APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60293

WILL MCRANEY,
Plaintiff-Appellant,
v.

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

Filed July 16, 2020

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]

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[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

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 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

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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)).

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] *Id.* at 425. The court found that, under these circumstances, resolution of the plaintiff's claims would not require the court to deter-

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

mine 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]

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[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.

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 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.

UNITED STATES OF COURT OF APPEALS
FIFTH CIRCUIT
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July 16, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-60293 Will McRaney v. N Amer Mission Bd So Baptist
USDC No. 1:17-CV-80

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Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41

will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that appellant pay to appellee the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk,

By: signature
Kenneth G. Lotz, Deputy
Clerk

Enclosure (s)

Mr. William Harvey Barton II
Ms. Kathleen Ingram Carrington
Ms. Donna Brown Jacobs
Mr. Joshua Jerome Wiener

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

Civil Action No. 1:17-cv-080-GHD-DAS

WILL MCRANEY,
Plaintiff,

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Pursuant to an opinion issued this day, it is hereby ORDERED that the Defendant's motion to dismiss [Doc. No. 8] is GRANTED IN PART AND DENIED IN PART, as follows:

(1) The motion is GRANTED insofar as it seeks dismissal of COUNT IV of the Plaintiffs Complaint [Doc. No. 2, at p. 7], which is the Plaintiff's claim for intentional interference with his speaking engagement at the Pastor's Conference in Florida, and that claim is DISMISSED WITH PREJUDICE; and

(2) The motion is DENIED in all other respects.

SO ORDERED, this, the 18th day of January, 2018.

signature

SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

Civil Action No. 1:17-cv-080-GHD-DAS

WILL MCRANEY,
Plaintiff,

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,
Defendant.

MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Before the Court is the Defendant North American Mission Board of the Southern Baptist Convention's ("NAMB") motion to dismiss [Doc. No. 8] the Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter is now ripe for review. Upon due consideration, the Court finds that the motion should be granted in part and denied in part.

Background

The Plaintiff Will McRaney ("McRaney") is the former Executive Director of the non-party General Mission Board of the Baptist Convention for Maryland/Delaware ("BCMD"). Pl.'s Comp. [Doc. No. 2] at 2. The BCMD is a self-governing group of 560 separate, autonomous churches. *Id.* It is one of 42 separate state

conventions that work in cooperation with the non-party Southern Baptist Convention ("SBC"). *Id.*

The Defendant NAMB is a constituent board of the SBC. *Id* at 2. While McRaney was never employed by the NAMB, he was employed by the BCMD, which partnered together with the NAMB under a "Strategic Partnership Agreement." *Id.* at 3. Aside from the obligations of this agreement, the BCMD are NAMB are separate and autonomous from each other. The BCMD is self-governing with its own boards and member churches, and the NAMB operates pursuant to its own Board of Trustees selected at annual meetings of the SBC. *Id.*

Under their partnership agreement, the BCMD and NAMB had eight jointly funded staff positions that were overseen by McRaney. *Id.* . In 2014, the NAMB developed a revised partnership agreement that eliminated the jointly-funded staff positions and gave the NAMB greater control over other staff positions of the BCMD. *Id.* The NAMB was unsuccessful in persuading McRaney to accept the new partnership agreement on behalf of the BCMD. NAMB President Dr. Kevin Ezell and Vice President Jeff Christopherson thereafter gave notice to the BCMD that the NAMB intended to cancel the partnership agreement between the NAMB and the BCMD. *Id.* at 4.

In June 2015, following meetings between Dr. Ezell and other board members of the BCMD, McRaney was terminated from his position as Executive Director of the BCMD. *Id.* According to McRaney, this was because Ezell threatened to withhold all NAMB funds from the BCMD unless the BCMD terminated McRaney and agreed to enter into the new partnership agreement. *Id.* at 5.

McRaney alleges that, after his termination from employment with the BCMD, NAMB leadership continued to interfere with business and contractual relationships that McRaney had with third parties. For instance, McRaney avers that, in October 2016, he was scheduled to speak at a mission symposium in Louisville, Mississippi, until NAMB employees allegedly spoke to organizers of the event and had him uninvited. *Id.* Additionally, in November 2016, McRaney alleges that he was scheduled to speak at the Florida Baptist Convention Pastor's Conference. In early November, the Pastor's Conference President informed McRaney that Dr. Ezell had attempted, unsuccessfully, to get McRaney's appearance canceled. *Id.* Finally, McRaney alleges that his photo was posted at the NAMB headquarters welcome desk with a caption that stated he was not to be trusted. *Id.*

McRaney then filed this action in the Circuit Court of Winston County, Mississippi, alleging three claims of intentional interference with business relationships, one claim of defamation, and one claim of intentional infliction of emotional distress. The NAMB then removed the case to this Court based on federal diversity jurisdiction, and after filing its answer, filed the present motion seeking to dismiss McRaney's claims.

Standard for Dismissal Under Rule 12(B)(6)

Motions to dismiss pursuant to Rule 12(b)(6) "are viewed with disfavor and are rarely granted." *Kocurek v. Cuna Mut. Ins. Soc'y*, 459 F. App'x 371, 373 (5th Cir. 2012) (citing *Gregson v. Zurich Am. Ins. Co.*, 322 F.3d 883, 885 (5th Cir. 2003)). When deciding a Rule 12(b)(6) motion to dismiss, the Court is limited to the allegations set forth in the complaint and any documents attached to the complaint. *Walker v. Webco Indus., Inc.*,

562 F. App'x 215, 216-17 (5th Cir. 2014) (per curiam) (citing *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir. 2004)).

"[A plaintiffs] complaint therefore 'must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." ' " *Phillips v. City of Dallas, Tex.*, 781 F.3d 772, 775-76 (5th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). "[P]laintiffs must allege facts that support the elements of the cause of action in order to make out a valid claim." *Webb v. Morella*, 522 F. App'x 238, 241 (5th Cir. 2013) (per curiam) (quoting *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152-53 (5th Cir. 2010) (internal quotation marks omitted)). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id.* (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (internal quotation marks omitted)). "Dismissal is appropriate when the plaintiff has not alleged 'enough facts to state a claim to relief that is plausible on its face' and has failed to 'raise a right to relief above the speculative level.' " *Emesowum v. Hous. Police Dep't*, 561 F. App'x 372, 372 (5th Cir. 2014) (per curiam) (quoting *Twombly*, 550 U.S. at 555, 570, 127 S. Ct. 1955).

Analysis

1. The Ministerial Exception and Ecclesiastical Abstention Doctrine

a. The Ministerial Exception

The NAMB first argues that the "ministerial exception" bars McRaney's claims. The "ministerial exception" is a First Amendment doctrine that precludes court interference into "the employment relationship between a religious institution and its 'ministers'." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (emphasis added). The purpose behind this exception is to prevent the state, through the enforcement of employment laws and regulations, from "depriving the church of control over the selection of those who will personify its beliefs." *Id.*

"Ministerial" in this context "does not depend upon ordination but upon the function of the position" *Id.* at 203 (Thomas, J., concurring)(citing *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985)). The Supreme Court in *Hosanna-Tabor* declined to apply a "rigid formula" to determine which employees qualified as a minister. Instead, the Court looked a totality of the circumstances analysis to find that the plaintiff, a teacher at a religious school, was a minister to whom the exception would apply. The factors the court considered included "the formal title given [the teacher] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church" *Id.* at 192. The Fifth Circuit likewise applied this analysis in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012). There the Fifth Circuit found that the ministerial exception

applied to a church music director. The Fifth Circuit considered the "integral role in the celebration of Mass" the plaintiff played by selecting music, teaching the choir, and playing piano during the service. *Id.* at 178.

Turning to the case *sub judice*, NAMB argues that because McRaney was the Executive Director of the BCMD, his duties included "ministry direction," and that because McRaney was thus the employee tasked with directing the ministry efforts of the BCMD, he qualifies as a "minister" to whom the exception applies. The Court agrees, and finds that McRaney is indeed the type of ministerial employee to whom the exception potentially applies.

That does not end the Court's analysis, however, because before the exception can be applied the Court must also determine whether McRaney's pending claims are the type to which this exception applies. The Court holds they are not, and thus his claims are not subject to dismissal under this exception. Specifically, every case the Court has reviewed in which the ministerial exception was applied involved a plaintiff who had been previously employed by the defendant religious organization *itself* (and not just employed by a related or affiliated organization). For instance, in *Hosanna-Tabor*, the dispute was one between a religious school and a former teacher at that school itself. 565 U.S. at 177-78. In *Cannata*, the dispute was between a church and its former music director. 700 F.3d at 170-71. In fact, every case cited by the NAMB in support of its motion involves a dispute between employer and employee. *See e.g., Conlon v. lnterVarsity Christian Fellowship*, 777 F.3d 829, 831 (6th Cir. 2015)(dispute between college missionary organization and "spiritual director" for the organization"); *Rweyemamu v. Cote*, 520 F.3d 198, 199-200 (2d. Cir. 2009)(dispute between

Catholic diocese and priest); and *Curl v. Beltsville Adventist School.*, 2016 WL 4382686, at *1 (D. Md., Aug. 15, 2016)(dispute between Seventh-Day Adventists school and teacher). Further, even within the employer-employee relationship, this exception only prevents claims that arise out of actual employment decisions *themselves*, and not just related conduct. For example, the Ninth Circuit held that a pastor terminated for complaining of sexual harassment by her superiors could not sue her former church employer for retaliatory termination without running afoul of the exception, but could sue for the harassment itself. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 966 (9th Cir. 2004).

