No. 20-1158

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

WILL MCRANEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Dr. Will McRaney filed a lawsuit in Mississippi state court against the North American Mission Board of the Southern Baptist Convention, Inc. ("NAMB"), a non-profit corporation organized under the laws of Georgia. The lawsuit alleges NAMB violated state common law, causing McRaney economic and non-economic harm actionable under state law.

McRaney is not, and never has been, an employee of the defendant, NAMB.

The alleged conduct by NAMB occurred both during and after McRaney was employed by a separate, autonomous organization—the General Mission Board of the Baptist Convention for Maryland/Delaware ("BCMD"). BCMD is not a party to McRaney's lawsuit.

After the district court dismissed for lack of subject matter jurisdiction, a Fifth Circuit panel unanimously reversed. Noting that NAMB has "never been McRaney's employer," and that he "is not challenging the termination of his employment," the court of appeals identified as "the relevant question" whether "it appears certain that resolution of McRaney's claims will require the court to address purely ecclesiastical questions." 3a-5a. "At this stage, the answer is no." 4a. The court of appeals further explained, however, that "many of the relevant facts have yet to be developed," and "[i]f 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." 4a, 7a.

NAMB contends the Fifth Circuit's decision "departs" from this Court's prior decisions, and "conflicts" with decisions by other federal courts of appeals and state courts of last resort. The cases NAMB relies on show otherwise.

While NAMB—and especially its *amici*—are eager for this Court to refashion its Religion Clause jurisprudence, this is not the case to consider doing so. The Fifth Circuit's opinion is measured and case-specific. It simply, and wisely, concludes the district court got ahead of itself, and leaves for another day whether, after further factual development, NAMB may have a valid First Amendment defense to McRaney's claims. There is nothing about the Fifth Circuit's decision, which is fully consistent with "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976), worthy of this Court's review.

Moreover, even if some variation of the questions presented by NAMB warrant the Court's consideration in the future, this case is an unsuitable vehicle for several reasons, including its arrival with an undeveloped record, having been dismissed by the district court at an early stage with "many of the relevant facts hav[ing] yet to be developed." 4a.

The Petition should be denied.

STATEMENT OF THE CASE

A. District Court Proceedings

Dr. McRaney's complaint against NAMB asserts claims for intentional interference with business relationships, defamation, and intentional infliction of emotional distress, and seeks damages, fees and costs from NAMB.

NAMB removed the case from state court to federal court on the basis of diversity jurisdiction (34a), and then sought dismissal of the complaint on the basis of the "ministerial exception." The district court denied that motion because "McRaney was indisputably not employed by NAMB" (21a), their relationship was not "one of employee-employer," and the "ministerial exception" was therefore inapplicable (31a).

Soon after discovery was getting underway, NAMB filed a motion for partial summary judgment, seeking dismissal of some—but not all—of McRaney's claims, on the purported ground that NAMB was implicitly a third-party beneficiary under a severance agreement between McRaney and BCMD.[1]

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[1] By asking the district court to adjudicate the meaning and effect of the separation agreement between McRaney and BCMD, and use that interpretation as a basis for dismissal of certain claims, NAMB should be deemed to have waived, or be estopped from making, its "church autonomy" argument, which runs directly counter to its effort to invoke the jurisdiction of the federal courts.

After receiving NAMB's motion for partial summary judgment, the district court issued an order to show cause about why it should not remand the case to state court for lack of subject matter jurisdiction. After briefing on the motion and show cause order, the district court, "[c]onsidering all the facts available to it, and not just those in the complaint," found "this case would delve into church matters" (37a), and dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1), finding that "under the First Amendment it lacks subject matter jurisdiction." 39a.

