that are essential to the institution's central mission," including "the selection of individuals who play key roles." *Id.* The ministerial exception is a specific application "carved" from the "broad" church autonomy doctrine. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242

n.4 (10th Cir. 2010). Under the ministerial exception, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *OLG*, 140 S. Ct. at 2060.

The panel held that the church autonomy doctrine[1] "precludes judicial review of claims that require resolution of 'strictly and purely ecclesiastical' questions," Op. 2, and then narrowly construed what constitutes a "purely ecclesiastical question." As relevant here, matters of church government—including "internal management decisions that are essential to the institution's central mission"—are ecclesiastical questions categorically beyond the reach of secular courts. *OLG*, 140 S. Ct. at 2060. And this is true regardless of the reasons raised by the religious organization in support of its governance decisions. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012) (holding that the constitutional protection of a religious organization's decision does not apply "only when it is made for a religious reason"); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1037 (7th Cir. 2006) (holding that dismissal is appropriate even when "the complaint is not based on and does not refer to religious doctrine *or* church management" if it is

[1] Courts have used the terms "church autonomy doctrine" and "ecclesiastical abstention" interchangeably. *See, e.g.*, *Ogle v. Hocker*, 279 F. App'x 391, 395 (6th Cir. 2008).

"apparent that a controversy over either *may* erupt in the course of adjudication" (emphases added)). Among the church governance issues that secular courts may not adjudicate "is the selection of the individuals who play key roles" in a religious organization. *OLG*, 140 S. Ct. at 2060. In other words, courts must, as a category of cases, "stay out of employment disputes involving those holding certain important positions within churches and other religious institutions." *Id.*

The panel believed that a legal dispute did not turn on purely ecclesiastical questions if it could be resolved by application of "neutral principles of tort law." Op. 4-5. But courts have largely cabined those "neutral principles of law" to church property disputes. *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392, 393-396 (6th Cir. 1986). And this Court has heretofore never applied that doctrine to matters of church governance and leadership. In fact, this Court has rejected the idea that church autonomy protections do not apply in "purely nondoctrinal" disputes, *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999), or that they are "narrowly limit[ed] … to differences in church doctrine," but instead cover "matters of church government as well as those of faith and doctrine," *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). This is important because, while the elements of tort claims can sometimes be *defined* by neutral principles without regard to religion, "the *application* of those principles to impose civil tort liability" in the context of a

church governance case invariably impinges on a religious organization's "ability to manage its internal affairs." *Westbrook v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007).

Repeating its error, the panel construed the church autonomy doctrine's requirement that a case present "purely ecclesiastical questions" to cover only those cases where the parties raise explicitly religious arguments requiring the adjudication of doctrinal questions. Op. 4-5. In the panel's view, whether Dr. McRaney's claims are purely ecclesiastical in nature depends on whether the Mission Board raises "valid religious reasons" for its conduct. *See* Op. 6. The panel believed that secular courts are permitted to adjudicate matters of church governance—including speaker selection at a mission symposium—so long as the reasons for the governance decision at issue are not "religious." *See* Op. 6. This is not the law and "misses the point" of the church autonomy doctrine, "[t]he purpose of [which] is not to safeguard a church's decision … only when it is made for a religious reason." *Hosanna-Tabor*, 565 U.S. at 194.[2] Rather, secular courts are categorically precluded from delving into religious institutions' critical

[2] Rather than apply the Supreme Court's clear directives in *Hosanna-Tabor*, the panel relied on pre-*Hosanna-Tabor* opinions suggesting that a religious organization's governance decisions could be reviewed based on "neutral principles of law" rather than religious ones. Op. 3-5. Those decisions conflict with intervening Supreme Court precedent and should be rejected.

internal management decisions such as the "selection of individuals who play key roles" regardless of the reasons underlying those governance decisions. *See id.* at 195; *OLG*, 140 S. Ct. at 2060.

The panel's unduly narrow application of the church autonomy doctrine was apparently influenced by its view that the First Amendment "'does not categorically insulate religious relationships from judicial scrutiny'" because doing so "would impermissibly place a religious leader in a preferred position in our society." Op. 3 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-336 (5th Cir. 1998)). Contrary to the panel's assertion, religious organizations *do* enjoy a "preferred position in our society" given the importance of keeping church and state independent from one another. As the Supreme Court unanimously recognized in *Hosanna-Tabor*, "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations" over and above other rights, such as the freedom of association, that are "enjoyed by religious and secular groups alike." 565 U.S. at 189.

