STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-1907-PL-27728

JOSHUA PAYNE-ELLIOTT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.,	)
	)
	)
Defendant.	)

Memorandum in Support of the Archdiocese's Motion for Judgment on the Pleadings

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INTRODUCTION

The U.S. Supreme Court has long held that churches have a First Amendment right "to decide for themselves, free from state interference, matters of church government." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Unfortunately, this lawsuit strikes at the heart of church government. It is therefore barred by the First Amendment.

Plaintiff Payne-Elliott was a teacher at a Catholic high school ("Cathedral") who entered a same-sex marriage in violation of his contract and of longstanding Catholic teaching. In response, the Defendant, the Roman Catholic Archdiocese of Indianapolis, engaged in "22 months of earnest discussion and extensive dialogue" with Cathedral to discern the most appropriate pastoral response based on canon law and Catholic teaching. Compl. Ex. C. at 1.

Ultimately, the Archbishop of Indianapolis issued an ecclesiastical directive to Cathedral stating that, under Catholic canon law, the Archdiocese would no longer recognize Cathedral as Catholic unless the school required its teachers to abide by the Church's moral teachings. This ecclesiastical directive was issued pursuant to the Archbishop's canon-law duty to ensure that Catholic schools are "grounded in the principles of Catholic doctrine" and that Catholic teachers are "outstanding in correct doctrine and integrity of life." 1983 Code of Canon Law c.803. Wishing to remain Catholic, Cathedral chose to comply with the Archbishop's directive, recognizing that "[i]t is Archbishop Thompson's responsibility to oversee faith and morals as related to Catholic identity within the Archdiocese of Indianapolis." Compl. Ex. C at 1. Cathedral then separated from Payne-Elliott.

Payne-Elliott has now sued the Archdiocese—not Cathedral—alleging that the Archbishop's ecclesiastical directive constituted "tortious interference" with his contract. In other words, he seeks to punish the Archbishop in tort for telling Cathedral

what ecclesiastical rules it needed to follow in order to remain Catholic. Not surprisingly, such a claim is barred by multiple, overlapping First Amendment doctrines.

First, it is barred by the doctrine of church autonomy—which provides that "civil courts exercise no jurisdiction" over matters of "church discipline" or "ecclesiastical government." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). In fact, Indiana courts have repeatedly rejected tortious interference claims even less troubling than this one on the ground that they would intrude on matters of church governance. *See McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003). Those cases are controlling here.

Second, Payne-Elliott's claim is barred by the First Amendment freedom of association, which protects the right of expressive organizations, including churches, to disaffiliate from those who would undermine their ability to express particular views. Just as the Boy Scouts can disaffiliate from a scoutmaster who contradicts its views, *Boy Scouts v. Dale*, 530 U.S. 640, 659 (2000), and a religious student group can disaffiliate from leaders who contradict its views, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir 2006), the Archdiocese can disaffiliate from teachers (or schools) who contradict its views.

Third, Payne-Elliott's claims are barred by the First Amendment's ministerial exception, which prohibits government interference with a religious organization's selection of its leaders. Numerous courts, including both the U.S. Supreme Court and Seventh Circuit, have held that the ministerial exception applies to teachers at religious schools. Those decisions are controlling here.

Finally, apart from its First Amendment defects, Payne-Elliott's complaint fails to allege facts supporting key elements of his claims—including the elements of malice and lack of justification—and fails to explain how a court could even assess those elements without becoming unduly entangled in religious questions.

* * *

Over 120 years ago, the Indiana Supreme Court declared: "No power save that of the church can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authorities." *Dwenger v. Geary*, 14 N.E. 903, 908 (Ind. 1888). Here, Payne-Elliott seeks to intrude on precisely that question, punishing the Archdiocese for telling a Catholic school what rules it must follow to be Catholic. That is not permitted by the First Amendment. Accordingly, judgment for the Archdiocese is required.

