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| STATE OF INDIANA |) | IN THE MARION SUPERIOR COURT |
| |) SS: | |
| COUNTY OF MARION |) | |
| | | CAUSE NO. 49D01-1907-PL-27728 |
| JOSHUA PAYNE-ELLIOTT, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| ROMAN CATHOLIC ARCHDIOCESE OF |) | |
| INDIANAPOLIS, INC., |) | |
| |) | |
| Defendant. |) | |

**ARCHDIOCESE’S MEMORANDUM OF LAW IN SUPPORT OF
RECONSIDERATION OF MOTION TO DISMISS**

The Archdiocese respectfully submits this motion to offer clarification on the questions of canon law raised by the Court’s May 1 Order (“Order”)—namely, whether Cathedral could have appealed the Archdiocese’s directive, and whether the actions in this case proceeded from the highest ecclesiastical authority. Order 6-7. The Archdiocese recognizes that these questions were not fully explored in the parties’ briefing on the motion to dismiss and that, due to the coronavirus, the Court was unable to address these issues at oral argument. Accordingly, the Archdiocese respectfully asks the Court to reconsider the ruling with the benefit of additional clarity on the key canon-law matters it has identified.

Taking the Complaint and exhibits as true, and taking judicial notice of undisputed canon law, the Archbishop’s directive to Cathedral could not be appealed within the Church, and the Archbishop is the “highest ecclesiastical authority”—as the Order uses that term—over Cathedral’s affiliation with the Catholic Church. Should the Court in considering this jurisdictional question under Rule 12(b)(1) wish to consider evidence on how canon law governs the relationships among Cathedral, the Archbishop, and the broader Church, the Archdiocese submits an affidavit from Fr. Joseph L. Newton, an expert in canon law, attached as Exhibit A.

If the Court remains unsure whether the Archbishop is the highest ecclesiastical authority on the religious matters at issue here, the case should nevertheless be dismissed in the absence of any internal church appeal. Because Cathedral did not appeal, the Archbishop is in any event the

highest church authority *to which the matter has been carried*, which is dispositive for civil-court purposes under binding precedent. And the “highest authority” framework is not applied where a court is asked to inquire into whether a church followed its own procedures. In short, both on a proper understanding of the canon-law relationship between the Archdiocese and Cathedral, and in the absence of any internal church appeal, Payne-Elliott’s claims must be dismissed.

ARGUMENT

“A trial court has the inherent power to reconsider ... any previous order” in a live case, and the Indiana trial rules permit timely motions for same. *Stephens v. Irvin*, 730 N.E.2d 1271, 1277 (Ind. Ct. App.), *aff’d on reh’g*, 734 N.E.2d 1133 (Ind. Ct. App. 2000); *see* Ind. R. Trial P. 7(B), 53.4. “A motion for reconsideration performs a valuable function where ‘the Court ... has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension,’” or is presented with a “significant change in ... facts.” *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (citation omitted); *see, e.g., Shawnee Const. & Eng’g, Inc. v. Stanley*, 962 N.E.2d 76, 79-80 (Ind. Ct. App. 2011).

I. The Archbishop is the highest church authority on the matters at issue.

At the heart of the Court’s resolution of the motion to dismiss was its uncertainty over whether the Archbishop is the “highest ecclesiastical authority” over the matters at issue in this case. Order 6-7. If he is, the Court recognized that the doctrine of church autonomy would likely “preclude [the Court] from having jurisdiction” and require that the Archdiocese’s motion be granted. Order 4, 7, 12 n.5. The Court recognized that this question was not fully briefed. *Id.* 6-7 & n.3. The Archdiocese thus submits this motion to clarify that the Archbishop is the highest ecclesiastical authority as the Order used that term.