Accordingly, in the case *sub judice*, because McRaney was indisputably not employed by NAMB, this is not a claim between employer and employee, is not a claim that arises out of employment decisions made by the sole Defendant NAMB, and thus the ministerial exception does not apply to mandate dismissal of any of McRaney's claims.

b. *The Ecclesiastical Abstention Doctrine*

Next, the NAMB argues that the doctrine of "ecclesiastical abstention" prevents the Court from resolving McRaney's claims and mandates their dismissal. First, the Court notes that while the parties equate the ecclesiastical abstention doctrine with the ministerial exception, they are in fact separate, albeit related, principles. *See, e.g. Gregorio v. Hoover*, 238 F. Supp. 3d 37, 46 (D.D.C. 2017) (describing the ecclesiastical abstention doctrine as "separate but distinct from the ministerial exception.").

The ecclesiastical abstention doctrine is built out of numerous Supreme Court cases affirming that churches have the "power to decide for themselves,

free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Thus, civil courts are limited in deciding "religious controversies that incidentally affect civil rights." *E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 710 (1976). Courts may only decide "church disputes over church polity and church administration" when they can do so "without resolving underlying controversies over religious doctrine." *Id.* (internal quotations omitted). Under this doctrine courts have:

> consistently agreed that civil courts should not review the internal policies, internal procedures, or internal decisions of the church, and this includes review of whether a church followed its own internal policies or procedures. *See, e.g., Kral v. Sisters of the Third Order Regular of St. Francis*, 746 F.2d 450 (8th Cir.1984) ("A claim of violation of the law of a hierarchical church, once rejected by the church's judicial authorities, is not subject to revision in the secular courts."); *Nunn v. Black*, 506 F. Supp. 444, 448 (W.D.Va.1981) (stating "the fact that local church may have departed arbitrarily from its established expulsion procedure in removing [dissident church members] was of no constitutional consequence"), *aff'd* 661 F.2d 925 (4th Cir.1981); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir.1974); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30 (D.D.C.1990).

Ginyard v. Church of God in Christ Kentucky First Jurisdiction, Inc., 6 F. Supp. 3d 725, 729 (W.D. Ky. 2014).

As for the ecclesiastical abstention doctrine's potential application to McRaney's interference claims, the Court cannot rule at this juncture that resolving these claims will necessarily require the Court to decide "matters of religious doctrine." While this is a dispute between members of the same religious denomination, it is not one which, on the face of the complaint, involves a review of "*internal* policies, *internal* procedures, or *internal* decisions of the church." *Id* (emphasis added). The claims of the complaint relate to the NAMB's *external* actions toward separate autonomous organizations, rather than internal decisions within the hierarchy of a single organization. Therefore, at this juncture the Court will decline to apply the ecclesiastical abstention doctrine to McRaney's claims for intentional interference with business relations, and those claims are not subject to dismissal based on this doctrine.

As for McRaney's claim for defamation and the ecclesiastical abstention doctrine, McRaney contends that the NAMB defamed him when its president, Dr. Ezell, told various leaders of the BCMD that McRaney refused to discuss the updated partnership agreement. Pl. Comp. at 4, 6. McRaney claims that he attempted to do so, and that it was NAMB leadership that refused to meet with him. *Id.* at 4. McRaney claims this disparaged him in the eyes of BCMD leadership and contributed to his termination. *Id.*

To prove defamation under Mississippi law, a plaintiff must show:

> (a) a false statement that has the capacity to injure the plaintiff's reputation; (b) an unprivileged publication, i.e., communication to a third party; (c) negligence or greater fault on part of

> publisher; and (d) either actionability of statement irrespective of special harm or existence of special harm caused by publication.

Mayweather v. Isle of Capri Casino, Inc., 996 So.2d 136, 139 (Miss. Ct. App 2008)(citing *Speed v. Scott*, 787 SO.2d 626,631 (Miss. 2001)).

The NAMB argues that adjudicating McRaney's defamation claim would require the Court to decide matters of internal church governance and that the ecclesiastical abstention doctrine thus bars the claims. The NAMB cites two cases to support its proposition.

The first is *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732, (D.N.J.1999). In that case, the plaintiff, a member of an Orthodox Jewish congregation, sued a group of Rabbis for publishing a false statement about the plaintiff's marriage and divorce. *Id.* at 734-735. The plaintiff alleged that the notice charged the plaintiff with "bigamy," "failing to comply with an order of a rabbinical court," and "failing to submit to the jurisdiction of a rabbinical court." *Id.* at 740-41. The *Klagsbrun* court found that to resolve the case, it would need to determine not just factual issues, such as whether the plaintiff had failed to comply with a rabbinical court order, but also whether that failure was a sin "within the Orthodox Jewish faith which lead to the imposition of the punishment of shunning." *Id.*at 741. The court could not engage in purely secular analysis, such as determining was factually engaged in bigamy, but whether he was engaged in bigamy "within the meaning of the Orthodox Jewish faith." *Id.* These questions, the court held, could only be decided by an inquiry into religious doctrine, an imper-

missible inquiry under the First Amendment. Thus, the plaintiff's claims were dismissed.

In the second case, *Horne v. Andrews*, 589 S.E. 2d 719 (Ga. Ct. App. 2003), the plaintiff, a church pastor, sued another church official for defamation. The church official had prepared a document which he gave to another church official accusing the pastor of "refus[ing] to follow the United Methodist Discipline; failing to visit members who were ill or otherwise unable to attend church; failing to participate in the church's stewardship campaign; failing to meet or communicate with other church leaders; failing to raise funds for the church; and inappropriate behavior." *Id.* at 720. According to the Georgia Court of Appeals, determining whether these statements were libelous would require the court to "inquire into church policy regarding such matters as a pastor's role in participating in stewardship programs, the proper use of church funds, and the proper time for a pastor to arrive at church." The court could not do so, and therefore ruled that dismissal of the claims was appropriate. *Id.*

In the case *sub judice*, to determine whether the subject statements were defamatory this Court must determine, among other things: (1) whether McRaney refused to meet with NAMB officials to discuss the new partnership agreement; and, if not, (2) whether McRaney was harmed by the false statements. While the first inquiry is clearly a pure factual matter, the NAMB contends that resolving the second inquiry would entangle the Court in matters of the BCMD's and NAMB's internal governance and thus the claim should be dismissed.

The Court disagrees. First, unlike the court in *Klagsbrun*, this Court would not need to decide mat-

ters of pure religious doctrine such as what constitutes a valid religious divorce or a rabbinical court order. Second, while this case is much more similar to *Horne*, the nature of the alleged harm would not require this Court to decide any parameters or issues of proper church governance. In *Horne*, the plaintiff pastor alleged that the defamatory statements subjected him to "humiliation, ridicule, contempt, and emotional distress and caused his ministry as pastor to suffer suspicion." 589 S.3d 2d at 721. Because he did not allege any "special harm," but rather only general damages, those statements would only be actionable if they constituted defamation *per se*. Thus to determine whether the statements were defamatory, the *Horne* court was required to determine whether the statements about the pastor were "injurious on their face." *See Bellemead, LLC v. Stoker*, 631 .S.E.2d 693, 695 (Ga. 2006) (defining "slander per se" under Georgia law). And to do that, the court would necessarily be required to determine what constituted "appropriate behavior" for a pastor—a clear inquiry into religious practice.

In the case *sub judice*, however, McRaney *has* pled specific harm—that the alleged defamatory statements contributed to his termination. *See Speed*, 787 So.3d at 632 ("Special harm is the loss of something having economic or pecuniary value.")(internal quotations omitted). Accordingly, to determine whether McRaney's claim has merit, the Court need only decide whether the statements about McRaney were false and whether they caused his termination, neither of which will require the Court to delve into any religious practices or matters of internal church governance. Thus, on the face of the complaint, the Court can adjudicate this claim without delving into impermissible religious inquiries, the ecclesiastical exception therefore does not

apply, and NAMB's motion to dismiss this claim on this basis is denied.

2. Whether McRaney Has Adequately Pled His Claims under Rule 12(b)(6)

As noted above, under Rule 12(b)(6) a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). NAMB asserts that McRaney has not met this standard with respect to his claims for intentional interference with contractual relationships or his claim for intentional infliction of emotional distress, and thus those claims should face dismissal.

a. McRaney's Claims of Intentional Interference with Contractual Relationships

In his Complaint, McRaney asserts that there are three separate incidents where the NAMB intentionally interfered with business relationships he held with other parties. First, he alleges that the NAMB intentionally interfered with his contractual employment relationship with the BCMD by threatening to withhold funds from the BCMD unless they fired McRaney. Pl. Comp. at 6. Second and third, he alleges that the NAMB tortiously sought to have him removed from two unaffiliated speaking engagements in Mississippi and Florida. *Id.* at 6-7.

Under Mississippi law, the elements of intentional interference with a contractual relationship are: "(1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his/her lawful business; (3) that they were done with

the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which acts constitute malice); (4) that actual damage or loss resulted," and "(5) the defendant's acts were the proximate cause of the loss or damage suffered by the plaintiff." *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So.2d 1093, 1098-99 (Miss.2005). To succeed a plaintiff "must prove that the contract would have been performed but for the alleged interference." *Id.* (internal citations omitted).

Because an essential element is that the plaintiff suffer some damage or loss, the Court holds that McRaney's claim that the NAMB intentionally interfered with his scheduled appearance at the Florida Pastor's Conference fails.[1] Despite the NAMB's actions, McRaney admits that his speech in Florida was not canceled and he therefore did not suffer damages. McRaney therefore cannot state a claim for interference with that relationship and that claim shall be dismissed.