BACKGROUND[1]

A. The Archdiocese and Cathedral.

The Roman Catholic Archdiocese of Indianapolis, Inc. ("Archdiocese") is an Indiana nonprofit corporation that has served Catholics and the community of central and southern Indiana since 1834. *See* Roman Catholic Archdiocese of Indianapolis, Inc., Articles of Incorporation, https://bsd.sos.in.gov/PublicBusinessSearch/ (filing number: 5137575). The Archdiocese is governed by the Archbishop of Indianapolis ("Archbishop") and is a constituent entity of the broader Roman Catholic Church. *Id.* Like all such constituent entities, the Archdiocese's activities are governed by the Canon Law of the Catholic Church. *See, e.g.*, 1983 Code c.368-402.

Cathedral Trustees, Inc., doing business as Cathedral High School ("Cathedral"), was founded as a Catholic high school in 1918 under the control of the Archdiocese. Compl. Ex. C at 1. It separately incorporated in 1972, and it has retained its affiliation as a constituent entity of the Catholic Church. *See id.*

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[1] For purposes of this motion, the Archdiocese treats Plaintiff's factual allegations as true. This factual background relies on the pleadings, the documents referred to in the complaint, and material subject to judicial notice. The latter category includes the formal Catholic Church documents referenced here, all of which are publicly available on the Vatican's website. *See* https://perma.cc/6F4F-47QA (Code of Canon Law); https://perma.cc/AS3W-9QCM (*Gravissimum Educationis*); https://perma.cc/4HU9-QPXV (Catechism of the Catholic Church).

The relationship between the Archdiocese and Cathedral is governed by the Code of Canon Law. 1983 Code c.796-806. The Code provides that the Archbishop "has the right to watch over and visit the Catholic schools" within the Archdiocese and to issue "prescripts which pertain to the general regulation of Catholic schools." *Id.* c.806, § 1. These precepts are binding: "no school is to bear the name Catholic school without the consent of competent ecclesiastical authority"—here, the Archbishop. *Id.* c.803, § 3. The Archbishop, in turn, must ensure that the education in Catholic schools is "grounded in the principles of Catholic doctrine" and that "teachers are ... outstanding in correct doctrine and integrity of life." *Id.* c.803 § 2.

B. The duties of Catholic teachers.

The Catholic Church requires teachers to "bear witness to Christ, the unique Teacher" by "their life as much as by their instruction." Second Vatican Council, *Gravissimum Educationis* (Oct. 28, 1965). These requirements are reflected in the "policies and procedures" of the "Cathedral Employee Handbook" incorporated into Plaintiff's employment agreement. *See* Compl. Ex. A at 1. The Handbook explained that Payne-Elliott was expected to "[s]upport[] the teachings and traditions of the Roman Catholic Church," "[s]erve[] as a role model for a Christ-centered lifestyle," "[d]isplay[] a lifelong faith commitment," "[i]nfluence[] others through his/her roles as servant, shepherd, and steward," and "[e]mbrace[] the sacramental life of the school and encourage[] students to do the same." Ex. 1 at 3.

The Handbook also includes a morals clause, which states that teachers, as leaders in a "ministr[y] of the Catholic Church ... teaching the Word of God," must be "credible witnesses of the Catholic faith" and "models of Christian values." Ex. 1 at 4. Accordingly, their "personal conduct" must "convey and be supportive of the teachings of the Catholic Church" as set forth "in the Catechism of the Catholic Church." *Id.* Finally, the Handbook made clear that "[d]etermining whether a faculty member is conducting him/herself in accordance with the teachings of the Catholic Church is an

internal Church/School matter and is at the discretion of the pastor, administrator, and/or Archbishop." *Id.* at 4-5.

The Archdiocese also expects Catholic teachers to play a key role in students' religious formation. The official job description for Catholic teachers within the Archdiocese, as set forth in February 2016, states that teachers are expected to form students' faith in the following ways:

- "Prays with and for students, families and colleagues and their intentions. Plans and celebrates liturgies and prayer services";
- "Teaches and celebrates Catholic traditions and all observances in the Liturgical Year";
- "Models Jesus, the Master Teacher, in what He taught, how He lived, and how He treated others";
- "Communicates the Catholic faith to students by direct teaching of Religion and/or, as appropriate, by the integration[] of moral values in all curriculum areas";
- "Conveys the Church's message and carries out its mission by modeling a Christ-centered life";
- "Participates in religious instruction and Catholic formation, including Christian services, offered at the school";
- "Participates in spiritual retreats, days of reflection, and spiritual formation programs as directed by the principal and as required by Archdiocesan faith formation expectations."