B. Fifth Circuit Proceedings

On appeal, the Fifth Circuit reversed, finding "premature" the district court's conclusion that "it would need to resolve ecclesiastical questions in order to resolve McRaney's claims." 1a-2a. Noting that NAMB has "never been McRaney's employer" (4a), and that he "is not challenging the termination of his employment" (5a), the court explained that "the relevant question is whether it appears certain that resolution of McRaney's claims will require the court

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NAMB also asked the district court to dismiss two counts of McRaney's complaint in light of BCMD's argument, in a motion to quash a document subpoena from McRaney, that the subpoena constituted an unconstitutional intrusion into BCMD's "choice of minister" and internal governance. NAMB did not contend in its motion for partial summary judgment that McRaney's lawsuit intruded into *its own* "choice of minister" or "internal governance." Memorandum in Support of NAMB's Motion for Partial Summary Judgment at 6, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, No 1:17-cv-00080-GHD-DAS (Apr. 24, 2019), ECF No. 49.

to address purely ecclesiastical questions." "At this stage, the answer is no." 4a.

The court of appeals further explained: "[c]ritically, many of the relevant facts have yet to be developed." 4a. "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." 7a. "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." 8a.

NAMB sought en banc review, and the Fifth Circuit denied a petition for rehearing en banc, by a vote of 9-8. 43a.

Six of the Fifth Circuit judges who voted for rehearing en banc mistakenly described the conduct challenged in McRaney's district court complaint as an "internal dispute over who should lead a church."

45a; *see also* 49a, 50a, 52a. That was a factual error,[2] the source of which is unclear, but perhaps based on erroneous representations presented to the Fifth Circuit in an amicus brief, corrected by the brief's sponsors only after the Firth Circuit ruled on rehearing.[3]

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[2] As the district noted, "the BCMD and NAMB are separate and autonomous from each other." 16a. Moreover, neither organization is itself a church, and even Baptist churches are independent of one another. *See* Thomas S. Kidd & Barry Hankins, BAPTISTS IN AMERICA: A HISTORY 248 (2019) ("As is often said, there is no Baptist Church, only Baptist churches."); James L. Sullivan, BAPTIST POLITY 25 (1983) ("Baptists must think of local churches as the building blocks of a denomination. They are the units out of which denominations are to be built in the Baptist concept . . . . Each church owns its own property, calls its own pastor, makes its own decisions and lives with them . . . ."); *see also* Philip Hamburger, SEPARATION OF CHURCH AND STATE 281 (2002) (noting the "unusually antihierarchical, antiecclesiastical, and individualistic sentiments" of Baptists).

[3] After the Fifth Circuit ruled on the petition for rehearing, the authors of an amicus brief wrote the Court acknowledging factual errors in their submission. Letter of Amici Curiae Ethics and Religious Liberty Commission and Thomas More Society, at 1, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346 (5th Cir. 2020) (No. 19-60293) (filed Dec. 14, 2020) ("[I]t has come to the attention of Amici that the Brief Amici Curiae includes certain factual statements that inaccurately describe the Southern Baptist Convention's polity and theology of cooperative ministry."). The untimely correction stated: "All Southern Baptist churches are autonomous, self-determining, and subject only to the Lordship of Christ—no local, state or national entity may exercise control or authority over any Southern Baptist church. Baptists reject the idea of a religious 'hierarchy' or 'umbrella' superior to the local church, or that any Baptist Convention is in a hierarchy or governing relationship over another Convention." *Id*. at 2. As explained in Section II, the possible taint of that factually inaccurate amicus brief is a further reason to deny the Petition.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision Does Not Warrant Review

NAMB claims the decision below "departs" from this Court's prior decisions, and "conflicts" with decisions by other federal courts of appeals and state courts of last resort. Neither claim is correct.

A. The Decision Below Does Not "Depart" From This Court's Prior Decisions

NAMB asserts the Fifth Circuit's opinion "departs" from this Court's prior decisions concerning "church autonomy." Not so.