In regard to McRaney's other two claims for intentional inference, the Court finds that he has met his initial pleading burden and that dismissal of those

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[1] Though not discussed by the parties, it is not clear to the Court whether Florida or Mississippi law should apply to McRaney's Florida-based claim. In any event, because it is also a requirement under Florida law that the plaintiff suffer damages, dismissal of this claim is warranted under both Mississippi and Florida law. *Farah v. Canada*, 740 So. 2d 560, 561 (Fla. Dist. Ct. App. 1999)("The elements of the tort of intentional interference [with a contract] [under Florida law] are: 1) the contract; 2) the wrongdoer's knowledge thereof; 3) his intentional procurement of its breach; 4) the absence of justification; and 5) damages.")(internal quotation omitted).

claims at this juncture is thus inappropriate.[2] First, with regard to his relationship to the BCMD, McRaney has alleged that the NAMB intentionally acted to have the BCMD fire him, and that he was actually fired as a result of NAMB' s actions. These allegations are sufficient at this juncture to state a claim for intentional interference under these alleged facts. Second, he has sufficiently alleged that the NAMB intentionally sought to have his speech in Louisville, Mississippi, cancelled and that it was actually cancelled as a result, thus causing him damage. These allegations are likewise sufficient to state a claim for intentional interference at this juncture. Accordingly, the Court shall deny the NAMB's motion to dismiss these two interference claims.

b. *McRaney's Claim for Intentional Infliction of Emotional Distress*

Finally, McRaney alleges that the NAMB intentionally inflicted him with emotional distress by

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[2] The laws of Mississippi, Delaware, and Maryland are similar such that McRaney has met his pleading burden under all three, regardless of which ultimately applies to each claim. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001)(Elements of tortious interference with a business relationship are "(a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages … . [applied] in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner."); *Blondell v. Littlepage*, 991 A.2d 80, 97 (Md. 2010)("A claim for intentional interference with contractual or business relations requires the following elements:(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.")

placing a photograph of him in the NAMB's headquarters with a caption that said "he was not to be trusted and [is] public enemy #1 of NAMB." Pl. Comp. at 7.

To prevail on a claim for intentional infliction of emotional distress under Mississippi law, the plaintiff must show:

> (1) the defendant acted willfully or wantonly toward the plaintiff by committing certain described actions; (2) the defendant's acts are ones that evoke outrage or revulsion in civilized society; (3) the acts were directed at, or intended to cause harm to, the plaintiff; (4) the plaintiff suffered severe emotional distress as a direct result of the acts of the defendant; and (5) such resulting emotional distress was foreseeable from the intentional acts of the defendant.

Rainer v. Wal-Mart Assocs. Inc., 119 So.3d 398, 403-04 (Miss. Ct. App. 2013) (citing *J.R. ex rel. R.R. v. Malley*, 62 So.3d 902, 906-07 (Miss. 2011)).

In order to state such a claim, the defendant's alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Bowden v. Young*, 120 So. 3d 971, 980 (Miss. 2013)(citing *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 982 (N.D. Miss. 1996)). This liability will not extend to "insults, indignities, threats, annoyances, petty oppression, or other trivialities." *Pegues*, 913 F.Supp at 982.

The Court finds that McRaney has facially met his pleading burden at this stage. He has alleged that NAMB employees acted intentionally when they placed

the photograph of him at NAMB headquarters, that the NAMB did so to cause him emotional distress by impugning his reputation and character, and that he suffered emotional distress as a result. Given the circumstances of the photograph and the location where it was allegedly posted, the Court find that McRaney has, at a minimum, facially stated a plausible claim for relief for intentional infliction of emotional distress related to this incident, and this claim shall therefore proceed.

CONCLUSION

For the reasons stated above, the Court holds that McRaney has failed to adequately plead Count IV of his complaint, for intentional interference with business relations, in relation to a speaking engagement in Florida. That claim shall be dismissed pursuant to Rule 12(b)(6).

As for McRaney's remaining claims, the ministerial exception "precludes application of [employment] legislation to claims concerning the employment relationship between a religious institution and its ministers. *Hosanna-Tabor*, 575 U.S. at 188. Because the relationship between McRaney and the NAMB was not one of employee-employer, that exception is inapplicable to McRaney's remaining claims and does not subject the claims to dismissal. Further, McRaney's claims, as stated on the face of the Complaint, will not require the Court to impermissibly inquire into religious doctrine and practice, although the factual development of this case may later prove otherwise. Thus, the Court will not apply the ecclesiastical abstention doctrine to dismiss McRaney's remaining claims at this time. Finally, the Court finds that McRaney has adequately pled two claims for intentional interference with contractual relations, as set forth above, and has adequately pled a

claim for intentional infliction of emotional distress. Those claims are not subject to dismissal under Rule 12(b(6), and the Defendant's motion to dismiss those claims shall be denied.

An order in accordance with this opinion shall issue this day.

THIS, the 18th of January, 2018.

signature
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

Civil Action No. 1:17-cv-00080-GHD-DAS

WILL MCRANEY,
Plaintiff,

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION
Defendant.

MEMORANDUM OPINION

This matter is before the Court on Defendant The North American Mission Board's motion for summary judgment [48] and the Court's order to show cause [60] why the Court should not remand for lack of subject matter jurisdiction. For the reasons set forth below, the Court dismisses this case for lack of subject matter jurisdiction.

Background

Plaintiff Will McRaney, the former Executive Director of the Baptist Convention of Maryland and Delaware ("BCMD"), sued the North American Mission Board of the Southern Baptist Convention ("NAMB") in the Circuit Court of Winston County, Mississippi. McRaney alleges that the NAMB defamed him and tor-

tiously interfered with his employment with the BCMD resulting in his termination.

The NAMB removed to this Court premising federal jurisdiction on diversity of citizenship under 28 U.S.C § 1332. The NAMB then filed a motion to dismiss for failure to state claim, arguing that the ecclesiastical abstention doctrine required dismissal. The ecclesiastical abstention doctrine prohibits courts from reviewing "internal policies, internal procedures, or internal decisions of the church." *Ginyard v. Church of God in Christ Kentucky First Jurisdiction, Inc.*, 6 F. Supp. 3d 725, 729 (W.D. Ky. 2014). Under the doctrine, courts may only decide "disputes over church polity and church administration" when they can do so "without resolving underlying controversies over religious doctrine." *E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 710, 96 S.Ct 2372, 49 L.3d.2d 151 (1976) (internal quotations omitted).

Because the NAMB moved for dismissal under l2(b)(6), the Court reviewed its request under that standard and found that based on the allegations of the complaint alone, the Court could not say that review of this case would necessarily entangle the Court in matters of religious doctrine.[1] The ecclesiastical abstention doctrine is treated by most courts, however, as jurisdictional. *See, e.g., Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928 (11th Cir. 2018); *Gregorio v. Hoover*, 238 F. Supp. 3d 37, 46 (D.D.C. 2017); *Kelley v. Decatur Baptist Church*, No. 5:17-CV-1239-

[1] The Court did dismiss one count of tortious interference because McRaney failed to plead that he had suffered damages.

HNJ, 2018 WL 2130433, at *2 (N.D. Ala. May 9, 2018). This is the case within the Fifth Circuit. *See Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974)

Defendant reasserted the application of the doctrine as to counts I and II of the complaint in a motion for summary judgment. The Court, now recognizing the jurisdictional nature of the doctrine, ordered the parties to show cause why the matter should not be remanded back to state court for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(c) (In case removed to federal court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.") The parties responded, and the Court now considers whether it has subject matter jurisdiction over McRaney's claims.

12(b)(1) Subject Matter Jurisdiction Standard

The Court has a continuing duty to assess its subject matter jurisdiction through all phases of the litigation. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Thus, the Court converts the NAMB's motion to summary judgment to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974) (affirming the district court's dismissal for of pastor's claims against church defendants under the ecclesiastical abstention doctrine and noting the district court treated motion for summary judgment as a motion to dismiss for lack of subject matter jurisdiction.)

The Fifth Circuit has instructed:

> A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power

> to adjudicate the case. In considering a challenge to subject matter jurisdiction, the district court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case. Thus, under Rule 12(b)(1), the district court can resolve disputed issues of fact to the extent necessary to determine jurisdiction[.]

Smith v. Reg'l Transit Auth., 756 F.3d 340, 347 (5th Cir. 2014) (quotation marks and citation omitted). In ruling on a rule 12(b)(1) motion to dismiss, the Court can consider: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016) (internal quotation marks and citation omitted).

Analysis

I. Application of the Ecclesiastical Abstention Doctrine

The ecclesiastical abstention doctrine, rooted in the First Amendment's free exercise clause, is built out of numerous Supreme Court cases affirming that churches have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 73 S. Ct. 143, 97 L. Ed. 120 (1952). Thus, civil courts are limited in deciding "religious controversies that incidentally affect civil rights." *Milivojevich*, 426 U.S. at 710. Courts may only decide "church disputes over church polity and church administration"

when they can do so "without resolving underlying controversies over religious doctrine." *Id.* (internal quotations omitted). Under this doctrine courts have:

> consistently agreed that civil courts should not review the internal policies, internal procedures, or internal decisions of the church, and this includes review of whether a church followed its own internal policies or procedures. *See, e.g., Kral v. Sisters of the Third Order Regular of St. Francis*, 746 F.2d 450 (8th Cir. 1984) ("A claim of violation of the law of a hierarchical church, once rejected by the church's judicial authorities, is not subject to revision in the secular courts."); *Nunn v. Black*, 506 F. Supp. 444, 448 (W.D. Va. 1981) (stating "the fact that local church may have departed arbitrarily from its established expulsion procedure in removing [dissident church members] was of no constitutional consequence"), *aff'd* 661 F.2d 925 (4th Cir. 1981); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30 (D.D.C. 1990).

Ginyard, 6 F. Supp. 3d at 729 (W.D. Ky. 2014).

Considering all the facts available to it, and not just those in the complaint, the Court finds that this case would delve into church matters. McRaney first contends that the NAMB defamed him to the BCMD and tortiously interfered with his employment agreement with the BCMD and that, as a result, he was fired. To prove a defendant tortiously interfered with a business relationship, the plaintiff must show "(1) that the acts

were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his/her lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which acts constitute malice); (4) that actual damage or loss resulted," and "(5) the defendant's acts were the proximate cause of the loss or damage suffered by the plaintiff." *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So.2d 1093, 1098–99 (Miss. 2005).