Ex. 2 at 1-2. This job description likewise sets forth the requirement that teachers in Plaintiff's position are "vital ministers" of the faith and "must convey and be supportive of the teachings of the Catholic Church." *Id.* at 3-4.

Cathedral's Handbook, the 2016 job description for teachers, and the standard Archdiocesan teaching contract all address the issue of marriage. Cathedral's Handbook incorporates the Catechism of the Catholic Church, Ex. 1 at 4, which describes the Church's well-known, millennia-old teaching that marriage is between one man and one woman. *Catechism* §§ 2331-2400; *see* 1983 Canon c.1055 § 1. The Archdiocese's 2016 job description for teachers emphasizes that they must, in word and deed,

"convey and be supportive of … the belief that all persons are called to respecting human sexuality and its expression in the Sacrament of Marriage as a sign of God's love and fidelity to His Church." Ex. 2 at 3-4. And the "Teaching Ministry Contract" for Catholic schools in the Archdiocese lists as grounds for default (1) "any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church," and (2) any "[r]elationships that are contrary to a valid marriage as seen through the eyes of the Catholic Church." Ex. 3 at 2 (2018-19 Ministry Contract).

C. The ecclesiastical directive from the Archbishop.

Plaintiff Joshua Payne-Elliott was a language and social studies teacher at Cathedral. Compl. ¶ 7. He entered a same-sex marriage in 2017 in violation of Catholic teaching. Compl. ¶ 10. The Archdiocese then engaged in "22 months of earnest discussion and extensive dialogue" with Cathedral to discern a pastoral response based on canon law and Catholic teaching. Compl. Ex. C at 1.

To fulfill his obligations under Canon 803, the Archbishop issued an ecclesiastical directive to Cathedral, informing it that if it wished to remain Catholic, "it needed to adopt and enforce morals clause language used in teacher contracts at Archdiocesan schools," Compl. ¶ 13—meaning that Cathedral could not continue employing teachers who lived in open, unrepentant violation of Church teaching. Based on its desire to remain Catholic, Cathedral complied with this directive. Compl. ¶ 13; *see* Compl. Ex. C. On June 23, 2019, Cathedral's leadership published a letter to the school community stating "[i]t is Archbishop Thompson's responsibility to oversee faith and morals as related to Catholic identity within the Archdiocese of Indianapolis," that "our Catholic faith is at the core of who we are and what we teach at Cathedral," and that "in order to remain a Catholic Holy Cross School, Cathedral must follow the direct guidance given to us by Archbishop Thompson and separate from the [Plaintiff]." Compl. Ex. C at 1-2.

D. The lawsuit.

After the separation, Plaintiff filed a complaint with the Equal Employment Opportunity Commission and reached a settlement with Cathedral. Plaintiff then sued the Archdiocese, alleging that the Archbishop's ecclesiastical directive violated Indiana law. Specifically, he alleged that "[t]he Archdiocese exercises significant control over Cathedral, including, but not limited to, its recognition of Cathedral as a Catholic school" (Compl. ¶ 8)—the control set forth under canon law. And he asked that the Court declare the way the Archdiocese exercised that control here—namely, by issuing an ecclesiastical directive outlining the canon-law requirements for recognizing Cathedral as Catholic—"not justified," and thereby find the Archdiocese liable for intentional inference with contract or a business relationship. Compl. ¶¶ 30, 36. The Complaint demands a jury trial, compensatory damages, emotional distress damages, punitive damages, and attorneys' fees. Compl. p.6-7.