While the Court has rarely used the phrase "church autonomy" deployed by Petitioner,[4] the Court recently described "the general principle of church autonomy" as concerning "independence in matters of faith and doctrine and in closely linked matters of *internal* government." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) (emphasis added).[5]

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[4] The district court and members of the Fifth Circuit expressed different views about how to describe the relevant doctrine. The district court dismissed for lack of subject matter jurisdiction on the basis of the "ecclesiastical abstention doctrine." 41a. The Fifth Circuit panel described the ecclesiastical abstention doctrine as the "religious autonomy doctrine." 1a. The dissent from the denial of rehearing en banc authored by Judge Ho invokes the "church autonomy doctrine" (45a), whereas the dissent authored by Judge Oldham relies on the "ecclesiastical-autonomy doctrine" (63a).

[5] Petitioner quotes most of the language from *Morrissey-Berru* (Pet. at 17), but notably omits the reference to "*internal* government."

Attempting to substantiate its claim that the Fifth Circuit departed from this Court's decisional law, NAMB principally relies on two recent cases concerning the "ministerial exception"—*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), in which this Court for the first time recognized the "ministerial exception," and *Morrissey-Berru*, 140 S. Ct. 2049, in which the Court applied that exception to "teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith," *id.* at 2055.

NAMB effectively conceded in the Fifth Circuit that this case does not involve the ministerial exception,[6] given that McRaney has never been employed by NAMB, and worked for a separate, autonomous organization. 4a, 16a.

Faced with that obstacle, NAMB labels McRaney's case against it as an "employment-related" dispute,[7] and then suggests that *Hosanna-Tabor* and *Morrissey-Berru* be read as extending to this case. This sleight of hand is unavailing.

Employment disputes are disputes between employer and employee. McRaney did not bring a

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[6] NAMB initially sought dismissal in the district court on the basis of the ministerial exception, but that motion was denied, and NAMB did not maintain that position on appeal. As the Fifth Circuit noted: "Both parties agree" that "the ministerial exception is not before us." 7a.

[7] Pet. at i, 3; *see also id.* at 2, 21 ("a ministerial employment dispute"), 27.

claim against BCMD, his former employer.[8] He filed a lawsuit against a separate, non-profit corporation—NAMB.

Hosanna-Tabor bear no resemblance to this case. The question there was whether the Religion Clauses of the First Amendment bar an employment discrimination lawsuit "when the employer is a religious group and the employee is one of the group's ministers." 565 U.S. at 176-77. The Court held that both Clauses "bar the government from interfering with the decision of a religious group to fire one of *its* ministers." *Id.* at 181 (emphasis added); *id.* at 188 ("ministerial exception" concerns "the *employment relationship* between a religious institution and *its* ministers") (emphasis added).

Petitioner concedes there is no genuine conflict between the Fifth Circuit's decision and *Hosanna-Tabor*, noting the later "addressed the application of the First Amendment's church autonomy doctrine only to federal employment discrimination laws." Pet. at 19. And concede NAMB must. The Court made clear in *Hosanna-Tabor* the narrowness of its holding, stating: "We express no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of

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[8] To the contrary, McRaney entered into a severance agreement (governed by Maryland law) with his former employer, *see* Third-Party Respondent Baptist Convention of Maryland/Delaware, Inc.'s Motion to Quash *Subpoena Duces Tecum*, Exhibit A, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, No 1:17-cv-00080-GHD-DAS (N.D. Miss. Oct. 5, 2018), ECF No. 37-1—an agreement which NAMB told the district court shielded it from some of McRaney's causes of action.

contract or tortious conduct by their religious employers." 565 U.S. at 196. Thus, the accusation that the Fifth Circuit's decision here departed from *Hosanna-Tabor* is far-fetched.

Morrissey-Berru likewise lends no support to Petitioner. There, as in *Hosanna-Tabor*, the Court focused on protecting the autonomy of religious institutions "with respect to *internal* management decisions that are essential to the institution's central mission," while reaffirming such institutions do not "enjoy a general immunity from secular laws." 140 S. Ct. at 2060 (emphasis added). Here, McRaney was not an employee of NAMB, and his lawsuit concerns NAMB's actions directed toward him, which are alleged to be actionable under generally applicable state tort law, not NAMB's "internal management."[9]

B. The Decision Below Does Not Conflict With Decisions By Other Federal Courts of Appeals or State Courts of Last Resort

NAMB also asserts the Fifth Circuit's opinion "conflicts" with decisions by other federal courts of appeals and state courts of last resort. Again, not so.