The panel was also incorrect to suggest (Op. 3) that giving full expression to the church autonomy doctrine is in tension with the Establishment Clause. The Supreme Court expressly rejected this proposition in *Hosanna-Tabor*. While at times "there can be 'internal tension … between the Establishment Clause and the Free Exercise Clause,'" that is "[n]ot so here." *Hosanna-Tabor*, 565 U.S. at 181

(quoting *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion)). Instead, "[*b*]*oth* Religion Clauses bar the government from interfering with" ministerial personnel decisions. *Id.* (emphasis added); *see also id.* at 189 ("the Establishment Clause … prohibits government [from] involvement in [] ecclesiastical decisions"). The Court reaffirmed this principle in *OLG*, holding that state interference in matters of faith and doctrine "would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." 140 S. Ct. at 2060. In short, both Religion Clauses require courts to protect the autonomy of religious organizations by abstaining from adjudicating internal governance disputes.

II. DR. MCRANEY'S LEGAL CLAIMS REQUIRE ADJUDICATION OF MATTERS OF CHURCH GOVERNANCE.

The panel's decision inserts the district court into a matter of church government, requiring an adjudication of the reasons underlying the termination of Dr. McRaney's ministry employment and his disinvitation from a mission symposium. These are precisely the types of inquiries that the Supreme Court in *OLG* forbade secular courts to undertake.

In allowing this litigation to proceed, the panel noted that Dr. "McRaney is not challenging the termination of his employment." Op. 4. The Supreme Court's holding in *OLG* does not turn on the particular claim brought, but rather on

whether the lawsuit requires adjudication of "internal management decisions that are essential to the institution's central mission." 140 S. Ct. at 2060. The dispute here easily satisfies this standard, as the panel itself recognized that Dr. McRaney's claims, regardless of whether they directly challenge his termination, turn on the cause of his termination as a minister and his disinvitation as a mission speaker. *See, e.g.*, Op. 4 (Dr. McRaney alleges that the Mission Board "intentionally made false statements about him to [the Baptist Convention] *that resulted in* his termination." (emphasis added)).

Indeed, the Supreme Court has been clear that the type of claim is irrelevant; what matters is whether the dispute centers around "matters of church government" or "faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116-117 (1952); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) ("This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."). This is true regardless of whether a plaintiff is a member or a non-member of the religious organization. *See Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). Courts will not "pars[e]" between the secular and religious elements of a case, as doing so "would unconstitutionally entangle the court in matters of church governance." *Westbrook*, 231 S.W.3d at 392.

Also irrelevant is the fact that the Southern Baptist Convention is not organized like a hierarchical church. The panel disregarded that the Baptist Convention works "in cooperation with the Southern Baptist Convention" and the Mission Board "is one of the twelve boards and agencies of the Southern Baptist Convention," highlighting instead that the Mission Board has "never been McRaney's employer." Op. 3. Not all churches organize their authority structure into employer-employee relationships. The panel's holding thus discriminates against churches based on their organizational structure in contravention of Supreme Court precedent.[3] *See, e.g.*, *OLG*, 140 S. Ct. at 2064 (criticizing a lower court for "privileging religious traditions with formal organizational structures over those that are less formal").

The district court's unchallenged ruling that Dr. McRaney's employment records are covered by the ministerial exception and the ecclesiastical abstention doctrine further demonstrates the error here. ROA.270-271. The district court granted the Baptist Convention's motion to quash and entered its show cause order because the underlying dispute is a religious employment decision subject to the ministerial exception and the church autonomy doctrine. ROA.308-310. As it

[3] The panel's approach in advantaging hierarchical churches over congregational denominations also favors one religious expression over another. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

stands, the Mission Board is in the impossible position of being required by the panel opinion to offer "evidence" of valid religious reasons for its actions while being denied access to the employment records based on the church autonomy doctrine and ministerial exception.[4]

En banc review is warranted here because the panel failed to consider whether the decisions of a religious organization (whether the Mission Board or the Baptist Convention) are church governance decisions categorically barred from adjudication in secular courts regardless of whether the religious organization advances valid religious reasons for those decisions.