To prove those claims, McRaney has already attempted to obtain from the BCMD his entire personnel file by subpoena. Review of these claims will require the Court to determine why the BCMD fired McRaney—whether it was for a secular or religious purpose. It will require the Court to determine whether the NAMB's actions were done "without right or justifiable cause"—in other words, whether the NAMB had a valid religious reason for its actions. That the Court cannot do.

McRaney also claims that as a result of the NAMB's interference, he was disinvited to speak at a religious event in Louisville, Mississippi. Again, review of this claim would require the Court to determine if the event canceled McRaney's speech for a valid religious reason. It would even require the Court to determine if the NAMB's efforts to stop the speech were tortious or if they were a valid exercise of religious belief. That matter the Court cannot decide.

Finally, McRaney claims that the NAMB intentionally inflicted emotional distress upon him by displaying a picture of him at its headquarters which stated "that he was not be trusted and public enemy #1 of NAMB." Compl. at 6. A plaintiff seeking to establish

an intentional infliction of emotional distress must show that "(1) the defendant acted willfully or wantonly toward the plaintiff by committing certain described actions; (2) the defendant's acts are ones that evoke outrage or revulsion in civilized society; (3) the acts were directed at, or intended to cause harm to, the plaintiff; (4) the plaintiff suffered severe emotional distress as a direct result of the acts of the defendant; and (5) such resulting emotional distress was foreseeable from the intentional acts of the defendant." *Rainer v. Wal-Mart Assocs. Inc.*, 119 So.3d 398, 403-04 (Miss. Ct. App. 2013). Once again, to resolve these issues, the Court will need to make determinations about why the NAMB held these opinions of McRaney, and because the NAMB is a religious institution, the question will touch on matters of religious belief. The Court, therefore, finds that under the First Amendment it lacks subject matter jurisdiction to adjudicate McRaney's disputes.

II. Dismissal vs. Remand

28 U.S.C. § 1447(c) provides that "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*" (emphasis added). Nonetheless, the Fifth Circuit have recognized that "that dismissal, rather than remand, may be proper if a suit is a local action over which the state court in which it was brought also would lack jurisdiction." *Boaz Legacy, L.P. v. Roberts*, 628 F. App'x 318, 320 (5th Cir. 2016) (citing *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144, 1148 (5th Cir. 1992)). The NAMB urges this Court to dismiss McRaney's claims because, it argues, the state courts of Mississippi would also lack subject-matter ju-

risdiction under the ecclesiastical abstention doctrine.[2] *See Mallette v. Church of God Int'l*, 789 So. 2d 120, 123 (Miss. Ct. App. 2001).

The futility exception applies when it is doubtless that the state court also lacks jurisdiction. For example, in *Boaz*, the plaintiff sued the defendant over the ownership of a tract of land in Texas state court. *Boaz*, 627 F. App'x at 319. The land was not located in Texas, however, but in Oklahoma. *Id.* The defendant removed the action to a Texas district court and then moved to dismiss. *Id.* The district court dismissed the case for lack of jurisdiction, and the Fifth Circuit affirmed. *Id.* The "local action doctrine" which states that a court "lacks jurisdiction over the subject matter of claims to land located outside the state in which the court sits," applied, and it applied in equally in state and federal courts. *Id.* (internal quotations and citations omitted). Because the land was in Oklahoma, both federal and state courts in Texas lacked jurisdiction over the claims to its ownership. *Id.* Thus, the Fifth Circuit held, the district court appropriately dismissed the case.

Likewise, in *Hill v. United States*, the plaintiff, a court-appointed conservator for a veteran, sued in state court challenging the Department of Veteran Affairs' determination that the veteran's VA benefits were to be managed by a VA-appointed fiduciary. No. 5:18-CV-21-DCB-MTP, 2018 WL 1902375, at *1 (S.D. Miss. Apr. 20, 2018). The government removed to federal court

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[2] In its show cause order, the Court also directed McRaney to address why the case should not be remanded for lack of subject matter jurisdiction based on the application of the ecclesiastical abstention doctrine. McRaney's response, however, asserted only that jurisdiction was proper because the requirements for diversity of citizenship jurisdiction had been met.

and then moved to dismiss. *Id.* The district court agreed that dismissal was appropriate because the Veterans' Judicial Review Act, 38 U.S.C. § 511, vested exclusive jurisdiction over review of VA benefits decisions to a few specific courts, none which were the district court or the state court from which the cases removed. *Id.* at *3. Thus, the court dismissed under the futility exception. *Id.* at 4–5.

The Court agrees that the state court also clearly lacks subject matter jurisdiction. Like the local application doctrine in *Boaz*, the ecclesiastical abstention doctrine applies in both state and federal courts. *Mallette*, 789 So. 2d at 123. ("A civil court is forbidden, under the First and Fourteenth Amendments to the United States Constitution, from becoming involved in ecclesiastical disputes.") If this court lacks jurisdiction to hear McRaney's claims because they involve ecclesiastical disputes, then all civil courts lack jurisdiction. Thus, on remand, the state trial court would likewise be compelled to dismiss under the doctrine. Accordingly, the Court finds that this matter should be dismissed rather than remanded.

An order in accordance with this opinion shall issue.

This, the 22nd day of March 2019.

signature
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

Civil Action No. 1:17-cv-00080-GHD-DAS

WILL MCRANEY,

Plaintiff,

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION

Defendant.

ORDER DISMISSING CASE

For the reasons set forth in the memorandum opinion issued this day, it is ORDERED that:

1. Defendant North American Mission Board's motion for summary judgement [48] is converted into a motion to dismiss for lack of subject matter jurisdiction and is GRANTED;

2. Plaintiff Will McRaney's claims are DISMISSED for lack of subject matter jurisdiction;

3. The North American Mission Board's pending motion to strike [56] is DENIED AS MOOT; and

4. This case is CLOSED.

SO ORDERED, this, the 22nd day of April 2019.

signature
SENIOR U.S. DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60293

WILL MCRANEY,
Plaintiff-Appellant,
versus

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

Filed November 25, 2020

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:17-CV-80

ON PETITION FOR REHEARING EN BANC

(Opinion - 7/16/2020, 5 CIR., ____, ____, F.3D _____)

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is **DENIED**.

In the en banc poll, 8 judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Willett, Ho, Duncan, Oldham, and Wilson), and 9 judges voted against rehearing (Chief Judge Owen and Judges Stewart, Dennis, Southwick, Haynes, Graves, Higginson, Costa, and Engelhardt).

ENTERED FOR THE COURT:

signature

STEPHEN A. HIGGINSON
United States Circuit Judge

JAMES C. HO, *Circuit Judge*, joined by JONES, SMITH, ELROD, WILLETT, and DUNCAN, *Circuit Judges*, dissenting from denial of rehearing en banc:

If religious liberty under our Constitution means anything, it surely means at least this much: that the government may not interfere in an internal dispute over who should lead a church—and especially not when the dispute is due to conflicting visions about the growth of the church. But it turns out that nothing is sacred, for that is precisely what we are doing here.

The First Amendment forbids government intrusion in "matters of church government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). It secures church "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* "And a component of this autonomy is the selection of the individuals who play certain key roles." *Id.*

This case falls right in the heartland of the church autonomy doctrine. A former Southern Baptist minister brought this suit to protest his dismissal from church leadership. That fact alone should be enough to bar this suit. As the saying goes, personnel *is* policy.

Moreover, this case proves the truth of that old adage. The complaint acknowledges that the plaintiff was dismissed because he "consistently declined to accept" church policy regarding "the specific area of starting new churches, including the selection, assessing and training of church planters." He even *admits* that "this cause of action had its roots in Church policy." We should take him at his word. This case is a dispute over a church's vision for spreading "the gospel of Jesus Christ through evangelism and church planting"—a fundamental tenet of faith, not just for the defendant in

this suit, but for hundreds of millions of evangelicals around the world. Put simply, this suit puts the church's evangelism on trial.

Not surprisingly, the district court dismissed this suit as barred by the First Amendment. We should have affirmed that decision. But the panel did the opposite. I respectfully dissent from the denial of rehearing en banc.

I.

The following facts are taken directly from Plaintiff's complaint and the strategic partnership agreement ("SPA") that gives rise to this dispute: The Baptist Convention for Maryland/Delaware ("Maryland/Delaware") is a state convention comprised of 560 Baptist churches that works in cooperation with the Southern Baptist Convention ("SBC"). The North American Mission Board ("North America") is a subdivision of the SBC that "exists 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." Its priorities include assisting churches in "planting healthy, multiplying, evangelistic SBC churches," "appointing, supporting, and assuring accountability for missionaries," and "providing missions education and coordinating volunteer missions opportunities for church members."

Maryland/Delaware and North America have worked together for some time under the terms of the SPA—a religious document whose stated purpose is "to define the relationships and responsibilities of [Maryland/Delaware] and [North America] in areas where the two partners jointly develop, administer and evalu-

ate a strategic plan for penetrating lostness through church planting and evangelism."

Plaintiff Will McRaney is an ordained minister. As the former executive director of Maryland/Delaware, he guided the direction of the ministry and organization, as well as the screening and managing of all staff. He also served as Maryland/Delaware's designated representative in SPA negotiations with North America.

In 2014, North America drafted a new SPA that "gave [North America] more controls over the financial resources and the hiring, supervising and firing of staff positions of the state conventions." North America then began pressuring Maryland/Delaware—and McRaney in particular—to accept the new SPA. But McRaney "consistently declined to accept the newly written SPA." He "view[ed] the proposed SPA as a weakening of the autonomy of [Maryland/Delaware] and the relinquishment of all controls to [North America] in the specific area of starting new churches, including the selection, assessing and training of church planters."

