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 Court of Appeals of North Carolina

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the lower courts are divided on whether the Religion Clauses always foreclose defamation claims that arise from ecclesiastical settings. Nor do they dispute that this question warrants the Court's review. In fact, respondents acknowledge that this question is "important." Opp. 5. The law professor *amici* supporting the Lippards in this case agree, as do the many *amici* supporting the petitioner raising the same question in *McRaney*, No. 20-1158. As those *amici* confirm, the lower courts need this Court's guidance on the application of the Religion Clauses to defamation claims.

Respondents nevertheless oppose review in this case for three reasons. None has merit.

First, respondents argue that the trial court ruled in their favor on alternative state-law grounds, which either deprives this Court of jurisdiction or otherwise creates a vehicle issue. Opp. 5-15. This Court's jurisdiction, however, turns on whether the *North Carolina Supreme Court* adopted alternative state-law grounds for *its* judgment. It did not. This Court therefore has jurisdiction to review the judgment below.[1] Nor does the trial court's state-law reasoning

[1] Although the Lippards' petition stated that it sought review of the judgment of the North Carolina Court of Appeals, *see* Pet. 1, the Lippards now have determined that the judgment to be reviewed is technically the judgment of the North Carolina Supreme Court. This Court has held that when, as here, the North Carolina Supreme Court both denies a petition for discretionary review and dismisses an appeal for lack of a substantial constitutional question, this Court reviews the judgment of the North Carolina Supreme Court. *See Grady v. North Carolina*,

weigh against review. The Court can resolve the question presented without addressing state law, and the Lippards can then renew their challenges to the trial court's state-law rulings on remand—challenges on which the Lippards likely will prevail.

Second, respondents contend that this case does not present the question on which courts are divided because the Court of Appeals did not adopt a categorical bar on defamation claims in ecclesiastical settings. Opp. 4 n.2. That contention cannot be squared with the language of the court's opinion, its rulings on several of the defamatory statements at issue, or the fact that Chief Judge McGee dissented on this point. Those considerations show that the Court of Appeals joined the courts holding that the First Amendment bars all defamation claims that arise from ecclesiastical settings, even when those claims can be decided through neutral principles of law.

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575 U.S. 306, 308 & n.* (2015) (per curiam); *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 136, 138-39 (1986); Pet. App. 121a. The Lippards therefore request that the Court, as it has done in similar circumstances in the past, construe their petition to seek review of the judgment of the North Carolina Supreme Court. For example, in *Foster v. Chatman*, the Court construed a petition that sought review of the judgment of a Georgia superior court as seeking review of the judgment of the Georgia Supreme Court. *See* 136 S. Ct. 1737, 1746 n.2 (2016); Pet. for Writ. of Cert., *Foster*, No. 14-8349, at 1 (U.S. Jan. 30, 2015). Similarly, in *Grady*, the Court treated the petition as seeking review of the North Carolina Supreme Court's judgment, even though the petition sought review of the judgments of both North Carolina appellate courts. *See* 575 U.S. at 308 n.* This approach is also consistent with respondents' opposition, which construes the petition to seek review of "the North Carolina Supreme Court's decision." Opp. 1.

Finally, respondents argue that the Court need not grant review in this case because it can grant review in *McRaney*. Opp. 15-16. As the Lippards' petition explained, however, this case's facts make it an excellent vehicle for addressing the question presented even if the Court also grants review in *McRaney*. Pet. 34-35. Respondents fail to address, much less rebut, those points.

I. The trial court's decision poses no obstacle to this Court's review.

A. The trial court's state-law rulings do not deprive this Court of jurisdiction.

Respondents contend that this Court lacks jurisdiction to review the judgment of the North Carolina Supreme Court because the trial court adopted adequate and independent state-law grounds for its judgment. *See* Opp. 1, 5, 13-15. That argument fails because this Court's jurisdiction to review the North Carolina Supreme Court's judgment turns on whether the North Carolina Supreme Court adopted adequate and independent state-law grounds—not whether the trial court did so.