In considering whether the Archbishop was the highest ecclesiastical authority, the Court compared this case with events taking place between the Archdiocese and another Catholic high school in Indianapolis, Brebeuf Jesuit Preparatory School. Order 6. As set forth in the Complaint,

the Archdiocese informed both Cathedral and Brebeuf that to retain their status as Catholic schools, they “needed to adopt and enforce” contractual language that would preclude the continued employment of teachers who failed to model the Church’s teachings on marriage and sexuality by entering a same-sex union. Compl. ¶¶ 13-16. Cathedral followed the Archdiocese’s directive and “separate[d] from” Payne-Elliott, Compl. Ex. C 2; Brebeuf did not and retained Payne-Elliott’s spouse. The Archdiocese then issued a canonical “decree” stating that Brebeuf would no longer be recognized as a Catholic institution. Compl. Ex. B. The decree noted that it was “subject to hierarchical recourse according to the provisions of canons 1734 and following.” *Id.* Brebeuf has sought hierarchical recourse by appealing to Rome, asserting that “Brebeuf Jesuit leadership has historically had the sole right and privilege to address and decide” school employment matters. Order 7 (quoting Brebeuf’s statement).

Based on these events, the Court found a “reasonable possibility” that the Archbishop was not “the highest ecclesiastical authority” with respect to the decision challenged in this litigation, because (1) Cathedral, like Brebeuf, may “have had the ability to ‘appeal’ to Rome”; and (2) based on Brebeuf’s statement, “Brebeuf and Cathedral” may not be “under the direct authority of the Archdiocese.” Order 6-7. The Archdiocese here clarifies that (1) Cathedral could not “appeal” the Archbishop’s directive about what it needed to do to remain a Catholic school; and (2) Cathedral has a different canonical status than Brebeuf and is under the Archbishop’s direct authority.

Hierarchical recourse. The Court first concluded that it was unclear whether the Archbishop was the highest church authority because the Court did not “know for certain” whether Cathedral, like Brebeuf, could have “‘appealed’ the Archdiocese’s directive” to Rome. Order 6. As Fr. Newton’s affidavit explains, the answer to that question is *no*, because there was no canonical decree for Cathedral to appeal. Ex. A ¶ 10.¹

¹ For the Court’s convenience in reviewing the affidavit, the Archdiocese notes that the Canon Law of the Catholic Church is publicly available on the Vatican’s government website, *see* http://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html.

As the Court’s Order notes, the canon-law term for an “appeal” from a bishop’s decision is “hierarchical recourse.” *Id.* As a matter of canon law, hierarchical recourse requires an object of recourse—such as a “singular decree.” Ex. A ¶ 6. Such decrees are written decisions that formally change the canonical status of a Catholic person or entity. *Id.* ¶¶ 5-6. Examples include decrees extinguishing a parish, laicizing a priest, reducing a church building to secular use, or—as with Brebeuf—declaring that an institution will no longer be recognized as “Catholic.” *Id.* ¶ 5.

As the Court noted, Brebeuf is seeking hierarchical recourse from the Archbishop’s decree formally rescinding its recognition as a Catholic institution. Order 6; Ex. A ¶¶ 8-9. Cathedral, however, cannot seek hierarchical recourse, because the Archbishop issued no decree with respect to it. What the Complaint and Order refer to as the Archdiocese’s “directive” to Cathedral was not a “decree,” because it did not change any person or entity’s canonical status; it merely informed Cathedral that its canonical status *would* change if it refused to ensure that its teachers upheld Catholic doctrine. Ex. A ¶¶ 11-12. And the Archbishop did not follow this directive with any “decree” addressed to Cathedral, as it did to Brebeuf, because Cathedral *agreed* to follow the Archbishop’s directive, and thus retained its status as a Catholic school. Compl. Ex. C. Unlike Brebeuf, then, Cathedral could not have “appealed” the Archdiocese’s actions in this case through any canon-law process. Ex. A ¶ 17; *Cf.* Order 6.