In response, North America worked to oust McRaney from his church leadership position. It advised other Maryland/Delaware leaders that he had repeatedly refused to meet with North America's President. It also threatened to withhold all funding from Maryland/Delaware unless Maryland/Delaware dismissed McRaney and accepted the new SPA. As McRaney puts it, North America leaders "g[ave] a one-year notice of cancellation" of the previous SPA, and "set[] forth in [a] letter … false and libelous accusations against [McRaney]"—all "[a]s a direct result of [his] refusal to accept the new SPA." After a series of meet-

ings with North America, Maryland/Delaware terminated McRaney.

McRaney filed this suit alleging that North America interfered with his contract with Maryland/Delaware and caused his termination. He also claims that North America lobbied another religious group to disinvite him from speaking at a large mission symposium in Mississippi. Finally, he contends that North America defamed him and caused him emotional distress by posting a photo of him in its headquarters' reception area that "communicate[d] he was not to be trusted and [was] public enemy #1."

The district court dismissed the suit under the First Amendment, reasoning that McRaney's claims would presumably require the court to determine whether North America had "valid religious reason[s]" for its actions. *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention*, 2019 WL 1810991, at *3 (N.D. Miss. Apr. 24, 2019).

But a panel of this court reversed, holding that "[t]he district court's dismissal was premature" because it is "not certain that resolution of McRaney's claims will require the court to interfere" with "purely ecclesiastical questions"—"matters of church government, matters of faith, or matters of doctrine." *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 350-51 (5th Cir. 2020).

II.

"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'"—as the Supreme Court has repeatedly held, and reminded us again just

this year. *Guadalupe*, 140 S. Ct. at 2055 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012); *Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 721-22 (1976); *Watson v. Jones*, 80 U.S. 679, 733-34 (1871). The church autonomy doctrine "does not mean that religious institutions enjoy a general immunity from secular laws." *Guadalupe*, 140 S. Ct. at 2060. "[B]ut it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.*

So the district court was right to dismiss this suit, because each of the three actions taken by the religious organizations that McRaney wishes to challenge here—decisions about whom to place in leadership, whom to host at a religious conference, and whom to exclude from one's headquarters—is an "internal management decision[] that [is] essential to the institution's central mission." *Id.* Each of these claims involves internal, "purely ecclesiastical" matters of church governance that federal courts have no business adjudicating. *Watson*, 80 U.S. at 733. *See id.* (describing certain matters as "strictly and purely ecclesiastical in ... character, ... over which the civil courts exercise no jurisdiction," including "matter[s] which concern[] theological controversy, church discipline, *ecclesiastical government*, or the conformity of the members of the church to the standard of morals required of them") (emphasis added).

For example, "the authority to select and control who will minister to the faithful"—that is, deciding who will lead and who will speak—"is the church's alone" because it is "a matter 'strictly ecclesiastical.'" *Hosan-*

na-Tabor, 565 U.S. at 195 (quoting *Kedroff*, 344 U.S. at 119). As a unanimous Supreme Court made clear, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, … *interferes with the internal governance of the church*, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188 (emphasis added). After all, "imposing an unwanted minister" or "[a]ccording the state the power to determine which individuals will minister to the faithful" violates *both* "the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," *and* "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-89. *See also Guadalupe*, 140 S. Ct. at 2060 ("[A] church's independence on matters of faith and doctrine requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities.") (quotations omitted); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974) ("Certainly a congregation's determination as to who shall preach from the church pulpit is at the very heart of the free exercise of religion.").

Likewise, a religious organization's decision to exclude and communicate internally about a former affiliate is a protected "internal management decision." *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (explaining that "control over [certain] employees" is an "essential component" of a religious group's "freedom to speak in its own voice, both to its own members and to the outside world") (quotations omitted); *Watson*, 80 U.S. at 733 ("[C]ivil courts exercise no jurisdiction" over "matter[s] which concern[] … church discipline, ecclesiastical government, or the conformity

of members of the church to the standard of morals required of them … . "); *Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018) (refusing to compel discovery of a third-party religious group's "internal communications" in part because the order "interfere[d] with [the group's] decision-making processes," "expose[d] those processes to an opponent," and "w[ould] induce similar ongoing intrusions against religious bodies' self-government"); *cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair [its] ability … to express those views, and only those views, that it intends to express."); *see also* W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS & THE LAW § 5:17 (2017) ("[T]he church autonomy case law … has resulted in [courts] declining to take jurisdiction over numerous subject matters related to religion, including … disputes concerning the discipline of church members, and claims arising from or related to church communications.").

So it's no surprise that the district court dismissed this suit. Because there's no way to adjudicate this dispute without violating the church autonomy doctrine. For example, the panel acknowledges that, to determine whether North America unlawfully interfered with McRaney's contract with Maryland/Delaware, a court will have to inquire why Maryland/Delaware voted to fire McRaney—including whether North America "intentionally made false statements about him to [Maryland/Delaware] that resulted in his termination" or "damaged [his] business relationships"—and if so, whether to punish North America for doing so. *McRaney*, 966 F.3d at 349. Likewise, to determine whether North America's actions impermissibly deprived McRaney of a speaking slot at the mission sym-

posium in Mississippi, a court will need to determine whether North America "got him uninvited to speak at the mission symposium"—and if so, why. *Id.* Finally, to hold North America liable for defamation and intentional infliction of emotional distress, a court will have to determine why North America circulated an internal opinion about McRaney and excluded him from its own headquarters—and then whether to punish North America for doing so.

All of this is anathema to the First Amendment. Decisions about who should lead, who should preach, and who should be excluded are all quintessential examples of "internal management decisions" that the Constitution leaves entirely to the discretion of the church. And this is especially so where, as here, these decisions were made as the result of a disagreement over a core mission of the church—establishing new churches and evangelizing new members.

III.

The panel's various attempts to justify further proceedings in this case conflict with bedrock First Amendment doctrine in several additional ways.

At first, the panel suggests that this suit does not implicate the church autonomy doctrine, because McRaney is merely asking the court to apply "neutral principles of tort law," and because dismissal of the case would be tantamount to giving religious institutions a "preferred position in our society" by uniquely immunizing them from civil liability. *Id.* at 348-49, 351.

There are various problems with these rationales, as explained below. But among the most troubling is this: Under the panel's logic, no claim would *ever* be subject to the church autonomy doctrine—*every* civil

plaintiff purports to invoke neutral legal principles, and *every* application of the church autonomy doctrine grants religious organizations special treatment. Moreover, these justifications miss a foundational principle of our Constitution—that the whole point of the First Amendment is to give religion a "preferred position in our society." *Id.* at 348. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 189.

Perhaps in recognition of these difficulties, the panel ultimately decides to backtrack. In the end, it suggests that it is merely too early in the case to invoke the church autonomy doctrine—and that the doctrine might be successfully deployed at a later stage of the litigation. But this too fails for multiple reasons. It's internally inconsistent with the panel's neutral principles and preferential treatment theories, which would presumably bar application of the church autonomy doctrine at *all* stages of the case. It misunderstands both the scope of and reasoning behind the church autonomy doctrine. And in any event, the district court already has what the panel says it needs to wait for—certainty that McRaney's case will turn on whether North America had "valid religious reason[s]" for its actions. *McRaney*, 966 F.3d at 351. Indeed, that standard was met with the very first docket entry in the case—it is clear from the face of McRaney's complaint (and further confirmed in his later filings) that this case is all about whether North America's actions were based on "valid religious reason[s]." *Id.*

A.

To begin with, the panel contends that the church autonomy doctrine does not apply here because this suit only requires the court to apply "neutral principles

of tort law." *Id.* at 349. This is wrong for at least three reasons.

First, the panel misinterprets the reference to "neutral principles of law" in *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979). To be sure, *Jones* held that courts may employ "neutral principles of law as a means of adjudicating a church property dispute"—specifically, that courts may "examine certain religious documents, such as a church constitution, for language of trust in favor of the general church." *Id.* at 604. But this was not to allow "religious autonomy concerns [to] be ignored whenever an ostensibly neutral or secular principle or policy seems relevant." 1 REL. ORGS. § 5:16. Rather, it was designed "to *protect* religious autonomy," including "internal formulations of religious doctrine and polity," "by assuring that secular courts would intervene in religious affairs *only* when the religious community itself had expressly stated in terms accessible to a secular court how a particular controversy should be resolved." *Id.* (emphases added). *Jones* thus includes the following cautionary note: "If … the interpretation of the instruments of ownership … require[s] the civil court *to resolve a religious controversy*, *then the court must defer to* the resolution of the doctrinal issue by *the authoritative ecclesiastical body*." 443 U.S. at 604 (emphases added).

So *Jones* is not an invitation to *courts* to decide all church property disputes—let alone all other manner of internal church disputes. Rather, it's an invitation to *churches*, where they deem it appropriate, to ask courts to assist them in resolving certain church property disputes.