This rule has been settled for more than a century. In *Allen v. Southern Pacific Railroad Co.*, 173 U.S. 479 (1899), the Court considered whether an adequate and independent state-law ground barred review of the judgment of a state supreme court. *See id.* at 489. When conducting that inquiry, the Court explained, "we are unconcerned with the conclusions of the trial court." *Id.* at 489. Rather, the Court's jurisdiction

turns on "the final action of the Supreme Court of the State in disposing of the controversy." *Id*.[2]

The Court's more recent articulations of the doctrine reflect this same point. For example, the Court has explained that it "lacks jurisdiction to entertain a federal claim on review of a state court judgment if *that judgment* rests on" an adequate and independent state-law ground. *Foster*, 136 S. Ct. at 1745 (emphasis added; quotation omitted). The Court similarly has observed that it lacks jurisdiction to review a state court's decision if "the decision of *that court*" has an alternative basis in state law. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (emphasis added). These statements reinforce *Allen*'s holding that the question is whether the court whose judgment is subject to review adopted an adequate and independent state-law ground—not whether a different court did so.

Here, the Lippards seek review of the judgment of the North Carolina Supreme Court, not the judgment of the trial court. Thus, respondents' arguments about the trial court's reasoning are misplaced. The question instead is whether the North Carolina Supreme Court adopted an adequate and independent state-law ground for its judgment.

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[2] *See also*, *e.g.*, 2 FED. PROC., L. ED. § 3:92 (2021) ("The Supreme Court considers only the final action of the highest court of the state in disposing of the controversy, and it is not concerned with the conclusions of the trial court or a subordinate appellate tribunal." (citing *Allen*)); *cf.* Erwin Chemerinsky, FEDERAL JURISDICTION, § 10.5 (Vicki Been et al. eds., 6th ed. 2012) ("[T]o constitute an independent state ground of decision, the state's highest court must have explicitly relied on it as a basis for its ruling.").

Respondents do not argue that it did. Nor could they. When, as here, the North Carolina Supreme Court dismisses an appeal for lack of a substantial constitutional question, *see* Pet. App. 121a, this Court treats that dismissal as an affirmance on the merits of the North Carolina Court of Appeals' judgment, absent a "contrary assurance" from the North Carolina Supreme Court. *R.J. Reynolds*, 479 U.S. at 138. The North Carolina Supreme Court provided no such assurance here—it dismissed the appeal without explanation. *See* Pet. App. 121a. In effect, therefore, that dismissal affirmed the Court of Appeals' judgment.

As respondents admit, the Court of Appeals' judgment rested solely on the First Amendment. *See* Opp. 8-9. Indeed, that court expressly declined to address the Lippards' challenges to the state-law grounds adopted by the trial court. *See id*. at 9; Pet. App. 51a. The Court of Appeals' judgment thus did not rest on state-law grounds. Because the North Carolina Supreme Court affirmed the Court of Appeals, the North Carolina Supreme Court's judgment also does not rest on state-law grounds, and instead rests solely on the First Amendment. This Court therefore has jurisdiction to review the judgment of the North Carolina Supreme Court.

B. The trial court's state-law rulings do not otherwise create a vehicle issue.

Respondents also argue that the trial court's state-law grounds create a vehicle concern because, even if this Court rules for the Lippards on the First Amendment, "the ultimate case outcome will not change." Opp. 5. As the Lippards explained in their petition, however, these state-law questions do not

pose a vehicle problem. Pet. 34. This Court need not address any issues of state law to resolve the question presented; it can instead leave all state-law issues to be addressed on remand. *Id.*; *see also* Stephen M. Shapiro et al., SUPREME COURT PRACTICE, § 3.27, at 3-94 (11th ed. 2019) (observing that the Court "customarily" adopts this approach).

Respondents contend that the state courts could not consider the state-law issues on remand because the trial court has already resolved those issues in respondents' favor. *See* Opp. 6. The Lippards, however, challenged the trial court's state-law rulings in the Court of Appeals, and the Court of Appeals declined to reach those challenges only because it ruled for respondents under the First Amendment. *See* Pet. App. 51a. As a result, if this Court reverses on the First Amendment question, the Lippards' challenges to the trial court's state-law rulings will be ripe for review on remand.