E. The procedural history.

1. Discovery disputes and motion to dismiss

On August 5, 2019, Plaintiff served wide-ranging discovery requests seeking, among other things:

- "any and all documents relating to, referring to, or evidencing the Archdiocese's directives to Catholic institutions" regarding any "conduct that does not conform to the doctrine and pastoral practice of the Catholic Church";
- all documents relating to any employees "alleged to be in violation of Catholic Church teachings," including "teachings related to divorce, annulment, co-habitation, pre-marital sex, extra-marital sex, birth control, sterilization, adultery, or fornication";
- the names of every employee who has violated Church teaching and the details of how their alleged sin "came to the Archdiocese's attention"; and
- all ecclesiastical directives to "schools or other institutions" regarding the employment of those in same-sex unions.

Mot. Protective Order Exs. 1-3.

On August 21, the Archdiocese moved to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim. T.R.12(B)(1), (6). The motion identified three independent First Amendment grounds barring Plaintiff's claims: interference with church autonomy, infringement of freedom of expressive association, and violation of the ministerial exception. On the same day, the Archdiocese also moved for a protective order staying discovery until resolution of the motion to dismiss, based on First Amendment protections from disclosure of internal church documents.

On September 25, the United States Department of Justice filed a Statement of Interest in the Archdiocese's support, stating that "[t]he First Amendment demands that this lawsuit be dismissed." Statement of Interest 16. As the Department explained, this suit would require the Court to "second-guess[] the Archdiocese's interpretation and application of Catholic law" and would "interfer[e] with the Archdiocese's right to expressive association," both in clear violation of the First Amendment and controlling precedent. *Id.*

Before ruling on the motion to dismiss, the Court on September 10, 2019, without an opinion, denied the Archdiocese's motion to stay discovery. The Archdiocese then provided hundreds of pages of discovery to Plaintiff, withholding only internal church documents and information protected by First Amendment privilege. Plaintiff then filed a Motion to Compel; four days later, without waiting for a response from the Archdiocese, the original special judge (Judge Heimann) ordered hundreds of pages of privileged internal church documents turned over to the Court so it could view them *in camera* before ruling on the motion to compel and motion to dismiss. Oct. 21, 2019 Order. On November 25, the Court likewise issued an order compelling discovery from nonparty Cathedral High School to Plaintiff, and ordering that other documents be produced to the Court, over Cathedral's First Amendment objections.

2. Settlement conference

On January 6, 2020, the judge set a settlement conference, which was held February 7. Following a brief session on the record, the judge met *ex parte* with counsel for the Archdiocese and its client representative. Mercer Affidavit Supp. Recusal (Aff.) 4. The judge stated that the Archdiocese should remember that the Catholic Church was "wrong on slavery" as well as "Galileo" and should try not to drive young people away from the Church in a changing time. *Id.* The judge also warned the Archdiocese that, whatever the merits of its legal arguments, the law on religious liberty is "in flux" and "Trump could implode." *Id.*

After those prefaces, the judge offered his own settlement proposal based on a conflict involving a different Catholic school in Indiana—Brebeuf Jesuit Preparatory School. Brebeuf, like Cathedral, employed a teacher in a same-sex marriage and was given an ecclesiastical directive from the Archbishop. But unlike Cathedral (which has different canonical status), Brebeuf disobeyed the directive, was de-recognized as Catholic, and filed a canon-law appeal with the Vatican. *Id.*; *see* Compl. ¶¶ 13-15 & Compl. Ex. C at 1. The judge proposed conditioning liability in this case on the outcome of Brebeuf's canon-law case at the Vatican: specifically, if the Vatican sided with the Archbishop, this case would be dismissed, and the Plaintiff would take nothing; but if the Vatican sided with Brebeuf, the Archdiocese would be liable for damages and attorneys' fees. Aff. 4-5. The Archdiocese declined the proposal, concluding that it raised significant church–state problems by entangling a civil-court proceeding with a canon-law proceeding and by placing civil judicial pressure on the Vatican's religious decisionmaking process. *Id.* The settlement conference concluded without agreement. *Id.* at 6.