Direct authority. Second, the Court expressed doubt about whether the Archbishop was the highest church authority because “there is a reasonable chance that Brebeuf and Cathedral are not under the direct authority of the Archdiocese.” Order 7. Specifically, the Court noted Brebeuf’s assertion that it is “governed by a religious order” and that its “leadership has historically had the sole right and privilege to address and decide” matters of “governance,” and it suggested Cathedral might have a similar status. *Id.*

But as a matter of canon law, Brebeuf and Cathedral have clearly different status. Brebeuf is an apostolic work of the USA Midwest Province of the Society of Jesus—an order of priests that qualifies as an “institute of pontifical right.” Ex. A ¶ 14. Such institutes “are immediately and exclusively subject to the power of the Apostolic See in regards to internal governance and

discipline.” *Id.* (quoting Canon 593). Cathedral, by contrast, is only informally affiliated with the Holy Cross Brothers—not governed or operated by them; it is instead operated by a lay Board of Directors. *Id.* ¶ 15. Thus, its status under canon law is as a “private association of the Christian faithful.” *Id.* Such an association remains “subject to the vigilance” and “governance” of the Archbishop. *Id.* (quoting Canons 323, 305). This means the Archbishop “has the duty and right to inspect” Cathedral and must “take care that the integrity of faith and morals is preserved in [it].” *Id.* (quoting Canon 305). It also means Cathedral cannot “claim the name Catholic without the consent” of the Archbishop. *Id.* (quoting Canons 215-216).

Thus, regardless of how the Vatican resolves the dispute involving Brebeuf, that resolution will not apply to Cathedral. *Id.* ¶ 17. The Archbishop retains authority under canon law to decide whether the school may be recognized as a Catholic institution. *Id.* ¶ 15.

This understanding of canon law is supported by Payne-Elliott’s Complaint and exhibits. The Complaint states that “[t]he Archdiocese exercises significant control over Cathedral, including, but not limited to, its recognition of Cathedral as a Catholic school.” Compl. ¶ 8. Likewise, the letter from Cathedral’s President acknowledges that “[i]t is Archbishop Thompson’s responsibility to oversee faith and morals as related to Catholic identity” at Cathedral, and that loss of recognition by the Archbishop would mean Cathedral “would lose our affiliation with The Brothers of Holy Cross.” Compl. Ex. C 1. Cathedral itself thus made clear that its “affiliation with The Brothers of Holy Cross” did not stand in contradiction to the Archbishop’s authority, but was *under* the Archbishop’s authority—as is correct under canon law. *Id.* It also recognized that it has a different canonical status than Brebeuf: “Brebeuf is sponsored by the Jesuits while Cathedral is merely affiliated with The Brothers of Holy Cross” such that “their *canonical* and nonprofit status is different than ours.” *Id.* at 2 (emphasis added).²

² The letter also expressed concern that loss of Catholic recognition might mean Cathedral “would lose its 501(c)(3) status.” *Id.* at 1. This is a reference to the fact that, under an IRS Determination Letter, all organizations listed in the *Official Catholic Directory* receive 501(c)(3) status automatically, without the need to apply for 501(c)(3) status individually. *See* Group Exemption Letter from Internal Revenue Service to United States Conference of Catholic Bishops (Aug. 21,

The facts alleged in the Complaint regarding Brebeuf do not contradict any points in Cathedral’s letter about the Archbishop’s authority, but only indicate a dispute whether “final governance decisions” at “an independent Catholic Jesuit school” are reviewable by the Archdiocese. Compl. ¶ 14. As explained above, the reasoning behind this question—deriving from Brebeuf’s canonical status as a school operated by an institute of pontifical right—does not apply to Cathedral. So while the Court need not take as true any allegations in the Complaint “that are contradicted by other allegations or exhibits attached to or incorporated in the pleading,” *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E. 2d 130, 134-35 (Ind. 2006) (citation omitted), the exhibits and the Complaint are all consistent with each other on this point.³

2019), <https://perma.cc/K7T4-QYPH>. But if Cathedral lost its Catholic recognition, it would not immediately lose its 501(c)(3) status. There would be a significant time lag between the effective date of any canonical decree and publication of the *Official Catholic Directory* for the following year, giving Cathedral ample time to file for 501(c)(3) status individually, just like any other private, non-Catholic school. This is consistent with the allegation in the Complaint that Cathedral would only “purportedly” lose its tax-exempt status. Compl. ¶ 13. In any event, whether Cathedral was motivated by a mistaken perception of the tax consequences of derecognition, or rather (as its letter stated) by a desire to retain the Sacraments, that does not change the fact relevant here—that the Archbishop had authority to set the terms on which Cathedral would be recognized as Catholic.

