

No. 20-1174

In The
Supreme Court of the United States

—◆—
KIM LIPPARD AND BARRY LIPPARD,

Petitioners,

v.

LARRY HOLLEMAN AND ALAN HIX,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The North Carolina Court Of Appeals**

—◆—
BRIEF IN OPPOSITION
—◆—

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BRIEF IN OPPOSITION
JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the North Carolina Supreme Court’s decision summarily declining review of a North Carolina judgment that rested on independent and adequate state-law grounds.



COUNTERSTATEMENT OF THE CASE

Factual background

A full statement of the factual background of the case is set forth in the decision of the North Carolina Court of Appeals. Petitioners’ Appendix (“Pet. App.”) at 3a-7a.

Counterstatement of procedural background

The statement of the procedural background of the case, including the Petitioners’ filing of their action against Diamond Hill Baptist Church, Respondent Larry Holleman, and Respondent Alan Hix, and the statement of the Unpublished *Lippard* is set forth in the decision of the North Carolina Court of Appeals. *Id.* at 7a-9a.

On remand from the North Carolina Court of Appeals, Holleman and Hix moved for summary judgment on the defamation claim, raising the following

issues as general state law defenses to the defamation claim against them:

1. The Lippards failed to raise a genuine issue of fact that Holleman or Hix had made any of their allegedly defamatory statements in their individual capacities. ROA197-201.¹
2. Holleman and Hix were entitled to judgment as a matter of law in their representative capacities as Pastor and Minister of Music for Diamond Hill Baptist Church because the Lippards had voluntarily dismissed the Church from the action. ROA201-203.
3. The Lippards failed to raise a genuine issue of fact that Holleman and Hix had defamed them.
 - a. As a matter of law, none of the statements made by Holleman and Hix about the Lippards were defamatory *per se*. ROA216-223.
 - b. The Lippards failed to raise a genuine issue of fact that the statements made by Holleman and Hix were defamatory *per quod*. ROA223-227.
4. The statements made by Holleman and Hix about the Lippards were made in the course of the Church's biblical reconciliation and disciplinary proceedings so that the trial court was precluded from inquiring into the

¹ "ROA" refers to the Record on Appeal in the North Carolina courts.

statements without violating the First Amendment. ROA204-216.

The trial court granted summary judgment for Holleman and Hix on four general state-law grounds:

1. “Defendants are entitled to judgment as a matter of law in their individual capacities’ because Plaintiffs ‘failed to raise any forecast of evidence that Defendants made any of their statements in their individual capacities.’” Pet. App. 9a and 94a.
2. “Defendants are entitled to judgment as a matter of law in their representative capacities because Plaintiffs voluntarily dismissed Defendants’ principal, DHBC.” *Id.* at 9a and 95a.
3. “[N]one of Defendants’ statements are defamatory *per se* as a matter of law.” *Id.* at 9a and 95a.
4. “Plaintiffs failed to ‘provide any evidentiary forecast that they suffered special damages because of any of Defendants’ allegedly defamatory *per quod* statements.’” *Id.* at 9a-10a and 96a.

The trial court also granted judgment to Respondents on the federal ground that “the First Amendment barred Plaintiffs’ claims because ‘inquiry into the falsity of the claimed “defamatory statements” would cross the ecclesiastical limitations prohibited by the First Amendment.’” *Id.* at 9a and 94a.

The trial court “therefore, Ordered, Adjudged, and Decreed That: Defendants’ Motion for Summary Judgment as to all allegations regarding Plaintiff’s Claim for Defamation is GRANTED.” *Id.* at 96a.

The Lippards appealed, challenging “all of the trial court’s rationales for granting summary judgment, including its First Amendment ruling.” Petition for a Writ of Certiorari (“Pet.”), 8. The majority of a divided panel of the North Carolina Court of Appeals affirmed the trial court’s order “on the ground that all statements Plaintiffs challenge are barred by the ecclesiastical entanglement doctrine. Having determined all of Plaintiffs’ claims on this ground, we do not address Plaintiffs’ remaining challenges.”² Pet. App. 51a.

The Petitioners did not petition the Court of Appeals to rehear the matter to consider the trial court’s state-law rationales for granting summary judgment

² Respondents do not agree with Petitioners’ characterization of the holding of the North Carolina Court of Appeals, which actually held that the First Amendment prohibits courts from determining only one of the several elements of a *prima facie* case – the truth or falsity of an allegedly defamatory statement – if doing so requires a court “to examine or inquire into ecclesiastical matters or church doctrine.” Pet. App. 20a. *See also, id.* at 11a. The Court of Appeals did not impose a blanket prohibition against the review of defamation claims arising in the context of an ecclesiastical setting. A court is barred from determining the falsity of a statement if the court would need to interpret or weigh ecclesiastical matters or church doctrine. The trial court, as affirmed by the Court of Appeals, actually granted summary judgment to Respondents upon state-law grounds as to other elements of Petitioners’ defamation claim.

to Respondents that had been left unaddressed by the Court of Appeals. N.C. R. App. P. Art. VI, Rule 31.