Moreover, the panel's theory that this suit should be allowed because it involves only "neutral principles

of tort law" is tantamount to saying that any plaintiff can litigate any case against a church, so long as he invokes a legal principle that complies with *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). After all, *Smith* ostensibly allows the government to impose "neutral law[s] of general applicability" on the religious and non-religious alike, so long as such laws are reasonably related to a legitimate government interest. *See id.* at 879, 881 & n.1. But the Supreme Court unanimously rejected this position in *Hosanna-Tabor*. There the government attempted to apply federal non-discrimination law to a church on the ground that the law complied with *Smith*. *See* 565 U.S. at 189 ("The EEOC and [Plaintiff] ... contend that our decision in [*Smith*] precludes recognition of a ministerial exception."). But that would require reading *Smith* to overturn over a century of church autonomy precedent. Not surprisingly, then, the Supreme Court dismissed this argument as having "no merit," noting that *Smith* does not govern "internal church decision[s] that affect[] the faith and mission of the church itself." *Id.* at 190. *See also* 1 REL. ORGS. § 5:12 (noting that *Hosanna-Tabor* "affirmed ... that the principle of church autonomy prevails over a neutral and generally-applicable law[] if it interferes with a religious organization's dismissal of an unwanted minister"). The panel's "misguided application" of *Jones* "invokes external neutral standards to override religious autonomy," "profoundly weaken[ing] the protection [that] the religious autonomy cases have long provided against government intrusion in religious affairs," and "tak[ing] state power into protected domains in which

[]binding religious autonomy cases do not allow it to go." *Id.* at § 5:16.[1]

And consider this: If an appeal to "neutral principles of tort law" were all it took to sue a religious institution, it would be the exception that swallowed the rule. Under *Guadalupe* and *Hosanna-Tabor*, the church autonomy doctrine immunizes religious institutions from various anti-discrimination claims. *See also id.* at § 5:12 (noting that the Court's decision to allow church autonomy to bar suit brought under "a leading piece of federal civil rights legislation" only "demonstrates [the doctrine's] reach and power"). Surely the panel would not contend that anti-discrimination laws are *non*-neutral legal principles. So if the panel is right, then *Guadalupe* and *Hosanna-Tabor* must be wrong.

Second, the Supreme Court has never extended the "neutral principles of law" approach beyond the context of church-property disputes. To the contrary, the Court has "intimat[ed]" that the church autonomy doctrine "cannot be brushed aside as irrelevant or controlled by the 'neutral principles' rule of *Jones v. Wolf* merely because it is raised in defense to common law claims." *Id.* *See also id.* (noting that in *Hosanna-Tabor*, "the Court specifically mentioned contract and tort claims … as settings where the ministerial exception might apply"). In fact, the Supreme Court and lower courts have invoked the church autonomy doctrine across a broad range of claims—up to and even

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[1] In any event, compliance with *Smith* is hardly the hallmark of First Amendment fidelity, considering that "[c]ivil rights leaders and scholars have derided … *Smith* … as 'the *Dred Scott* of First Amendment law.'" *Horvath v. City of Leander*, 946 F.3d 787, 794 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (citing authorities).

including church property disputes. *See id.* at § 5:17 (citing cases that "decline[d] to take jurisdiction over numerous subject matters related to religion, *including … disputes over church property*, disputes concerning religious employment, disputes between ministers or church leaders and the church, claims against clergy for malpractice or breach of fiduciary duty, claims against churches or church leaders for negligent hiring or poor supervision of employees, disputes concerning the discipline of church members, and claims arising from or related to church communications.") (emphasis added).

Finally, the panel opinion violates our rule of orderliness. In *Simpson*, a dismissed pastor, like McRaney, claimed that his suit could be resolved "on the basis of 'neutral principles of law,' which c[ould] be applied without establishing any particular view or interpretation of religious doctrine." 494 F.2d at 493. His suit only required the court to determine secular questions, he claimed—namely, whether he was fired for "his views on race and merger of the segregated church organization, and because of the color of his wife's skin." *Id.* This was not a "church dispute," he theorized, but a secular "racial dispute." *Id.* In short, "Simpson would narrowly limit *ecclesiastical disputes* to differences in church *doctrine*." *Id.* (emphases added).

We rejected the argument. In doing so, we noted that the pastor's crabbed view of the church autonomy doctrine contradicted the "'spirit of freedom for religious organizations' … reflected in the Supreme Court's decisions"—including the "'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* (quoting *Kedroff*, 344 U.S. at 116).

B.

The panel also contends that invoking the church autonomy doctrine here would "impermissibly place a religious [institution] in a preferred position in our society," and allow "religious entities [to] effectively immunize themselves from judicial review of claims brought against them." *McRaney*, 966 F.3d at 348, 351.

But the whole point of the First Amendment, of course, is to privilege religion. As the Supreme Court has unanimously stated, "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

That we need to be reminded of this may be what is most alarming about this case. It is widely understood (or at least it used to be) that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty … run through our laws, our public rituals, [and] our ceremonies." *Id.* at 312-13.

So it should be beyond dispute that, "[w]hen the state encourages religious instruction or cooperates with religious authorities … it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.* at 313-14.

In short, protecting religious institutions from government interference is not just the point of the church autonomy doctrine that the Supreme Court has recognized for nearly 150 years—it is foundational to who we are as Americans.

C.

Having initially intimated that the church autonomy doctrine can *never* bar cases like McRaney's, the panel switches gears. It suggests that it is merely *too early* to dismiss the case on that ground. As the panel now theorizes, it is not yet "certain" that this case will require the court to examine whether North America acted for "valid religious reason[s]." *McRaney*, 966 F.3d at 351. North America must present some "evidence" of these religious reasons before a court may consider dismissal on First Amendment grounds. *Id.*

Again, this approach is internally inconsistent with the panel's neutral principles and preferential-treatment concerns, which would logically apply at all stages of a lawsuit. It is also wrong for a number of additional reasons.

To begin with, we have no right to condition application of the church autonomy doctrine on a religious institution's ability to produce "evidence" that it had "valid religious reasons" for its actions. *Id.* To the contrary, the Supreme Court has been very clear that the church autonomy doctrine does *not* "safeguard a church's decision to fire a minister *only* when it is made for a religious reason." *Hosanna-Tabor*, 565 U.S. at 194 (emphasis added). "[A] church's independence on matters 'of faith and doctrine' *requires* the authority to select, supervise, and if necessary, remove a minister *without interference by secular authorities*." *Guada-*

lupe, 140 S. Ct. at 2060 (emphases added). That is why "the general principle of church autonomy" guarantees "independence," not only in "matters of faith and doctrine," but also in "matters of internal government." *Id.* at 2061.

The reason for the Court's categorical approach in this sphere is simple: Secular courts are not competent to determine what constitutes a "valid religious reason"—let alone whether a party has produced sufficient evidence of one. *See, e.g.*, *Milivojevich*, 426 U.S. at 713 ("For civil courts to analyze whether the ecclesiastical actions of a church … are … 'arbitrary' must inherently entail inquiry into [what] … canon or ecclesiastical law supposedly requires the church … to follow … . But this is exactly the inquiry that the First Amendment prohibits."); *Watson*, 80 U.S. at 733 ("[C]ivil courts exercise no jurisdiction" over "matter[s] which concern[] theological controversy.").

Moreover, forcing religious institutions to defend themselves on matters of internal governance is itself a tax on religious liberty. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (warning that "the very process of inquiry" into "the good faith of [a] position asserted by … clergy-administrators and its relationship to [the organizations'] religious mission" "may impinge on the rights guaranteed by the Religion Clauses"); *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring) ("[T]he mere adjudication of … questions [regarding the "*real reason*" for the dismissal of a religious employee] would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of [a] religious doctrine … , with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's

overall mission."); *Whole Woman's Health*, 896 F.3d at 373 (finding it "self-evident" that enforcing a subpoena against a third-party religious organization would "chill[]" the group's activities and "undermine[]" its ability to "conduct frank internal dialogue and determinations").

Indeed, by forcing a religious institution to produce "evidence" of valid religious reasons for its actions, the panel is approving the very kind of regime that the Supreme Court found so odious in *Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carrie[s] out what it underst[ands] to be its religious mission." *Id.* at 336.

Finally, even accepting the panel's incorrect standard, it is already obvious from the face of the complaint that litigating this dispute will inevitably require inquiry into North America's "valid religious reason[s]." McRaney, 966 F.3d at 351. *McRaney* himself argues that North America took action precisely because he refused to accept church policy in "the specific area of starting new churches, including the selection, assessing and training of church planters." He likewise admits in his response to the motion to dismiss that "this cause of action had its roots in Church policy" and "began as a battle of power and authority between two religious organizations."

* * *

It should not be difficult for the district court to dismiss this case again on remand, even accepting the incorrect standards set forth by the panel. McRaney admitted, both in his complaint and elsewhere, that this case is rooted in a dispute over church policy. Those statements were not mentioned by the panel, and they should be enough to show on remand that there is "evidence" that this case will turn on whether there are "valid religious reason[s]" behind the actions challenged here. *Id.*

I nevertheless find the panel decision troubling because it invites future challenges to internal church decisions based on "neutral principles of tort law." *Id.* at 349. And no doubt future plaintiffs will be less candid than McRaney in admitting the religious motivations at the heart of their disputes.

The denial of rehearing en banc in this case is accordingly an "ominous sign" and "grave cause for concern" for "those who value religious freedom." *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from the denial of certiorari). I respectfully dissent.

ANDREW S. OLDHAM, *Circuit Judge*, joined by SMITH, WILLETT, DUNCAN, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The Supreme Court has told us that the judicial power of the United States does not extend to ministry disputes. *Watson v. Jones*, 80 U.S. 679, 727 (1871); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2059-61 (2020). This case should've ended with a straightforward application of that doctrine. Dr. McRaney got into a ministry dispute with the Baptist Convention of Maryland/Delaware ("BCMD") and the North American Mission Board. The source of that dispute? McRaney did not share the religious organizations' ministry vision for church planting. So BCMD voted to terminate McRaney. Then McRaney brought the ecclesiastical dispute to the civil courts. The ecclesiastical-autonomy doctrine requires us to stay out of it. But our panel decision puts us in the middle of it. Indeed, the district court on remand is tasked with determining whether the ecclesiastical organizations have "valid religious reasons" for their actions. I respectfully dissent.

I.

As always, I start with the Constitution's original public meaning. The ecclesiastical-autonomy doctrine has a rich historical pedigree. And that history informed the meaning of the Constitution and its Religion Clauses at the Founding.

A.