³ The Court also expressed concern (Order 18 n.ii) that the letter from Cathedral’s President may have conflicted with the allegations of the Complaint. Specifically, the Complaint alleges that Cathedral and Brebeuf received the same “directive” from the Archbishop (to dismiss Payne-Elliott and his spouse) “**on the same timetable**,” and that Cathedral’s President met with Payne-Elliott “**on June 23, 2019** to inform him of his termination.” *Id.* Yet the letter from Cathedral’s President (Compl. Ex. C 1), dated “***June 23, 2019***,” says Cathedral could not function the same way as Brebeuf “***if Cathedral were to receive a similar decree as Brebeuf***.” *Id.* at 2 (emphasis added). This, the Court suggests, may be an error in the letter, because, “From reading the Complaint, it would appear that Cathedral had already received the directive from the Archdiocese.” Order 18 n.ii.

The Complaint and letter, however, are fully consistent. Both schools received the same “directive” from the Archbishop, well before June 23, 2019, that they needed to adopt and apply uniform moral standards to all teachers, including Payne-Elliott and his spouse. Compl. ¶ 16. When Brebeuf refused to follow the directive, it also received a “decree” from the Archbishop on June 21, 2019, that it would no longer be recognized as a Catholic institution. Compl. Ex. B. So when Cathedral’s President wrote on June 23, 2019, that it could not function the same way “if Cathedral were to receive a similar decree as Brebeuf,” it was referring to the June 21 “decree” of derecognition—not the earlier “directive” that both schools had already received.

In short, the Complaint, exhibits, judicially noticeable canon law, and newly submitted affidavit all confirm that the Archbishop had direct authority over the question here—whether and on what terms Cathedral could “claim the name Catholic[.]” Ex. A ¶ 15 (quoting Canons 215-216). This Court therefore lacks “subject matter jurisdiction to determine whether ‘[the Archbishop] properly exercised’” that authority, and the motion to dismiss should be granted. Order 8 (quoting *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E. 2d 334, 337 (Ind. Ct. App. 1999)).

II. In the absence of a canonical appeal, the case must be dismissed even if Vatican intervention was available.

Even if the Court remains uncertain about the Archbishop’s authority over Cathedral with respect to the matters at issue in this case—either because it has questions about the canon-law principles articulated above, or because it believes Cathedral hypothetically could have refused to follow the Archbishop’s directive and then could have appealed a decree derecognizing it as Catholic—that does not change the legal result under the doctrine of church autonomy. That is because, whatever Cathedral’s hypothetical ability to seek intervention from the Vatican, it is uncontested that Cathedral did not in fact seek any such intervention, but instead followed the Archbishop’s directive. The result is that the Archbishop remains “the highest of the[] church judicatories *to which the matter has been carried*,” such that “legal tribunals” like this Court “must accept [the Archdiocese’s] decision[] as final, and as binding on them.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)) (emphasis added); accord *Ramsey v. Hicks*, 91 N.E. 344, 349 (Ind. 1910) (quoting same).

This would be true even if Payne-Elliott were to argue—inconsistent with the Complaint and exhibits—that by not seeking intervention from the Vatican, Cathedral acquiesced to an improper church procedure. For to “inquir[e] into whether [a] Church had followed its own procedures” in rendering an ecclesiastical decision is to “unconstitutionally undertake[] the resolution of quintessentially religious controversies.” *Hosanna-Tabor*, 565 U.S. at 187 (quoting *Serbian E.*

Orthodox Diocese for U.S. & Can. v. Milivojevic, 426 U.S. 696, 720 (1976)). Put differently, although it is often appropriate for disputes involving religious organizations to be resolved by deferring to the highest ecclesiastical authority to which the matter had been submitted, the First Amendment does not permit secular courts to then inquire into whether that authority’s decision itself “complied with church laws and regulations.” *Milivojevic*, 426 U.S. at 713. Instead, a court applying the deference principle must “accept” the highest authority’s “ecclesiastical decisions ... as it finds them,” *id.*, leaving to the church hierarchy itself the power to correct any procedural deficiencies under church law. Otherwise, the court would have to “probe deeply enough into the allocation of power within a (hierarchical) church” to decide “religious law,” which is impermissible. *Id.* at 709 (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