The Lippards sought review by the North Carolina Supreme Court of the ruling of the North Carolina Court of Appeals. The North Carolina Supreme Court granted Respondents' motion to dismiss the appeal of the constitutional question and denied the Lippards' petition for discretionary review. Pet. App. 120a-121a.



REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to grant the writ under 28 U.S.C. § 1257(a) because the trial court granted judgment on independent and adequate state-law capacity of parties and defamation grounds.

A. A decision on the federal question by this Court would not finally determine the outcome of this case.

This case is not the case for determining the important First Amendment ecclesiastical entanglement doctrine as it applies to the tort of defamation. Even if the Court were to decide Petitioners' Question Presented favorably to them, the ultimate case outcome will not change. As stated by Petitioners in their statement of the case's Procedural Background, the North Carolina trial court not only "ruled that the Religion Clauses foreclosed the Lippard's claim . . . [i]t also ruled that summary judgment was warranted on unrelated state-law grounds." Pet. 8.

The trial court's summary judgment was based on multiple grounds other than the First Amendment Religion Clauses. Those alternative state-law grounds for judgment were left undisturbed by the North Carolina Court of Appeals, which affirmed the trial court's summary judgment, specifically upon the federal First Amendment ground. The North Carolina Supreme Court denied its discretionary review, again leaving the trial court's non-ecclesiastical, state-law grounded judgment undisturbed.

Contrary to Petitioners' assertion on page 34 of their Petition, the Court may not "grant review, resolve the question presented, and remand for consideration of these state-law issues." The state-law issues have already been decided by state courts and are entitled to no further judicial consideration. Therefore, assuming the Court even has jurisdiction under 28 U.S.C. § 1257(a) to review the constitutional question, any decision by this Court with regard to the question will not change the fact that the Petitioners will have still lost their case on general state-law grounds.

B. The authority granted this Court by 28 U.S.C. § 1257(a) does not include reviewing state-court decisions grounded on state law.

The certiorari authority granted to this Court by 28 U.S.C. § 1257(a) over state-court decisions limits the Court's jurisdiction to "[f]inal judgments or decrees rendered by the highest court of a State in which a

decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.” Specifically, “in a case coming from a state court this court can consider only Federal questions, and . . . it cannot entertain the case unless the decision was against the plaintiff in error upon those questions.” *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court “must accept as controlling the decision of the state courts upon questions of local law, both statutory and common.” *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927).

Consequently, this Court’s appellate jurisdiction over state-court decisions is limited to “correct[ing] them to the extent that they incorrectly adjudge *federal rights*.” *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Where federal law is not binding, and thus the state court could render the same judgment on remand even after this Court “corrected its views of federal laws,” this Court’s review would amount to nothing more than an advisory opinion. *Id.* at 126.

The sole issue of which Petitioners are now seeking review is “[w]hether the First Amendment’s Religion Clauses prohibit courts from hearing defamation claims that arise from ecclesiastical settings, even when the claims can be resolved using neutral principles of law.” Pet. i. In light of the undisturbed trial court judgment, even if this Court were to grant certiorari and hold that the ecclesiastical entanglement doctrine does permit courts to hear defamation claims arising from ecclesiastical settings, the Petitioners will have still lost their defamation case. That is true because, as

recognized by all three justices on the North Carolina Court of Appeals panel reviewing the trial court decision,³ the trial court did not rest its judgment solely on the First Amendment ecclesiastical entanglement doctrine, it alternatively granted judgment to Respondents on general state-law grounds. Those state-law grounds had the effect of wholly disposing of Petitioners' claims against Respondents.

C. The North Carolina Court of Appeals acknowledged the trial court's state-law grounded summary judgment for Respondents.

The North Carolina Court of Appeals recounted the immediate trial court history of the case before it, explaining that in an earlier appeal the Court had reversed a trial court dismissal of the Lippards' action and remanded it to the lower court where Holleman and Hix filed a motion for summary judgment. The Court of Appeals acknowledged that the trial court judge granted the motion upon grounds of state capacity of parties law and state defamation law in addition to Federal First Amendment grounds. *Lippard v. Holleman*, 844 S.E.2d 591, 597 (N.C. App. 2020). Pet. App. 9a-10a. The Lippards then appealed the summary judgment to the North Carolina Court of Appeals.