3. Denial of the motion to dismiss

On May 1, the judge denied the Archdiocese's Motion to Dismiss without a hearing. Despite extensive briefing by the parties, the opinion rested on an argument that

Plaintiff had never presented—namely, that it was "unknown" whether the Archdiocese was "the highest ecclesiastical authority" with respect to the ecclesiastical directive telling Cathedral what actions it needed to take to remain Catholic. May 1 Order at 6-7. This theory was not presented by Plaintiff's briefing and was in conflict with Plaintiff's complaint, which alleged that the Archdiocese exercised "control" over "recognition of Cathedral as a Catholic school." Compl. ¶ 8.

4. Denial of certification

The Archdiocese then sought certification of the order denying the motion to dismiss so that it could file an interlocutory appeal. On June 10, 2020, while the certification motion was pending, the judge sent an email to counsel for the parties and the United States Department of Justice urging the parties to consider settlement. Stating that "I AM NOT ATTEMPTING TO FORCE YOU TO SETTLE" (capitalization in original), the judge again proposed having the parties settle the case by agreeing to tie liability to "the decision from Rome regarding Brebeuf." Aff. Ex. C (email). The judge stated he would decide the motion for certification only if the parties did not agree to his proposal by June 24. *Id.*

With the Archdiocese unwilling to agree to his proposal, the judge on June 29 issued an order denying certification. June 29 Order. In his order, the judge stated that the Archdiocese's concerns about the continued subjection of its religious beliefs and decision-making to judicial process and discovery were unfounded, because the parties "will have the opportunity to seek an appeal after a decision on summary judgment (which is 99.9999999999999% likely to occur)." *Id.* at 3. After that statement, the judge introduced new information which he noted Plaintiff "may not be aware of," as it was information not provided to the Court by any party. *Id.* at 4. The judge stated that he "came to know" a priest named Fr. Raymond Shafer as one of his pastors at his "home parish" in Columbus; that Fr. Shafer "is gay" and was "permitted … to retire early" following a sabbatical; and that Fr. Shafer's treatment "may well

be relevant" to Plaintiff's claims. *Id.* at 4-6 & n.i. Accordingly, the judge encouraged the Plaintiff to seek discovery into "[w]hat has happened with [the priest]." *Id.* at 5. The judge further elaborated that "Fr. Shafer has refused to disclose whether he has remained celibate or whether he does engage in sexual relations." *Id.* And the judge said that even if Fr. Shafer could be presumed celibate, and Plaintiff presumed not to be (given his spouse), "this potentially presumed distinction does not appear to be great." *Id.* at 5-6.

5. Original action in the Indiana Supreme Court

With no avenue for immediate appeal, and facing the irreparable loss of its First Amendment rights, the Archdiocese on July 7 requested a certified record and transcript so it could file an original action in the Indiana Supreme Court. The Archdiocese also filed a motion to recuse the trial judge based on violations of the Code of Judicial Conduct.

The next day, the special judge set a discovery hearing for August 24, 2020 (July 8 Order), at which the judge indicated he would determine which of the hundreds of pages of internal church documents would be provided to the Plaintiff over the Archdiocese's First Amendment objections.

On August 14, the trial court certified the trial record, which is a prerequisite for filing an original action. The next business day, August 17, the Archdiocese filed its Original Action for Writ of Mandamus and Prohibition with the Indiana Supreme Court, asking for an order directing the Court to dismiss the case. In the alternative, it sought an order disqualifying the special judge. And with the trial court's August 24 discovery hearing looming, it also sought an emergency writ to prevent further discovery-related proceedings in violation of the First Amendment.

On August 21, the Supreme Court granted the emergency writ, noting that to "prevent irreparable injury," it would "stay all discovery-related proceedings" in the case. August 21 S. Ct. Order (Case No. 20S-OR-520) (emphasis omitted).

Both the State of Indiana and the United States Department of Justice then filed briefs supporting the Archdiocese's Original Action. The State of Indiana contended that the Archdiocese had an "absolute immunity" from suit over the "purely ecclesiastical" matters challenged by Payne-Elliott, and that the special judge "improperly interjected judicial power into ecclesiastical matters." State's S. Ct. Amicus 13-16. The Department of Justice likewise argued that the First Amendment's protections of church autonomy and expressive association both independently barred the action, and further noted that the U.S. Supreme Court's decision in *Our Lady of Guadalupe v. Morrissey-Berru* (decided after the motion to dismiss order) demonstrated that the ministerial exception also barred the suit. DOJ S. Ct. Amicus 23-34.