This analysis is underscored by the Indiana Supreme Court’s decision in *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003); see Mem. Supp. Mot. Dismiss 12-13 and Reply Br. 6-7 (discussing case). There, the plaintiff alleged that a priest and bishop in the Fort Wayne–South Bend Diocese tortiously interfered with her attempt to obtain a position at the University of Notre Dame. 796 N.E.2d at 288-89. It was undisputed that the Diocese did not directly control Notre Dame, which has an even greater claim to autonomy under canon law than does Brebeuf, much less Cathedral. In fact, the Court noted that “*higher church authority* (namely, the Pope) has directed Catholic universities such as Notre Dame and local Catholic diocese officials to cooperate closely.” *Id.* at 293 (emphasis added). Nevertheless, the Indiana Supreme Court held that it would “violate the church autonomy doctrine” to apply “tort law to penalize communication and coordination among church officials (*all answerable to higher church authority* that has directed them to work cooperatively) on a matter of internal church policy and administration that did not culminate in any illegal act.” *Id.* at 294 (emphasis added). That is this case. The Archbishop and Cathedral, like the bishop and Notre Dame in *Brazauskas*, are as a general matter “answerable to higher church authority” (the Pope) who has directed them to cooperate closely. And Payne-Elliott, like the plaintiff in *Brazauskas*, seeks to use “tort law to

penalize communication and coordination among church officials ... on a matter of internal church policy.” *Id.* Just as the existence of a “higher church authority” didn’t defeat the claim of church autonomy in *Brazauskas*, it doesn’t defeat the claim of church autonomy here.

III. The Rule 12(B)(6) First Amendment defenses apply.

The Archdiocese briefly clarifies its theories on freedom of association and the ministerial exception in light of the uncontested facts on the relationship between the Archdiocese and Cathedral, should the Court be willing to revisit these determinations.

First, the freedom-of-association defense relates primarily to the relationship between the Archdiocese and Cathedral, not between the Archdiocese and Payne-Elliott personally. *Cf.* Order at 14. In setting terms for Catholic identity informed by church law, the Archdiocese made the decision that it could not affiliate with a school that would not adopt and enforce the expectation that its teachers would follow Catholic teaching. As explained above, the Complaint and its exhibits establish the Archdiocese’s oversight relationship over Cathedral under Church law. Further, the Complaint alleges that Cathedral risked being denied, like Brebeuf, “recogni[tion] as a Catholic institution *by the Archdiocese of Indianapolis*.” Compl. ¶¶ 15-16 (emphasis partially omitted) (quoting Compl. Ex. B). So even if the Court found it uncertain whether Cathedral was part of or under the authority of the Archdiocese, it is clear that the *Archdiocese* had previously affiliated itself with Cathedral, and was setting the terms on which it would continue to do so. Denying the Archdiocese’s right to set terms on its association—whether or not that association conferred incidental benefits—would be to compel association. “[T]he United States Supreme Court has continually condemned forced association. Indiana courts have condemned forced association too.” *Fort Wayne Educ. Ass’n v. Aldrich*, 527 N.E.2d 201, 208 (Ind. Ct. App. 1988); *see Janus v. Am. Fed’n of State, Cty., & Mun. Empls., Council 31*, 138 S. Ct. 2448, 2463 (2018) (“Freedom of association ... plainly presupposes a freedom not to associate.”) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

The Court’s Order also raised a question as to whether the freedom-of-association defense applies where “Payne-Elliott has not asserted in his Complaint that the Archdiocese is violating any specific Indiana law.” Order 14. For the avoidance of doubt, the Archdiocese notes that the U.S. Supreme Court has repeatedly applied First Amendment defenses to bar state tort claims. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982) (freedom of association and free speech barred state tort action for business interference); *Snyder v. Phelps*, 562 U.S. 443, 450, 460-61 (2011) (freedom of speech and assembly barred intentional infliction of emotional distress and like claims); *see also* Reply Br. 8 (discussing freedom of association defense to common-law interference); *cf.* Mem. Supp. Mot. Dismiss 11 (citing cases applying church-autonomy defense to common-law torts).