For example, NAMB relies most heavily on *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir.

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[9] NAMB cites *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), in the section of the Petition claiming the Fifth Circuit's decision departs from this Court's rulings. But *Kedroff*, which concerned a "New York statute putting the Russian Orthodox churches of New York under the administration of the Russian Church in America," *id.* at 121, sets out no holding even remotely inconsistent with the Fifth Circuit opinion.

1997), as support for the notion that the Fifth Circuit is at odd with its sister circuits. However, the "stark contrast" promised by NAMB (Pet. at 24) is illusory.

The plaintiff in *Bell* was the former executive director of an interfaith organization that terminated him. The plaintiff named as defendants the "four principal constituent religious organizations" of the interfaith group, 126 F.3d at 329, which the Fourth Circuit determined to be a "joint ministry of its constituent churches." *Id.* at 332. Thus, the plaintiff in *Bell* effectively sued his employer, challenging how the defendants "would expend funds raised by the church for religious purposes." *Id.* The Fourth Circuit, deciding nothing more than "whether the dispute between Bell and the four national [constituent] churches is an ecclesiastical one," *id.* at 331, determined the First Amendment precluded Bell's claims. Nothing in the Fourth Circuit's decision about Bell's claims collides with the Fifth Circuit's decision concerning McRaney's lawsuit against NAMB, which never directly or indirectly employed him.[10]

The same is true with respect to NAMB's other cases. *See*, *e.g.*, *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986) (suit by Methodist minister "challenging his enforced retirement"); *Petruska v.*

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[10] While McRaney's case falls outside the parameters of the ministerial exception recognized in *Hosanna-Tabor*, 565 U.S. at 171, *Bell* appears to reside well within it. *See id.* at 181 (Religion Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers"); *id.* at 188 ("ministerial exception" concerns "the employment relationship between a religious institution and its ministers").

Gannon University, 462 F.3d 294 (3d Cir. 2006) (employment discrimination lawsuit by former university chaplain against former employer, private Catholic diocesan college); *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357 (Wash. 2012) (en banc) (suit by church employee); *Brazaukas v. Fort Wayne-South Bend Diocese*, Inc., 796 N.E.2d 286 (Ind. 2003) (suit by former church employee); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002) (suit by Episcopal priest and his wife against Episcopal Diocese and others); *Ex parte Bole*, 103 So.3d 40 (Ala. 2012) (suit by former pastor of church against church member concerning church activities); *El-Farra v. Sayyed*, 226 S.W.3d 792 (Ark. 2006) (suit by Imam against Islamic Center which previously employed him, related to termination of contract); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301 (Mass. 2004) (suit by pastor against church arising from employment); *Heard v. Johnson*, 810 A.2d 871 (D.C. 2002) (suit by former pastor against church related to termination); *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511 (Va. 2001) (suit by former pastor against church related to termination); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) (suit by minister asserting employment and other claims against another minister, church and church organization).

II. This Case Is An Unsuitable Vehicle For Considering The Questions Presented

Even putting aside that the questions presented by NAMB are improperly framed[11] and unworthy of review, this case is an unsuitable vehicle to address them, for at least five reasons.

First, this case was dismissed by the district court in its "early stage" (5a), with discovery barely underway, based on an erroneous jurisdictional ruling by the district court.[12] "Religion cases are among the most sensitive and challenging in American Law." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2610 (2020) (Kavanaugh, J., dissenting). And they often turn on case-specific factual development. For example, in *Hosanna-Tabor*, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minster," instead delving into the record in concluding that the ministerial exception applied in that instance "given all the circumstances." 565 U.S. at 190-91. *See also American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067, 2087 (2019) (Alito, J.) (discussing shift in Establishment

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[11] Respondent does not believe the questions presented are appropriately framed, including because McRaney's claims against NAMB are not "employment-related." If the Petition were granted, Respondent would set forth alternative question(s) presented.