[4] The panel had an independent duty to avoid entangling itself in a religious dispute under the ministerial exception, which *OLG* identified as residing within the church autonomy doctrine. The ministerial exception cannot be waived, lest the court be drawn into a religious dispute that the First Amendment forbids it from adjudicating; the panel's decision to not address the ministerial exception in fact creates a circuit split. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *Tomic*, 442 F.3d at 1042. Because the ministerial exception is a structural limitation on the judicial power that cannot be waived, courts can and do raise it *sua sponte*. *See, e.g.*, *Lee*, 903 F.3d at 118 & n.4 (affirming district court's *sua sponte* raising of ministerial exception). Dr. McRaney is clearly a minister who identified his duties as "ministry direction and priorities of the organization and the screening and managing of all staff members" in his Complaint. ROA.14. Thus, this court is "bound to stay out of [the] employment dispute[]" between Dr. McRaney and the Mission Board, because judicial intervention in the dispute "threaten[s] the [Mission Board's] independence in a way the First Amendment does not allow." *OLG*, 140 S. Ct. at 2060, 2069.

III. THE PANEL ERRED IN REQUIRING "CERTAIN[TY]" THAT ECCLESIASTICAL QUESTIONS WILL BE IMPLICATED BY THE LITIGATION.

Even were the panel correct—which it was not—that the justiciability of this controversy turned on whether the Mission Board raised "valid religious reasons" for the decisions Dr. McRaney challenges, the panel erred in holding that dismissal would be proper only if it is "certain" that resolution of Dr. McRaney's claims would "require" the court to delve into religious matters. Op. 3, 7. The panel acknowledged that the Mission Board had asserted that it had "valid religious reasons" for its actions. Op. 6; *see also* Brief of Appellee 15. Nevertheless, the panel demanded "evidence" of such reasons before dismissal would be appropriate. *See* Op. 6-7.

Subjecting a religious organization to the discovery process to substantiate its religious reasons and their validity to the satisfaction of a secular court is itself an impermissible intrusion into the organization's affairs. *See, e.g.*, *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (the "very process of inquiry leading to findings and conclusions" impinges on "rights guaranteed by the Religion Clauses"). Even were the law such that the reason for the Mission Board's decisions is relevant to the dismissal question, an assertion by the Mission Board that it had a religious reason should end the analysis and require dismissal. *Cf. Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or

the validity of particular litigants' interpretations of those creeds."). The panel erred in requiring "evidence" of these religious reasons and, presumably, the testing of such evidence in the discovery process.

CONCLUSION

The court should grant rehearing en banc.

August 13, 2020

Respectfully submitted,

/s/ Matthew T. Martens

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,899 words.

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Executed this 13th day of August, 2020

/s/ Matthew T. Martens
MATTHEW T. MARTENS

CERTIFICATE OF SERVICE

On this 13th day of August, 2020, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Matthew T. Martens
MATTHEW T. MARTENS

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60293

United States Court of Appeals
Fifth Circuit
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WILL MCRANEY,

Plaintiff - Appellant

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INCORPORATED,

Defendant - Appellee

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

Before CLEMENT, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Plaintiff-Appellant Will McRaney brought suit against Defendant-Appellee North American Mission Board of the Southern Baptist Convention ("NAMB") for intentional interference with business relationships, defamation, and intentional infliction of emotional distress. The district court dismissed the case for lack of jurisdiction, citing the ecclesiastical abstention doctrine, also known as the religious autonomy doctrine. The district court found that it would need to resolve ecclesiastical questions in order to resolve McRaney's claims. Because that conclusion was premature, we REVERSE and REMAND.

We review a dismissal for lack of subject matter jurisdiction *de novo*. *Williams v. Wynne*, 533 F.3d 360, 364 (5th Cir. 2008). Dismissal is only proper if "it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661, 663 (5th Cir. 2007) (quoting *Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 35 F.3d 348, 351 (5th Cir. 2003)).[1]

The ecclesiastical abstention doctrine recognizes that the Establishment Clause of the First Amendment precludes judicial review of claims that require resolution of "strictly and purely ecclesiastical" questions. *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 713 (1976) (quoting *Watson v. Jones*, 13 Wall. 679, 733 (1871)); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115–16 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 190–91 (1960). "[M]atters of church