Finally, the Archdiocese respectfully submits that the ministerial exception does not turn solely on whether “Cathedral classif[ied] Payne-Elliott as a minister at their school.” Order 16. The ministerial exception is an objective inquiry about the nature of a position, not limited to title, but also focusing on whether the position served “important religious functions.” *Hosanna-Tabor*, 565 U.S. at 192; *see id.* at 199 (Alito, J., joined by Kagan, J., concurring) (noting that certain “key functions” should be sufficient). For clarity, the Archdiocese agrees that it “did not have the authority to terminate Payne-Elliott’s teaching contract with Cathedral” as a matter of secular law, Order 16—since under secular law, Payne-Elliott was employed by Cathedral, a separate corporation. But given the canon-law status of Cathedral as a ministry of the Archdiocese, Payne-Elliott could nevertheless be a minister of the Archdiocese—as demonstrated by the many cases barring teachers’ claims against the diocese to which their school belonged. *See, e.g., Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); Mem. Supp. Mot. Dismiss 10-11 (citing cases).

Moreover, even if the Archdiocese were a mere peer Catholic organization, under Indiana law, the ministerial exception bars state tort claims arising from “intra-church communications made to ... Church officials regarding [one’s] status as a minister.” *Indiana Area Found. of United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174, 1180 (Ind. Ct. App. 2011). The Complaint here makes clear that Payne-Elliott’s claims arise from the Archdiocese’s communications to

another church body—Cathedral—about whether Payne-Elliott was eligible to retain his current role. If that role was as a “minister” under *Hosanna-Tabor*, the Court of Appeals’ decision in *Snyder* would apply, and Payne-Elliott’s claims would be barred, whatever the particulars of the relationship between the Archdiocese and Cathedral.

As explained in the Archdiocese’s Motion to Dismiss briefing, Payne-Elliott’s responsibilities—including to “teach[] the Word of God” and encourage participation in the Catholic sacraments—suffice to establish he served in a *Hosanna-Tabor*-protected ministerial role. *See* Mem. Supp. Mot. Dismiss 19 (quoting Cathedral Employee Handbook, Mot. Dismiss Ex. 1); *see also* Compl. Ex. A 1 (Cathedral commitment form incorporating employee handbook). So the Archdiocese’s Motion should be granted, on ministerial-exception grounds as well as the other grounds set forth above and in the Motion.

CONCLUSION

The Motion to Dismiss should be reconsidered and granted.

Respectfully submitted,

/s/ John S. (Jay) Mercer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by this court's electronic filing system today, May 11, 2020:

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I further certify that a copy of the foregoing was sent by electronic mail on May 11, 2020 to Judge Stephen Heimann to the email address provided by the Court.

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EXHIBIT A

| | | |
|-------------------------------|-------|-------------------------------|
| STATE OF INDIANA |) | IN THE MARION SUPERIOR COURT |
| |) SS: | |
| COUNTY OF MARION |) | CAUSE NO. 49D01-1907-PL-27728 |
| JOSHUA PAYNE-ELLIOTT, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| ROMAN CATHOLIC ARCHDIOCESE OF |) | |
| INDIANAPOLIS, INC., |) | |
| |) | |
| Defendant. |) | |

AFFIDAVIT OF FATHER JOSEPH L. NEWTON ON CANON LAW

My name is Joseph Newton. I am over the age of eighteen years, have never been convicted of a crime, and am competent in all respects to make this affidavit. Unless otherwise stated, I have personal knowledge of the facts stated herein and they are true and correct. I have read the Court's May 1 Order Regarding Motion to Dismiss Complaint and provide this affidavit at the request of Defendant's counsel to address issues of canon law that may be helpful to the Court, such as the availability of hierarchical recourse for canonical decrees and the different canonical status of Brebeuf Jesuit Preparatory School and Cathedral High School.