Acknowledging the "several errors" being appealed upon by Petitioners, the North Carolina Court of Appeals nevertheless decided only the ecclesiastical

³ Pet. App. 9a-10a and 81a.

entanglement doctrine and did not address the remaining claimed errors. “Having determined all of Plaintiffs’ claims on this [ecclesiastical entanglement doctrine], we do not address Plaintiffs’ remaining challenges. AFFIRMED.” Pet. App. 51a. The Court of Appeals did not reverse or vacate the trial court’s state-law grounded judgment.

Thus, the Court of Appeals left undisturbed the trial court’s judgment that (1) Holleman and Hix were granted judgment in their individual and representative capacities and (2) they were granted judgment as to all defamation claims against them. Those two grounds for judgment would not be impacted by a decision by this Court on the First Amendment doctrine raised by Petitioners because the trial court made its state-law grounded judgment independently of First Amendment law.

D. The state-law grounded judgment did not require any inquiry into the truth or falsity of the allegedly defamatory statement, much less the weighing of ecclesiastical matters.

None of the trial court’s four state-law grounds for granting judgment to Respondents required a judicial inquiry into the truth or falsity of the allegedly defamatory statements, or required the Court “to interpret or weigh ecclesiastical matters, an inquiry not permitted by the First Amendment.” Pet. App. 11a. In fact, the trial court did actually resolve the Petitioners’ claims

against Respondents using only general state principles of law.

The trial court's judgment based upon the capacity in which Respondents were sued by Petitioners did not require the trial court to address the truth or falsity of the any of the allegedly defamatory statements. The trial court's summary judgment simply found as a matter of law that Petitioners had not met the summary judgment burden required by general state law since they "failed to raise any forecast of evidence that Defendants made any of their statements in their individual capacities." *Id.* at 94a. As to Respondents' liability in their representative capacities, since Petitioners had voluntarily dismissed Respondents' principal, the Church, the trial court, based upon principles of general state law, concluded that the two men were "entitled to judgment as a matter of law in their representative capacities as Lead Pastor and Minister of Music of Diamond Hill Baptist Church." *Id.* at 95a. Yet again, the trial court had no occasion to inquire into the truth or falsity of the statements Respondents were alleged to have made about Petitioners.

Nor did the trial court need to interpret or weigh ecclesiastical matters to grant judgment to the Respondents with regard to the Lippards' defamation claims. Under neutral principles of state summary judgment law, "[s]ummary judgment is properly entered in favor of the moving party if the movant establishes that an essential element of the opposing party's claim is nonexistent." *Goins v. Puleo*, 512 S.E.2d 748, 751 (1999). A defamation claim is composed of several

elements, only one of which is the truth or falsity of the allegedly defamatory statement and the absence of only one of which the summary judgment movant must establish to prevail on his summary judgment motion.⁴ *Lippard v. Holleman*, 844 S.E.2d 591, 599 (N.C. 2020) (“Defamation . . . claim includes as *an* essential element the falsity of the defendant’s alleged statements.”) (Emphasis added.)

In general, under North Carolina law a statement is defamatory *per se* and actionable when “(1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt or disgrace; or (4) it tends to impeach one in his trade or profession.” *Flake v. Greensboro News Co.*, 195 S.E. 55 (1938). In North Carolina, “[w]hether a statement is defamatory *per se* is a question of law to be decided by the court. *See Ellis v. N. Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). The trial did not need to inquire into the truth or falsity of any statement to determine that none of the statements: charged Petitioners with having committed an infamous crime or having an infectious disease; subjected Petitioners to ridicule; or impeached them in their profession. The

⁴ “Generally, to make out a *prima facie* case for defamation, ‘plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff’s reputation.’” *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 356, 595 S.E.2d 778, 783 (2004) quoting *Tyson v. L’Eggs Prods., Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987).

court could and did determine as a matter of law, without the forbidden weighing and interpreting ecclesiastical matters, that the statements were not *per se* defamatory.

As to the other form of defamation alleged by Petitioners against Respondents – defamation *per quod* – one of the state-law-required elements of proof is that of special damages.⁵ The trial court concluded that “Plaintiffs did not provide any evidentiary forecast that they suffered special damages because of any of Defendants’ allegedly defamatory *per quod* statements.” That conclusion did not require that court to inquire into the truth or falsity of the statements or interpret ecclesiastical doctrine. The court was just required to determine whether Petitioners forecast any evidence of special damages. Petitioners had not; therefore, they lost their defamation *per quod* claim.

The trial court’s summary judgment for the Respondents in their individual and representative capacities and the judgment for the Respondents that Petitioners had not met their summary judgment burden for their defamation claims were two independent, non-federal grounds for, and adequate to support, the trial court’s judgment against Petitioners. The North

⁵ “[Plaintiff] would need to produce an evidentiary forecast to support a *prima facie* showing of special damages to survive defendant’s motion for summary judgment.” (*Griffin v. Holden*, 180 N.C. App. 129, 138, 636 S.E.2d 298, 305 (2006)). Under North Carolina defamation law, “special damage means pecuniary loss, as distinguished from humiliation.” *Stutts v. Duke Power*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980).