On December 10, 2020, the Supreme Court issued an order "declin[ing] to take any affirmative action" on the Archdiocese's petition, because the Justices were "evenly split." S. Ct. Order at 2 n.1. The Court noted that a writ of mandamus is an "extraordinary remedy" that is viewed with "disfavor" and is unavailable unless the relator shows that there is a "clear and obvious emergency" with no "adequate appellate remedy." S. Ct. Order at 1. And because "[t]wo Justices vote to deny the writ without a hearing, and two vote to hold a hearing"—meaning there was no majority in favor of the Archdiocese's petition—the petition was "deemed" denied. S. Ct. Order at 2. However, the Order noted that the "deemed denial" "does not preclude [the Archdiocese] from filing another original action should future circumstances warrant." *Id.* The Court also noted that Judge Heimann had "*sua sponte* recused" from the case, and it appointed Judge Hamner to serve as special judge in place of Judge Heimann, vesting him with authority to "reconsider previous orders in the case." *Id.* at 1-2.

LEGAL STANDARD

A motion for judgment on the pleadings under Trial Rule 12(C) is reviewed under the same standard as a motion to dismiss for failure to state a claim under Trial Rule 12(B)(6). *Nat'l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 363 & n.3

(Ind. Ct. App. 1995). Such a motion "attacks the legal sufficiency of the pleadings," and should be granted when "it is clear from the face of the complaint that under no circumstances could relief be granted." *Id.* In considering the motion, the court draws all "reasonable inferences" in favor of the nonmoving party and accepts as true "all facts well pleaded." *Id.* But it "need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading," or "conclusory, nonfactual assertions or legal conclusions." *Bd. of Comm'rs of Delaware Cnty. v. Evans*, 979 N.E.2d 1042, 1046 (Ind. Ct. App. 2012) (citation omitted). In addition to the pleadings, the court may consider documents that "are referred to in the plaintiff's complaint and are central to his [or her] claim," *id.*, and facts subject to judicial notice, *Moss v. Horizon Bank, N.A.*, 120 N.E.3d 560, 563 (Ind. Ct. App. 2019).

ARGUMENT

Judgment for the Archdiocese must be granted for four independent reasons:

(1) Plaintiff's claims are barred by the doctrine of church autonomy, which forbids judicial interference in matters of ecclesiastical government.

(2) Plaintiff's claims are barred by the First Amendment right of expressive association, which forbids claims that would undermine an organization's ability to communicate its viewpoints.

(3) Plaintiff's claims are barred by the ministerial exception, which forbids judicial interference with internal management decisions regarding key roles that are essential to a religious institution's mission.

(4) Plaintiff has failed to allege facts sufficient to support his claims of intentional interference.

Resolving this threshold motion before further proceedings is necessary to vindicate the core First Amendment principles at stake. The U.S. Supreme Court has recognized in numerous contexts that "the very process of inquiry" into internal church affairs and doctrines can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 717-18 (1976) (a court's

"detailed review of the evidence" regarding internal church procedures was itself "impermissible" under the First Amendment); *see also Stewart v. McCray*, 135 N.E.3d 1012, 1026 (Ind. Ct. App. 2019) ("civil courts are precluded from resolving disputes involving churches if 'resolution of the disputes cannot be made without extensive inquiry … into religious law and polity[.]'" (quoting *Milivojevich*, 426 U.S. at 709)). Thus, courts have likened the First Amendment's protection against judicial interference in internal religious affairs as "closely akin" to a type of "official immunity," because the immunity it provides is not simply immunity from an adverse judgment, but immunity from intrusive inquiries by secular courts into religious affairs. *McCarthy v. Fuller*, 714 F.3d 971, 975-76 (7th Cir. 2013) (accepting interlocutory appeal of church autonomy defense). Such a defense is therefore a "threshold matter" that should be decided early in the litigation and is "subject to prompt appellate review." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608-09 & n.45 (Ky. 2014).