[1] We note that it is somewhat unclear whether the ecclesiastical abstention doctrine serves as a jurisdictional bar requiring dismissal under Fed. R. Civ. P. 12(b)(1) or an affirmative defense requiring dismissal under Fed. R. Civ. P. 12(b)(6). *See, e.g.*, *Nayak v. MCA, Inc.*, 911 F.2d 1082, 1083 (5th Cir. 1990) (dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6) without explicitly discussing the jurisdictional nature of the doctrine); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492, 495 (5th Cir. 1974) (stating that "[t]he people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes" but affirming summary judgment rather than instructing the district court to dismiss for lack of jurisdiction); *see also Watson v. Jones*, 13 Wall. 679, 733 (1871) (describing a dispute that is "strictly and purely ecclesiastical in its character" as "a matter over which the civil courts exercise no jurisdiction"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012) (clarifying that the related "ministerial exception" is an affirmative defense rather than a jurisdictional bar); *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1208–09 (D.N.M. 2018) (collecting cases) *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 248 n.7 (S.D.N.Y. 2014) (discussing the uncertainty surrounding the jurisdictional nature of the ecclesiastical abstention doctrine post-*Hosanna-Tabor*). We need not resolve this uncertainty because dismissal was improper, regardless. *See Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 171 (5th Cir. 2012) (finding that review under Fed. R. Civ. P. 12(b)(6) "requires us to scrutinize the same materials we would have considered were the case properly before us on a 12(b)(1) motion"); *Ramming v. United States*, 281 F.3d 158, 161–62 (5th Cir. 2001) (providing the standards of review for dismissals under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)).

government, as well as those of faith and doctrine" constitute purely ecclesiastical questions. *Kedroff*, 344 U.S. at 116; *see also Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) (emphasizing that the ecclesiastical abstention doctrine covers matters of church government as well as matters of religious doctrine). But "[t]he First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships," which "would impermissibly place a religious leader in a preferred position in our society." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335–36 (5th Cir. 1998); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (describing the principle "that government should not prefer one religion to another, or religion to irreligion" as "at the heart of the Establishment Clause"); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (holding that courts may apply neutral principles of law to resolve church property disputes). Therefore, the relevant question is whether it appears certain that resolution of McRaney's claims will require the court to address purely ecclesiastical questions. At this stage, the answer is no.

Critically, many of the relevant facts have yet to be developed. Presently, we know only the following: (1) McRaney formerly worked as the Executive Director of the General Mission Board of the Baptist Convention for Maryland/Delaware ("BCMD"), one of 42 separate state conventions that work in cooperation with the Southern Baptist Convention; (2) NAMB, which has never been McRaney's employer, is one of twelve boards and agencies of the Southern Baptist Convention; (3) NAMB and BCMD entered into a Strategic Partnership Agreement ("SPA") that addressed issues of personnel, cooperation, and funding; (4) McRaney declined to adopt a new SPA on behalf of BCMD, and NAMB notified BCMD that it intended to terminate the SPA in one year; (5) McRaney's employment was either terminated or he resigned; (6)

after his termination, McRaney was uninvited to speak at a large mission symposium in Louisville, Mississippi; and (7) a photograph of McRaney was posted at NAMB headquarters in Alpharetta, Georgia.

McRaney alleges that NAMB intentionally made false statements about him to BCMD that resulted in his termination. Specifically, he alleges that NAMB falsely told BCMD that he refused to meet with Dr. Kevin Ezell, president of NAMB, to discuss a new SPA. He also alleges that NAMB intentionally got him uninvited to speak at the mission symposium and posted his picture at its headquarters to "communicate that [McRaney] was not to be trusted and [was] public enemy #1 of NAMB."

In order to resolve McRaney's claims, the court will need to determine (1) whether NAMB intentionally and maliciously damaged McRaney's business relationships by falsely claiming that he refused to meet with Ezell, *see Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1098 (Miss. 2005); (2) whether NAMB's statements about McRaney were false, defamatory, and at least negligently made, *see Jernigan v. Humphrey*, 815 So. 2d 1149, 1153 (Miss. 2002); and (3) whether NAMB intentionally caused McRaney to suffer foreseeable and severe emotional distress by displaying his picture at its headquarters, *see Jones v. City of Hattiesburg*, 228 So. 3d 816, 819 (Miss. 2017).