Carolina Court of Appeals left undisturbed these non-federal grounds for the trial court's judgment. The Petitioners could have petitioned the Court of Appeals for a rehearing of points of fact or law the court overlooked. (N.C. R. App. P. Art. VI, Rule 31). They failed to seek the rehearing. Instead, they sought, and were denied, review by the North Carolina Supreme Court, still leaving the non-federal independent and adequate grounds for judgment undisturbed.

E. The trial court's state-law grounded judgment for Respondents deprives this Court of jurisdiction to grant the requested Petition.

The trial court's judgment for Respondents based solely on state law deprives this Court of jurisdiction under 28 U.S.C. §1257(a) to grant certiorari. With the independent, non-federal party capacity, defamation *per se*, and defamation *per quod* grounds for the judgment below, this case is controlled by this Court's settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

In *Coleman v. Thompson*, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the

federal question and adequate to support the judgment.” See also *Harris v. Reed*, 489 U.S. 255, 262, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L. Ed. 789, 65 S. Ct. 459 (1945); see also *Sochor v. Florida*, 504 U.S. 527, 533-534, 119 L. Ed. 2d 326, 112 S. Ct. 2114, and n.* (1992).

Lambrix v. Singletary, 520 U.S. 518, 522-23, 117 S. Ct. 1517, 1522 (1997). “If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.” *Michigan v. Long*, 463 U.S. 1032, 1041, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). See also *Harris v. Reed*, 489 U.S. 255, 264, n. 10, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 80 L. Ed. 158, 56 S. Ct. 183 (1935).

Petitioners have glossed over the trial court’s alternative, independent and adequate non-federal grounds for the trial court judgment. However, the trial court’s non-federal grounds for its judgment are critical to this case for, even if this Court were to rule in Petitioners’ favor on the merits of their First Amendment argument, they will have still lost the case because of their failure to carry their summary judgment burden with regard to the non-ecclesiastical elements

of party capacity and their defamation *per se* and defamation *per quod* claims.

II. If the Court wishes to take up the First Amendment's ecclesiastical entanglement doctrine as it applies to the tort of defamation, it currently has before it another Petition that raises the same issue.

As argued above, this case has been decided on independent non-federal grounds by a final state court judgment, thus depriving the Court of 28 U.S.C. § 1257(a) jurisdiction to decide the First Amendment ecclesiastical entanglement issue Petitioners seek to raise. Nevertheless, if the Court determines the issue to be one upon which it should speak, another Petition was filed in this Court the week before the Petition herein that raises an issue that somewhat overlaps with the question raised by this Petition.

On February 22, 2021, the North American Mission Board of the Southern Baptist Convention filed its Petition seeking the Court's review of the Fifth Circuit decision, *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 966 F.3d 346 (5th Cir. 2020), in which the Fifth Circuit panel reversed the district court decision⁶ dismissing the action for lack of subject matter jurisdiction over the ecclesiastical dispute before it.

⁶ *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 1:17-cv-00080-GHD-DAS, 2019 U.S. Dist. LEXIS 70007, at *10 (N.D. Miss. Mar. 22, 2019).

On appeal, the Fifth Circuit concluded that it would be permissible for a court “to apply neutral principles of tort law” to, among others, his defamation claim, because the plaintiff minister was “not asking the court to weigh in on issues of faith and doctrine.” *Id.* at 349. The Fifth Circuit remanded the case to give the Mission Board the opportunity to present evidence of its claimed religious reasons for its actions and, if the Mission Board did in fact demonstrate such valid religious reasons, the claims could then be dismissed.

The Mission Board petitioned this Court for a writ of certiorari, raising for the Court the question: “Whether a secular court can, consistent with the First Amendment’s Religion Clauses, adjudicate a minister’s employment-related state law tort claims against a religious organization using neutral principles of tort law.” *McRaney*, Pet. i.

Unlike the case herein, the *McRaney* trial court decision was based solely on the question of the application of the First Amendment’s Religious Clauses to tort cases involving ecclesiastical tenets, doctrines, and decisions. The court made no independent and adequate judgment based upon state-law grounds; the decision was based solely on First Amendment grounds. The Fifth Circuit decision was also based only on First Amendment grounds. That being the case, this Court has 28 U.S.C. § 1257(a) jurisdiction to decide the First Amendment issue of *McRaney*.



CONCLUSION

For the foregoing reasons, Respondents Larry Holleman and Alan Hix respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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