Academic Background

1. I am a priest and the vicar judicial of the Metropolitan Tribunal within the Archdiocese of Indianapolis, which adjudicates canon law disputes within our jurisdiction. I have a Masters in Divinity from Saint Meinrad School of Theology in Indiana and a *juris canonici licentiate* degree (Licentiate of Canon Law, or canon law degree) from the Catholic University of America in Washington D.C.

2. I currently serve as a member of the Board of Governors, and Chair of the Committee on Governance, of the Canon Law Society of America, a professional association dedicated to the

study of canon law, <https://clsa.org/about/board-of-governors/>. I frequently make regional and national presentations on multiple subjects of canon law, and have multiple publications in my field.

Decrees in Canon Law

3. The Code of Canon Law of the Catholic Church recognizes the authority of “the diocesan bishop” “to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law.” Canon Law of the Catholic Church, Canons 381, 391.

4. The diocesan bishop exercises this legislative, executive, and judicial power through various means, such as declaring particular law to more effectively govern the diocese; overseeing the temporal goods given to the Church; and serving to adjudicate contentious matters as they arise in the diocese. As part of this governance function of the diocesan bishop, the diocesan bishop may also issue a “singular decree.”

5. A “singular decree” is “an administrative act issued by a competent executive authority in which a decision is given, or a provision is made for a particular case according to the norms of law.” Canon 48. Examples of a “singular decree” may include a decision to “suppress” (i.e., close) a parish (Canon 515), to “reduce” (e.g., sell) a church building to secular use (Canon 1222), to declare the invalidity of a priest’s sacred ordination (Canon 290), or to no longer recognize a school as a Catholic institution (Canon 803).

6. A singular decree must “be issued in writing.” Canon 51. And a singular decree is subject to appeal within the Church: “A person who claims to have been aggrieved by a decree

can make recourse for any just reason to the hierarchical superior of the one who issued the decree.” Canon 1737. This process is called “hierarchical recourse.” Canons 1732-1739.

7. In many matters, “hierarchical recourse suspends the execution of a decree.” Canon 1736. That is, the existence of the appeal temporarily suspends the effects of the decree. Canons 1735-1737.

8. As this Court noted in its opinion (page 6), Brebeuf Jesuit Preparatory School was the subject of a singular decree issued by Archbishop Thompson under Canon 803 on June 21, 2019, stating that Brebeuf “can no longer use the name Catholic and will no longer be identified or recognized as Catholic institution by the Archdiocese of Indianapolis nor included in the listing of The Official Catholic Directory.” Complaint, Exhibit B.

9. This singular decree is subject to hierarchical recourse under Canons 1734 and following. The USA Midwest Province of the Society of Jesus, a religious institute of pontifical rite, which sponsors Brebeuf, has sought hierarchical recourse from the relevant pontifical congregation in Rome, in this case, the Congregation on Education. As is common practice in canon law and in accord with the norm of Church law, any decree that has been appealed is automatically suspended so as to preserve the rights of all parties.

10. The Court also notes in its opinion (page 6) that the Archdiocese sent a “directive” to Cathedral that it must dismiss Payne-Elliott. It asks, “Could Cathedral have ‘appealed’ the Archdiocese’s directive[?],” and states that “[m]ost likely the answer is ‘yes.’” As a matter of canon law, the answer is “no.” Neither the “directive” to Cathedral nor the “directive” to Brebeuf (which the Court and the Complaint describe as telling those schools to dismiss Payne-Elliott and his spouse, and which is distinct from the decree stating that Brebeuf could no longer be recognized as a Catholic institution) was a singular decree. Thus, neither directive was subject to hierarchical

recourse within the Church. Any “directive” sent by the Archdiocese to Cathedral would not have been subject to hierarchical recourse, as the “directive” did not have an object (subject to Canons 1732-1739) contained within it.

11. What has been described in the Complaint and by the Court as a “directive,” is what is called in canon law an “instruction.” Subject to Canon 34 §1, an instruction explains what is already in the law and is sent to “those whose duty it is to execute the law,” in this case, Cathedral High School. Cathedral, a diocesan private association of the faithful, subject to the Archbishop in matters of faith and morals, was directed to follow Church law. Cathedral chose to dismiss Payne-Elliott.