[12] *Cf. Hosanna-Tabor*, 565 U.S. at 195 n. 4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."). While the district court relied on the "ecclesiastical abstention doctrine" to dismiss (41a), there is no obvious reason to think this Court would treat "ecclesiastical abstention" or "church autonomy" as jurisdictional when the ministerial exception is not.

Clause cases to "a more modest approach that focuses on the particular issue at hand").

NAMB's arguments for dismissal of McRaney's lawsuit depend on the accuracy of its characterizations about the relationships among McRaney, NAMB, BCMD, and others. But NAMB itself acknowledges that the "relevant actors in church autonomy cases will vary from religion to religion." Pet. at 23. Given the fact-specific and denomination-specific nature of NAMB's argument,[13] the Court should not wade into this dispute with a partial record, featuring disagreement over key facts, which the Court should not be asked to resolve. The Fifth Circuit aptly explained that "many of the relevant facts have yet to be developed" (4a), and "[p]rudence [] dictates awaiting a case" where the salient issues are "fully litigated below." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992); *cf. South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Barrett, J., concurring in partial grant of application) (explaining that some requested relief should be denied at present because "the record is uncertain").

Second, notwithstanding Petitioner's framing of the questions presented, certain counts in McRaney's complaint cannot be characterized as "employment-related," even with creative labeling. NAMB's motion for partial summary judgment sought dismissal of only *some* causes of action, explaining to the district

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[13] For example, NAMB argues in the Petition that the church autonomy doctrine (as NAMB understands it) should extend "to those with whom [NAMB] indirectly partners through a SPA." Pet at 22.

court: "NAMB does not seek dismissal of Count III and Count V, both of which involve events that allegedly took place after Plaintiff's termination by BCMD and after Plaintiff's execution of the Separation Agreement. BCMD was not involved in these alleged post-termination events."[14] NAMB's allegedly tortious conduct *after* McRaney no longer worked for BCMD, and the damage that conduct caused, cannot have been "employment-related." If the Court is interested in the questions presented, it should wait for a case in which answering those questions might be dispositive of the entire matter.

Third, as discussed above, NAMB sought partial summary judgment on the basis of its assertion it was a third-party beneficiary of a release in the separation agreement between McRaney and BCMD. The doctrines of waiver or estoppel should preclude NAMB from contending, in this Court or below, that the Religion Clauses foreclose McRaney's claims, given that NAMB itself urged the district court to adjudicate the meaning and effect of the separation agreement, which it now contends are matters of "church autonomy," beyond the jurisdiction of federal courts.

Fourth, as discussed above (page 3, footnote 1), the proceedings in the Fifth Circuit were tainted by a factually inaccurate amicus brief, which was corrected by its sponsors, but only after the conclusion of

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[14] Memorandum in Support of NAMB's Motion for Partial Summary Judgment at 7 n.3, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, No 1:17-cv-00080-GHD-DAS (Apr. 24, 2019), ECF No. 49.

proceedings before the court of appeals. While the Fifth Circuit panel did not obviously rely on those misrepresentations, the six Judges voting for rehearing who mistakenly described the conduct challenged in McRaney's complaint as an "internal dispute over who should lead a church" (45a) may have done so, given their unsourced, but inaccurate, characterization.

Finally, although NAMB relies on the "church autonomy doctrine," it is unclear if NAMB is asking this Court to permit lower federal courts to abstain from exercising jurisdiction when not required to do so by the First Amendment. Such an abstention doctrine might present federalism issues when applied to state law causes of action, like those asserted here by McRaney. That this issue has not yet been considered by the courts below is further reason why the case is an unsuitable vehicle to address the questions presented.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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