Those challenges also will likely succeed. Thus, even if the probability of a different outcome on remand matters to this Court's analysis of whether to grant review, respondents are incorrect to contend that the outcome here will not change.

For example, the trial court granted summary judgment for respondents on the theory that none of their statements were defamatory per se. Pet. App. 95a. In an earlier appeal in this case, however, the Court of Appeals unanimously held that some of the statements at issue *could* be understood as defamatory per se. *See id.* at 112a. The trial court erred in failing to follow that ruling as law of the case. *See*, *e.g.*, *Weston v. Carolina Medicorp, Inc.*, 438 S.E.2d 751, 753 (N.C. Ct. App. 1994).

The trial court's defamation per se ruling also conflicts with *Kindley v. Privette*, 84 S.E.2d 660 (N.C. 1954). In *Kindley*, the North Carolina Supreme Court held that a pastor's statements accusing a church minister of causing disruption within the church were defamatory per se. *See id.* at 663-64. The court reasoned that those types of statements tend to subject a minister to ridicule, contempt, or disgrace and to impeach the minister in his profession. *See id.* Here, Holleman made statements that similarly accused a minister (Mrs. Lippard) of causing disruption within the church. *See* Pet. 6, 34. Under *Kindley*, those statements were defamatory per se. On remand, therefore, the Lippards will have persuasive arguments that the trial court erred in rejecting their claim for defamation per se.[3]

The trial court also mistakenly granted summary judgment for respondents on the theory that they did not make their defamatory statements in their "individual capacities." Pet. App. 94a; *see* Opp. 10. The court appears to have reasoned that respondents instead made their statements in their capacities as ministers of the church. *See* Pet. App. 94a-95a. Under North Carolina law, however, the issue of "capacity" goes to "the nature of the relief sought, not the nature of the act or omission alleged." *Meyer v. Walls*, 489

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[3] The trial court also granted summary judgment for respondents on the Lippards' claim for defamation per quod. *See* Opp. 12; Pet. App. 95a-96a. Defamation per se and defamation per quod are separate theories under North Carolina law. *See Renwick v. News & Observer Pub. Co.*, 312 S.E.2d 405, 408 (N.C. 1984). Thus, the trial court's error on defamation per se would warrant the reversal of summary judgment regardless of the outcome on defamation per quod. In any event, the Lippards also challenged the trial court's ruling on defamation per quod below.

S.E.2d 880, 887 (N.C. 1997) (quotation omitted). If monetary damages are sought from "the pocket of the individual," the defendant has been sued in her individual capacity. *Id.* (quotation omitted).

Here, the Lippards sought monetary damages against respondents "jointly and severally," thus seeking damages from respondents' own pockets, not the church's. *See* ROA26 (seeking to "have and recover of [respondents], jointly and severally, general, compensatory, and special damages"). Thus, the Lippards sued respondents in their individual capacities. *See Mabrey v. Smith*, 548 S.E.2d 183, 187 (N.C. Ct. App. 2001) (confirming that defendants had been sued in their individual capacities when plaintiff's prayer for relief sought damages from them "jointly and severally").

Contrary to the trial court's conclusion, Pet. App. 94a, the Lippards can recover from respondents in their individual capacities even if respondents made their defamatory statements in their capacities as ministers of the church. Respondents are not, for example, government officers entitled to immunity for their "official" acts. *Cf. Meyer*, 489 S.E.2d at 888. Indeed, the trial court identified no support in North Carolina law for its ruling on this point. *See* Pet. App. 94a. Nor have respondents identified any such support. *See* Opp. 10. On remand, therefore, the Lippards will have a persuasive argument that the trial court also erred in granting summary judgment for respondents on "capacity" grounds.

In sum, the trial court's state-law rulings create no jurisdictional or practical impediment to this Court's review. Rather, as the Lippards explained in their petition, this case is an excellent vehicle for resolving the conflict on the question presented and

providing much-needed guidance to the lower courts on the application of the Religion Clauses to defamation claims. *See* Pet. 33-35.