I. Plaintiff's claims are barred by the doctrine of church autonomy.

The First Amendment guarantees the right of churches "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). "This dimension of religious liberty"—the church-autonomy doctrine—mandates that "civil authorities have no say over matters of religious governance." *Korte v. Sebelius*, 735 F.3d 654, 677-78 (7th Cir. 2013). Church autonomy thus "mark[s] a boundary between two separate polities, the secular and the religious." *Id.* at 677. And it does so to the benefit of both—granting churches (on the one hand) space to decide their own religious affairs, and protecting the government (on the other) from becoming "entangled in essentially religious controversies." *Milivojevich*, 426 U.S. at 709.

In applying the doctrine, the key question is whether the lawsuit's subject is a matter of "theological controversy, church discipline, [or] ecclesiastical government."

Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871). If so, the First Amendment "requires civil courts to refrain from interfering." *Stewart*, 135 N.E.3d at 1026 (also citing *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999)). "Religious questions are to be answered by religious bodies." *McCarthy*, 714 F.3d at 976. So when a plaintiff's claim challenges an essentially ecclesiastical decision, the court "cannot review or question" it; it must grant judgment to defendants. *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 294 (Ind. 2003) (judgment for defendants); *Dwenger v. Geary*, 14 N.E. 903, 908 (Ind. 1888) (quoted language; dismissing state contract claim); *Stewart*, 135 N.E.3d at 1025-29 (dismissing state tort claim).[2]

Plaintiff's lawsuit on its face encroaches on church autonomy. He seeks to invoke state tort law to punish the Archdiocese for issuing an ecclesiastical directive telling a Catholic school what religious rules it needed to follow to remain Catholic. But whether and on what terms an Archbishop recognizes another organization as Catholic is a matter of "church discipline" and "ecclesiastical government," *Watson*, 80 U.S. (13 Wall.) at 733—"not the proper subject of civil court inquiry." *Milivojevich*, 426 U.S. at 713-14. Accordingly, Plaintiff's claims are barred. *See Dwenger*, 14 N.E. at 908 ("No power save that of the church can rightfully declare who is a Catholic."); *see also, e.g.*, *Myhre v. Seventh-day Adventist Church Reform Movement Am. Union Int'l*

[2] Some decisions treat church autonomy as depriving a court of subject matter jurisdiction over a claim. *Stewart v. Kingsley Terrace Church of Christ, Inc.*, 767 N.E.2d 542, 548 (Ind. Ct. App. 2002); *Stewart*, 135 N.E.3d at 1025-29. Others treat church autonomy as an affirmative defense on the merits. *Brazauskas*, 796 N.E.2d at 289-90. That makes no difference here, as the Archdiocese asserts both. That is, if the Court views church autonomy as a defense on the merits (as in *Brazauskas*), it can grant judgment on the pleadings; if it views autonomy as going to subject matter jurisdiction, it may dismiss for lack of jurisdiction (as in *Kingsley Terrace Church* or *Stewart*).

Missionary Soc'y, 719 F. App'x 926, 928 (11th Cir. 2018) (barring "contractual interference" claim), *cert. denied*, 139 S. Ct. 175; *Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007) (barring tort claim for communication around excluding person from church because it "would impinge upon matters of church governance in violation of the First Amendment"); Victor E. Schwartz & Christopher Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. Cin. L. Rev. 431, 461-75 (2011) (collecting cases where tort claims "conflict[ed] with the church autonomy doctrine").

Multiple, binding Indiana decisions require this result. In fact, Indiana courts have twice confronted lawsuits presenting indistinguishable facts: *Brazauskas*, 796 N.E.2d at 286 (Ind. 2003), *cert. denied*, 541 U.S. 902 (2004); *McEnroy*, 713 N.E.2d at 334 (Ind. Ct. App. 1999). In both cases, the court held that adjudicating those disputes would violate the church autonomy doctrine.