In the Middle Ages, clergy were categorically exempt from the reach of civil courts. *See* FELIX MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTI-

TUTION OF THE CHURCH OF ENGLAND 384-94 (London, 1895). During the reign of the Saxon kings, civil courts had no jurisdiction over clergy accused of even clearly secular crimes unless and until the bishop divested them of their spiritual authority. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 43 (1968); *see, e.g.*, Wihtræd c. 6 (695) ("If a priest allow of illicit intercourse; or neglect the baptism of a sick person, or be drunk to that degree that he cannot do it; let him abstain from his ministry until the doom of the bishop."); Alfred c. 21 (892) ("If a priest kill another man, … let the bishop secularize him; then let him be given up from the minister … ."); Edward and Guthrum c. 4 § 2 (906) ("If a priest commits a crime worthy of death, he shall be seized and kept until the bishop's judgment.").[1] And during the reign of King Edgar the Peaceful (959-975), the Church required all disputes between clergymen to be addressed before bishops and not secular courts. *See* MAKOWER, *supra*, at 389. Spiritual supervisors retained exclusive competence to discipline clergy, and civil courts could not intervene in church matters. *See id.* at 389-90.

The Church's exclusive jurisdiction over clergy served as a one-way jurisdictional boundary. *See id.* at 390-91. Although civil courts were powerless to interfere with the matters affecting clergy or other ministerial prerogatives, religious authorities extended their power into the operation of civil courts in a variety of ways. *See id.* at 385-86. For example, ecclesiastical

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[1] Obviously, the present case involves only non-criminal controversies and, beyond that, is limited to disputes between and among ecclesiastical officials. The aforementioned examples are meant only to illustrate the ancient roots of ecclesiastical jurisdiction.

leaders served alongside a "high civil official" on civil courts. *Id.* at 384. King Edgar mandated that "the bishop of the shire and the ealdorman" sit together as a civil judicial body empowered to apply both "the law of God" and "the secular law." Edgar III c. 5. Thus, while civil officials had no role in ecclesiastical matters, ecclesiastical officials adjudicated both sectarian and secular matters. *See* MAKOWER, *supra*, at 384-85; WILLIAM RICHARD WOOD STEPHENS, THE ENGLISH CHURCH FROM THE NORMAN CONQUEST TO THE ACCESSION OF EDWARD I at 49 (1901).

The Norman Conquest further solidified the divide. Around 1076, King William I issued an ordinance formally divesting civil courts of subject matter jurisdiction over religious matters. *See* Ordinance of William I Separating the Spiritual and Temporal Courts ("[N]o bishop … shall … bring before the judgment of secular men any case which pertains to the rule of souls."); 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 307-08 (3d ed. Oxford, 1897). The ordinance established separate ecclesiastical courts. STEPHENS, *supra*, at 49. As a result, bishops and other clergy were granted exclusive jurisdiction over all cases "pertain[ing] to the rule of souls." Ordinance of William I. Not only did the Church retain exclusive personal jurisdiction over cases involving its clergymen, it also gained exclusive subject matter jurisdiction over disputes involving "the canons and the episcopal laws." *Ibid.*; *accord* MAKOWER, *supra*, at 392. The resulting changes were legion. *See* STUBBS, *supra*, at 307-08.

Over the next several centuries, the civil and ecclesiastical courts continued to dispute the boundaries of their respective jurisdictions. *See* MAKOWER, *supra*, at 392-93. The courts each strived to extend their compe-

tence to reach additional categories of cases claimed by the other. *Ibid.* In their struggle, "[t]he lay courts employed new weapons" while "the clergy resorted to the old." Harold W. Wolfram, *The "Ancient and Just" Writ of Prohibition in New York*, 52 COLUM. L. REV. 334, 334 (1952).

For example, the clergy threatened to excommunicate civil judges who infringed ecclesiastical jurisdiction, while civil courts issued writs of prohibition. *Ibid.* Writs of prohibition were injunctive. *See* Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272, 274 (1936). Blackstone described them as necessary to secure the jurisdiction of the King's Bench over secular controversies. 3 WILLIAM BLACKSTONE, COMMENTARIES *112. When issued, they stripped ecclesiastical jurisdiction and required transfer of the case to a civil court. *See* Adams, *supra*, at 274.

But a writ of prohibition was not always the last word. *See id.* at 291-92. An ecclesiastical court could challenge a writ of prohibition with a competing writ of consultation seeking return of the suit to its court. *Ibid.* The writs of prohibition and consultation created a procedural mechanism for deciding the appropriate venue for resolution of particular controversies. But they did precious little to clarify the jurisdictional boundary between the secular and sacred. The line between the two remained an oft-litigated source of controversy for centuries to come.

Consider for example the famed case of Nicholas Fuller. *See Nicholas Fuller's Case* (1607), 12 Co. Rep. 41 (K.B.). There, the High Commission—an ecclesiastical court—hauled Fuller before it to answer for various contemptuous statements he made against high com-

missioners and other religious authorities. *See* Roland G. Usher, *Nicholas Fuller: A Forgotten Exponent of English Liberty*, 12 AM. HIST. REV. 743, 747-48 (1907). But Fuller, a rabble-rousing lawyer, disputed the jurisdiction of the High Commission and sought a writ of prohibition to transfer the case to the King's Bench. *Id.* at 749—50. Fuller argued that because his case implicated slander and contempt—purely secular crimes—jurisdiction could not lie in an ecclesiastical court. *See* 12 Co. Rep. at 42; Usher, *supra*, at 749-50. The King's Bench issued the writ prohibiting ecclesiastical jurisdiction based on the secular crimes for which Fuller stood accused. Usher, *supra*, at 750. But upon reconsideration, Sir Edward Coke, then Chief Justice of the King's Bench, issued a writ of consultation partially returning jurisdiction to the High Commission. 12 Co. Rep. at 43-44. In doing so, Coke recognized and reaffirmed the jurisdictional boundary between ecclesiastical and civil jurisdiction.

The important point for present purposes is not the precise contours of that boundary, which obviously changed over time. What matters is that the jurisdictional line prohibiting civil courts from intruding on ecclesiastical matters is an ancient one. It goes back to the Middle Ages. It has been part of England's formal law since William the Conqueror. It's so entrenched in English history that even Coke—the seventeenth century's fiercest champion of civil jurisdiction and the common law—respected it. And although there were disputes about boundaries of ecclesiastical jurisdiction over laypersons like Nicholas Fuller, there could be little dispute about ecclesiastical jurisdiction over ecclesiastical matters like ministry disputes and discipline.

B.

English philosopher John Locke also recognized the jurisdictional boundary between religious and civil authority. His *Letter Concerning Toleration* sought "to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." JOHN LOCKE, A LETTER CONCERNING TOLERATION 10 (J. Brook ed., 1796) (1689). Locke believed it was "the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life." *Id.* at 11. But he recognized that because the "jurisdiction of the magistrate reaches only to these civil concernments … *it neither can nor ought in any manner to be extended to the salvation of souls*." *Ibid.* (emphasis added); *cf.* Ordinance of William I.

Locke's work was foundational to the original public understanding of church autonomy in America. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1431 (1990) ("Locke's ideas … are [an] indispensable part of the intellectual backdrop for the framing of the free exercise clause."); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1420 (2004) ("Locke's theory was imbibed by most educated Americans … ."); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 354 (2002) ("Locke's version of the idea of liberty of conscience formed the basic theoretical ground for the separation of church and state in America."). For example, Baptist preacher John Leland made almost verbatim Lockean arguments in fa-

vor of disestablishment: "The rights of conscience should always be considered inalienable—religious opinions a[re] not the objects of civil government, nor any way under its jurisdiction." John Leland, *The Yankee Spy: Calculated for the Religious Meridian of Massachusetts, but Will Answer for New Hampshire, Connecticut, and Vermont, Without Any Material Alterations* (1794), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (1845). But Locke didn't go far enough for many Evangelicals. That's because Locke was a legislative supremacist—he believed a conflict between the law and matters of faith "does not take away the obligation of that law, nor deserve a dispensation." A LETTER CONCERNING TOLERATION, *supra*, at 51. Locke attempted to rationalize his position by arguing that such conflicts would "seldom happen." *Ibid.*

That was hollow solace to "[t]he Baptists languishing in the Culpepper jail and the Presbyterians fighting legislative interference with their form of church governance." McConnell, *supra*, at 1445. So Evangelicals in America argued for disestablishment on grounds that establishment tended to corrupt religion through governmental interference. *See, e.g.*, *Declaration of the Virginia Association of Baptists* (Dec. 25, 1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 660-61 (Julian P. Boyd ed., 1950) [hereinafter PAPERS OF THOMAS JEFFERSON] (arguing that preachers should not be "Officers of the State" because "those whom the State employs in its Service, it has a Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach."). And they argued that ecclesiastical jurisdiction must be defined by looking to "what matters God is concerned about, according to the con-

scientious belief of the individual." McConnell, *supra*, at 1446.

James Madison echoed those views. Madison's personal opinions did not always accord with the Religion Clauses he helped frame.[2] So I reference him simply as one datum in the public understanding of ecclesiastical jurisdiction. In 1785, when Virginia's legislature sought to pass a bill providing for compulsory support of religion, Madison penned the then-anonymous *Memorial and Remonstrance Against Religious Assessments*. Madison objected "[b]ecause if Religion can be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987). And further emphasizing the line between ecclesiastical jurisdiction and civil authority, Madison objected:

> Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the

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[2] To take one example, the First Amendment plainly allows Congress to have a Chaplain. *See Marsh v. Chambers*, 463 U.S. 783 (1983). As a member of the first Congress, Madison voted for the bill that established the Chaplain. *See* 1 ANNALS OF CONG. 891 (1789). Yet many years later, he expressed his personal view that the office was unconstitutional. *See* Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558 (1946).