12. If Cathedral had chosen not to follow the Archdiocese’s instruction (“directive”), and if the Archdiocese had issued a singular decree under Canon 803 stating that Cathedral would no longer be recognized as a Catholic institution, that decree would have been subject to hierarchical recourse to the Congregation on Education because it changes the status of the institution. But because Cathedral, a diocesan private association of the Catholic faithful, chose to adhere to the faith and morals of the Catholic Church and follow the Archdiocese’s directive, there was no singular decree by the Archbishop to “appeal.”

13. Payne-Elliott also had a more limited ability under canon law to “appeal” Cathedral’s decision to terminate him from employment. Cathedral’s decision to terminate functions as a singular administrative act, Canons 35-47, that was issued by a diocesan private association of the faithful (Cathedral). If Payne-Elliott felt aggrieved by Cathedral’s decision, he could have sought administrative recourse to the Archbishop of Indianapolis pursuant to the norms found in Canons 1732, but within the time limit of 15 days from the date of the decision by Cathedral. However, as

explained below, the absolute authority in causes regarding singular administrative acts of diocesan private associations of the faithful is the diocesan bishop.

Brebeuf and Cathedral

14. The Court’s opinion (page 7) addresses the canonical status of Cathedral and Brebeuf. Brebeuf Jesuit Preparatory School is an apostolic work of the USA Midwest Province of the Society of Jesus, a province of the Society of Jesus (or Jesuits). The Jesuits are an order of priests qualifying, under Canon Law, as an “institute of pontifical right.” Canons 589-596. Such institutes “are immediately and exclusively subject to the power of the Apostolic See in regards to internal governance and discipline.” Canon 593. This gives them a unique status under canon law.

15. Cathedral High School was founded in 1918 by the Archdiocese, was operated by the Holy Cross Brothers from 1964 until it closed briefly in 1973, and then was refounded by lay Catholics with the approval of the bishop. It is currently operated by a lay Board of Directors. Unlike Brebeuf, it is not an apostolic work of an institute of pontifical right (Canons 589-596). Rather, it is a “private association of the Christian faithful.” Canons 321-326. Although the Christian faithful have a measure of “autonomy” to “guide and direct” a private association (Canon 321), the association remains “subject to the vigilance of ecclesiastical authority”—in this instance, the diocesan bishop—“and even to the governance of the same authority.” Canons 323, 305. This means that the diocesan bishop “has the duty and right to inspect them” and must “take care that the integrity of faith and morals is preserved in them.” Canon 305. No private association of the faithful “is to claim the name Catholic without the consent of competent ecclesiastical authority.” Canons 215-216.

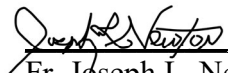
16. In response to the Archbishop's singular decree regarding Brebeuf, the USA Midwest Province of the Society of Jesus, a religious institute of pontifical rite, has sought hierarchical recourse from the Congregation for Catholic Education in Rome. Herein, the object of the recourse is the Archbishop's singular decree about the status of Brebeuf. As an institute of pontifical rite, Brebeuf must first appeal to the Archbishop and then may appeal to the corresponding pontifical office if they continue to feel aggrieved. In the appeal by the Society of Jesus, Brebeuf claims that the Archbishop's singular decree infringed on the autonomy granted to religious institutes of pontifical right that operate Catholic schools.

17. This type of resolution, however, would not be applicable to Cathedral or Payne-Elliott. For Cathedral, what is missing is the object of recourse; because the Archbishop never issued a singular decree changing the canonical status of Cathedral (no longer recognizing the school as a Catholic institution), there was no singular decree by the Archbishop to "appeal." And even if Cathedral had chosen not to follow the Archbishop's instruction ("directive"), and if the Archbishop had issued a singular decree, Cathedral could not make the same claim of autonomy as Brebeuf because it is an Archdiocesan private association of the Christian faithful.

18. For Payne-Elliott, the opportunity for hierarchical recourse regarding Cathedral's decision to terminate him has passed. And even if he had sought such recourse, because Cathedral is a diocesan private association of the faithful, the Archbishop would be and is the highest authority for such recourse.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of May, 2020.



Fr. Joseph L. Newton.