At this early stage of the litigation, it is not clear that any of these determinations will require the court to address purely ecclesiastical questions. McRaney is not challenging the termination of his employment, *see Simpson*, 494 F.2d at 492–93 (affirming dismissal of a lawsuit in which the plaintiff challenged his removal as pastor), and he is not asking the court to weigh in on issues of faith or doctrine, *see Nayak v. MCA, Inc.*, 911 F.2d 1082, 1082–83 (5th Cir. 1990) (affirming dismissal of a defamation lawsuit seeking to enjoin the distribution and presentation of the movie "The Last Temptation

of Christ"). His complaint asks the court to apply neutral principles of tort law to a case that, on the face of the complaint, involves a civil rather than religious dispute. *See, e.g.*, *Jones*, 443 U.S. at 602 (holding that courts may apply neutral principles of law to resolve church property disputes); *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928 (11th Cir. 2018) ("Civil courts may apply neutral principles of law to decide church disputes that 'involve[] no consideration of doctrinal matters.'" (quoting *Jones*, 443 U.S. at 602)); *Hutterville Hutterian Brethren, Inc. v. Sveen*, 776 F.3d 547, 553 (8th Cir. 2015) ("[A] court need not defer to an ecclesiastical tribunal on secular questions and permissibly may resolve a matter by applying neutral principles of the law." (internal quotation marks omitted)); *Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 419 (3d Cir. 2012) ("When a church dispute turns on a question devoid of doctrinal implications, civil courts may employ neutral principles of law to adjudicate the controversy."); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99–100 (2d Cir. 2002) ("Courts may decide disputes that implicate religious interests as long as they can do so based on 'neutral principles' of secular law without undue entanglement in issues of religious doctrine.").

Other courts have held that similar claims did not require resolution of purely ecclesiastical questions. In *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993), the Alaska Supreme Court found that it had jurisdiction to consider claims of intentional interference with a contract and defamation brought by a minister against a church executive. *Id.* at 425, 429. There, as here, the alleged interference consisted of false statements that were not religious in nature.[2]

[2] NAMB argues that *Marshall* is distinguishable because this dispute "is rooted in and intertwined with the primary ministry strategies of various religious organizations." At least at this time, the record does not support NAMB's view. The only derogatory information

Id. at 425. The court found that, under these circumstances, resolution of the plaintiff's claims would not require the court to determine whether the plaintiff was qualified to serve as a pastor. *Id.* at 428.

Similarly, in *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir. 1993), the Eighth Circuit found that it had jurisdiction over a claim of intentional interference with a legitimate expectation of employment brought by a minister against a religious organization. *Id.* at 469, 472. The plaintiff alleged that the organization placed false information—that his spouse had previously been married—in his personal file. *Id.* at 469. The court reasoned that the plaintiff's fitness as a minister was not in dispute and the defendant had not yet "offered any religious explanation for its actions which might entangle the court in a religious controversy." *Id.* at 471–72. The Eighth Circuit recognized, however, that its decision was preliminary. *Id.* at 472 ("If further proceedings reveal that this matter cannot be resolved without interpreting religious procedures or beliefs, the district court should reconsider the . . . motion to dismiss."). The same is true here. If further proceedings and factual development reveal that McRaney's claims cannot be resolved without deciding purely ecclesiastical questions, the court is free to reconsider whether it is appropriate to dismiss some or all of McRaney's claims.[3]

NAMB broadly objects that it may have "valid religious reason[s]" for its actions. On remand, if NAMB presents evidence of these reasons and the district court concludes that it cannot resolve McRaney's claims without

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McRaney identifies in his complaint—statements by NAMB that McRaney refused to meet with Ezell—is not ecclesiastical in nature.

[3] NAMB previously moved for dismissal based on the ministerial exception, *see Hosanna-Tabor*, 565 U.S. at 188; *see also Our Lady of Guad. Sch. v. Morrissey-Berru*, --- S. Ct. ---, 2020 WL 3808420 (July 8, 2020), but the district court denied that motion, finding that the ministerial exception only applies to disputes between employees and employers, not employees and third parties. Both parties agree that the correctness of the district court's decision regarding the applicability of the ministerial exception is not before us.

addressing these reasons, then there may be cause to dismiss. *See id.* Were such a broad statement alone sufficient to warrant dismissal at this stage, however, religious entities could effectively immunize themselves from judicial review of claims brought against them.

"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.'" *Our Lady of Guad. Sch. v. Morrissey-Berru*, --- S. Ct. ---, 2020 WL 3808420, at *3 (July 8, 2020) (quoting *Kedroff*, 334 U.S. at 116). At this time, it is not certain that resolution of McRaney's claims will require the court to interfere with matters of church government, matters of faith, or matters of doctrine. The district court's dismissal was premature. Accordingly, we REVERSE and REMAND.