> world: the second an unhallowed perversion of the means of salvation.

Id. at 83.

And even Thomas Jefferson—who had little or no sympathy for America's churches—evoked ecclesiastical jurisdiction. (Query, however, whether he did so unwittingly.) In 1801, the Danbury Baptist Association wrote to President-elect Jefferson, explaining that their "[s]entiments are uniformly on the side of Religious Liberty" and expressing hope that Jefferson would recognize that religion "is at all times and places a Matter between God and Individuals." 35 PAPERS OF THOMAS JEFFERSON, *supra*, at 407-09. Jefferson saw the letter as providing an opportunity "to reprimand his clerical and Federalist opponents and to propagate his own, profoundly anticlerical, vision of the relationship of religion to politics." PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 144 (2002). Three months later, Jefferson responded:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

36 PAPERS OF THOMAS JEFFERSON, *supra*, at 258.

Jefferson's wall metaphor went almost completely unnoticed in the nineteenth century. *See* Hamburger, *supra*, at 162-64. And it was generally misunderstood in the twentieth century: "[W]hat should be regarded as an important feature of religious freedom under constitutionally limited government too often serves as a slogan, and is too often employed as a rallying cry, not for the distinctiveness and independence of religious institutions, but for the marginalization and privatization of religious faith." Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 504 (2006-2007). The Supreme Court invoked it, *see Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), but not without criticism, *see Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, C.J., dissenting) ("Whether due to its lack of historical support or its practical unworkability, the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication."). And in the twenty-first century, it appears the Supreme Court has relegated Jefferson's "wall" to dissenting opinions. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting).

Of interest here, however, Jefferson did not invent the metaphor. Before Jefferson, Roger Williams invoked the wall as an aspirational "image of the purity he sought in religion." HAMBURGER, *supra*, at 38. Before Williams was Richard Hooker. *See id.* at 32-38 (explaining how the wall between church and state "first became widely known in England when [Anglican apologist] Richard Hooker ungenerously used it to characterize the position of Protestant dissenters who sought to purify the English church"). And before that,

Christians had used the "ancient phrase," *id.* at 3, since the time of Jesus. *See* Garnett, *supra*, at 507 (noting that the separation of church and state was "an ancient Western teaching rooted in the Bible" (quoting JOHN WITTE, JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 210 (2006))). Early Christians invoked the wall to "differentiate[] between civil and ecclesiastical jurisdiction—between the powers of *regnum* and *sacerdotium*." HAMBURGER, *supra*, at 23. And "they often took for granted that church and state were distinct institutions, with different jurisdictions and powers." *Id.* at 21.

II.

Consistent with the history recounted above, the Supreme Court has held that the ecclesiastical-autonomy doctrine carries jurisdictional consequences. In *Watson v. Jones*, two competing church factions invoked civil jurisdiction to resolve their dispute over church property. 80 U.S. at 691-92. The dispositive issue was jurisdictional—namely, whether the judicial power of the United States extended to such ecclesiastical disputes. *See id.* at 732-33. The Court held that churches, rather than courts, have the final say over disputes implicating "theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standards of morals required." *Ibid.* The upshot: over ecclesiastical and religious controversies, "civil courts exercise no jurisdiction." *Id.* at 733.

Of course, "'jurisdiction' … is a word of many, too many, meanings." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (quotation omitted). And the "profligate use of the term" has caused much confusion. *See United Pac. R.R. Co. v. Bhd. of Locomotive Eng'r & Train-*

men Gen. Comm. of Adjustment Cent. Region, 558 U.S. 67, 81-83 (2009) (describing the general confusion caused by courts using the word "jurisdiction" to refer to various unrelated legal concepts).

But the *Watson* Court emphasized that it really meant what it said. *See* 80 U.S. at 732-33. It explained that a civil court wielding the judicial power to settle an ecclesiastical dispute would be tantamount to a church "try[ing] one of its members for murder, and punish[ing] him with death or imprisonment." *Id.* at 733. Such a sentence would "be utterly disregarded by any civil court" because the crime of murder falls within the exclusive jurisdiction of civil authorities. *Ibid.* Similar, the Court explained, is the exclusive jurisdiction of a church to settle ecclesiastical or ministerial disputes. *Id.* at 733-34. The Supreme Court later anchored *Watson's* jurisdictional holding in the First Amendment. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the *Watson* "opinion[] radiates … a spirit of freedom for religious organizations" and "an independence from secular control or manipulation"). And the Court reaffirmed it in 1976. *See Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) (preventing courts from inquiring into church personnel decisions in observation of "the general rule that religious controversies are not the proper subject of civil court inquiry"). So far so neat.

In subsequent cases, however, the Court created contrary rules. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979) (explaining that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute"); *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (purporting to exclude neutral laws of general applicability from First Amend-

ment scrutiny). Then in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, the Supreme Court unanimously rejected the proposition that cases like *Smith* preclude ecclesiastical exemptions to neutral laws. *See* 565 U.S. 171, 189-90 (2012). At the same time, *Hosanna-Tabor* mentioned in a footnote that part of the ecclesiastical-autonomy doctrine "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Id.* at 195 n.4. And while *Our Lady of Guadalupe* broadly reaffirmed ecclesiastical autonomy in matters of faith, ministry, doctrine, and church governance, it did not have occasion to consider whether the doctrine retains jurisdictional consequences. *Cf.* 140 S. Ct. at 2060 ("[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").[3]

Since *Hosanna-Tabor*, confusion over the ecclesiastical-autonomy doctrine has increased. Some courts still see it as jurisdictional. *See, e.g.*, *Flynn v. Estavez*,

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[3] If the ecclesiastical-autonomy doctrine retains jurisdictional consequences, it's not clear they come from the First Amendment. After all, the text of that Amendment does not purport to limit the judicial power of the United States—unlike say the Eleventh Amendment. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). On the other hand, the Supreme Court has made clear that States enjoy sovereign immunity *outside* of the Eleventh Amendment—and that immunity carries jurisdictional consequences. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 72-73 (1996). It's possible that the jurisdictional consequences of the ecclesiastical-autonomy doctrine likewise come from the original public meaning of Article III.

221 So. 3d 1241, 1247 (Fla. Dist. Ct. App. 2017) ("In Florida, courts have interpreted the doctrine as a jurisdictional bar, meaning a claim should be dismissed upon a determination that it requires secular adjudication of a religious matter."(quotation omitted)); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (N.C. Ct. App. 2016) (noting "the ecclesiastical abstention doctrine … is a jurisdictional bar to courts adjudicating ecclesiastical matters of a church"); *In re St. Thomas High Sch.*, 495 S.W.3d 500, 506 (Tex. App.—Houston [14th Dist.] 2016), *appeal dism'd sub nom. St. Thomas High Sch. v. M.F.G.*, 2016 Tex. App. LEXIS 5035 (Tex. App.—Houston [14th Dist.] July 12, 2016, no pet.) (noting the church-autonomy doctrine is "a threshold jurisdictional question"). Those courts think *Hosanna-Tabor* left *Watson's* broader rule undisturbed. *See, e.g., Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 157 (Tenn. 2017) (recognizing that the "ecclesiastical abstention doctrine predates the ministerial exception by almost a century" and concluding *Hosanna-Tabor* "did not address" that doctrine).

But others think the *Hosanna-Tabor* footnote necessitates a reexamination of the jurisdictional consequences of ecclesiastical autonomy. *See, e.g., Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284, 290-91 (Okla. 2017) (noting the church-autonomy doctrine "operates as an affirmative defense" (quoting *Hosanna-Tabor*, 565 U.S. at 195 n.4)); *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 737 (Ky. 2014) ("[T]he ecclesiastical-abstention doctrine is an affirmative defense."); *Pfeil v. St. Mathews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528, 534-35 (Minn. 2016) (reversing course on previous holding and noting "*Hosan-*

na-Tabor leads us to conclude that the ecclesiastical abstention doctrine is not a jurisdictional bar").

Of course, it's not our job to decide whether *Watson* remains binding. It remains binding on us until the Supreme Court says otherwise. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting "it is [the Supreme] Court's prerogative alone to overrule one of its precedents"). And that's reason enough to justify rehearing this case en banc. *See* FED. R. APP. P. 35(b)(1)(A) (listing as a ground for rehearing that "the panel decision conflicts with a decision of the United States Supreme Court").

Moreover, this case is rich with questions of exceptional importance. *See* FED. R. APP. P. 35(a)(2). For example, ecclesiastical jurisdiction at one time extended to certain torts, like defamation, that today seem purely secular. *See* 10 Edw. 2, stat. 1 c. 4 (1316) (recognizing ecclesiastical jurisdiction over "defamations"); *cf. Fuller's Case*, 12 Co. Rep. at 44 (distinguishing between secular "slander" and ecclesiastical "Heresy, Schism, and erroneous Opinions, &c."). Does it extend to McRaney's defamation claim? If so, does ecclesiastical autonomy require dismissal of it? What do we make of the post-*Hosanna-Tabor* split of authority on the jurisdictional consequences *vel non* of the ecclesiastical-autonomy doctrine? Our refusal to grant rehearing means these questions must wait for another day.

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FIFTH CIRCUIT
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November 25, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-60293 Will McRaney v. N Amer Mission Bd So Baptist
USDC No. 1:17-CV-80

Enclosed is an order entered in this case.

Sincerely,
LYLE W. CAYCE, Clerk

By: signature
Whitney M. Jett, Deputy Clerk
504-310-7772

Mr. William Harvey Barton II
Mr. Justin E. Butterfield
Ms. Kathleen Ingram Carrington
Mr. Stephen M. Crampton
Mr. David Crews
Ms. Donna Brown Jacobs
Mr. Matthew T. Martens
Mr. Hiram Stanley Sasser III
Mrs. Natalie Deyo Thompson
Mr. Joshua Jerome Wiener