II. This case squarely presents the question on which the lower courts are divided.

Respondents also argue that this case does not implicate the conflict in the lower courts. According to respondents, the Court of Appeals did not join the courts that categorically foreclose defamation claims that arise from ecclesiastical settings. Opp. 4 n.2. Respondents argue that the Court of Appeals instead held only that the Religion Clauses bar defamation claims when the defamatory statements' truth or falsity turns on ecclesiastical questions. *Id*. This argument fails for three reasons.[4]

First, respondents' argument conflicts with the Court of Appeals' express statement of its holding: "The First Amendment does not permit courts to hear defamation claims when they were made during an internal religious dispute regarding ecclesiastical matters." Pet. App. 2a. That statement is a categorical rule against defamation claims that arise from ecclesiastical settings.

Second, respondents' argument cannot be squared with the Court of Appeals' rulings on several of the defamatory statements in this case. The court concluded, for example, that the First Amendment barred

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[4] As explained above, the judgment to be reviewed in this case is the judgment of the North Carolina Supreme Court, but this Court treats that judgment as affirming the Court of Appeals' decision on the merits. *See supra* p. 5; *R.J. Reynolds*, 479 U.S. at 138. The Court of Appeals' opinion therefore provides the operative reasoning for this Court's review.

the Lippards' defamation claim as to Holleman's statement that Mr. Lippard had "blocked [Hix's] exit from the music room and was aggressively going after [Hix], pointing his finger in [Hix]'s face." Pet. App. 34a, 49a-50a (alterations in original). The truth or falsity of that statement does not turn on ecclesiastical questions, and the Court of Appeals did not say otherwise. *See id.* Instead, it held that the Religion Clauses foreclosed the Lippards' claim as to this statement based on the setting in which the statement was made. *See id.* The same is true for other defamatory statements in this case. *See* Pet. 9-10.

Third, respondents' argument fails to account for Chief Judge McGee's partial dissent. Chief Judge McGee dissented *because* the majority held that the Religion Clauses prohibit defamation claims that arise from ecclesiastical settings. *See* Pet. 10; Pet. App. 52a-53a, 77a-78a. She would have held that the Religion Clauses instead bar a defamation claim only when the truth or falsity of the statements at issue turns on a religious question. *See* Pet. App. 53a. That is the rule respondents say *the majority* adopted. Opp. 4 n.2. If respondents were correct, Chief Judge McGee would have had no reason to dissent on this issue.

To be sure, the majority opinion also stated that a defamation claim is prohibited if the statements' truth or falsity turns on ecclesiastical questions. *See* Opp. 4 n.2. As the Lippards have explained, however, that was an *additional* holding of the Court of Appeals. *See* Pet. 8-9. That is, the court held that the Religion Clauses bar a defamation claim if the claim arises from an ecclesiastical setting *or* truth or falsity turns on ecclesiastical matters—not *only* if truth or falsity turns on ecclesiastical matters. *See id.*

The Court of Appeals thus embraced the same categorical rule that has been adopted by six federal courts of appeals and state courts of last resort, and that has been rejected by five others: that the Religion Clauses prohibit courts from hearing defamation claims that arise from ecclesiastical settings, even when those claims can be resolved using neutral principles of law. The decision below therefore squarely presents the question on which courts are divided.

III. The Court should grant review in this case whether or not it grants review in *McRaney*.

Respondents finally contend that the Court need not grant review in this case because it can decide the question presented in *McRaney*. *See* Opp. 15-16. As the Lippards have explained, however, the facts of this case differ from the facts in *McRaney* in ways that make this case an especially useful vehicle for addressing the question presented. *See* Pet. 34-35. Respondents do not address those points. They instead merely repeat their mistaken assertion that the Court lacks jurisdiction in this case. *See* Opp. 15-16. Thus, for the reasons that the Lippards have explained, the Court should grant review in this case even if it also grants review in *McRaney*. At a minimum, if the Court grants review in *McRaney*, it should hold this case for *McRaney*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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