First, in *Brazauskas*, the plaintiff sued a Catholic diocese for tortious interference with a business relationship, alleging that the diocese prevented her from getting a job at Notre Dame by informing Notre Dame of her employment suit against the diocese. 796 N.E.2d at 289, 291. But the Supreme Court held that the First Amendment barred the claim. *Id.* at 289, 293-94. The Court explained that to apply "tort law to penalize communication and coordination among church officials ... on a matter of internal church policy and administration" "would violate the church autonomy doctrine." *Id.* at 294. Civil-court resolution of the plaintiff's claims was thus prohibited by "fundamental law." *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

Second, in *McEnroy*, a Catholic seminary professor was removed after she publicly opposed the Pope's teaching on women's ordination. 713 N.E.2d at 335-36. The professor then sued the Archabbot for tortious interference, because he had directed the seminary's president to remove her for her "seriously deficient" actions as a teacher under "the Church's canon law." *Id.* at 336. The Court of Appeals held that the claim

was barred by the First Amendment. Adjudicating the claim, the court explained, would require the court to determine whether her conduct caused her to be "seriously deficient" as a teacher as a matter of Church doctrine, and whether the Archabbot "properly exercised his jurisdiction over" the seminary. *Id.* at 336-37. The claim thus "clearly and excessively entangled" the trial court "in religious affairs." *Id.* at 337.

Brazauskas and *McEnroy* are dispositive here. Both cases—like this one—involved an employee (or prospective employee) of a Catholic educational institution. In both cases—like this one—the employee brought a claim of tortious interference not simply against the employer but against the Church body that exercised its ecclesiastical authority to bring about the adverse employment action. And in both cases, the court held that resolving that claim would require impermissible interference by civil courts "in matters of church discipline, faith, practice and religious law," *McEnroy*, 713 N.E.2d at 336, in violation of "the church autonomy doctrine," *Brazauskas*, 796 N.E.2d at 294. *Brazauskas* and *McEnroy* require the same result here.

Indeed, this case is even *more* religiously entangling than *Brazauskas* and *McEnroy*. First, here, the underlying dispute between Plaintiff and his employer (Cathedral) was settled out of court—so the *only* challenged action is the Archdiocese's ecclesiastical directive to Cathedral setting out terms on which Cathedral could remain Catholic. If religious "personnel decisions" "are protected from civil court interference where review ... would require the courts to interpret and apply religious doctrine or ecclesiastical law," *McEnroy*, 713 N.E.2d at 337, then the First Amendment applies even more obviously when the plaintiff challenges the "appl[ication] of religious doctrine or ecclesiastical law" directly, *id.*, by seeking to punish an ecclesiastical directive implementing canon law. *See Brazauskas*, 796 N.E.2d at 293 (greater First Amendment protection when "the challenged activity [is] communicative").

Moreover, here, unlike in *Brazauskas* and *McEnroy*, the question whether adjudicating Plaintiff's claims would require the Court to "entangle [itself] in religious matters" is hardly hypothetical. *Cf. McEnroy*, 713 N.E.2d at 335. To the contrary, Plaintiff has said that he hopes to prove that other Archdiocesan employees violated other Church teachings—such as prohibitions on "divorce and re-marriage without annulment, unmarried co-habitation, marriage without the sacrament, or other practices," Resp. Mot. Dismiss 10—and that it is "not justified" for the Archdiocese to treat a same-sex union any differently. And the proceedings have already reached into those religious questions, with the prior special judge concluding that any religious "distinction" between a "gay" priest who remains "celibate" and a gay teacher who enters a same-sex union "does not appear to be great," notwithstanding the Catholic Church's clear teaching to the contrary. *Compare* Order on Certification 5-6 with Catechism § 2359.

Whether any of these various situations are comparable for the Archdiocese's purposes is an inherently "religious question[]" outside the competence of civil courts, *Korte*, 735 F.3d at 678—and one that Church teaching answers in the negative. *See* Catechism §§ 2357-59, 2380-81, 2390-91 (describing the different issues posed by the subjects above). Courts "have no business" independently interpreting religious doctrines, much less telling a religious entity "that [its] beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) ("Plainly, the First Amendment forbids civil courts from" "interpret[ing] particular church doctrines and the importance of those doctrines to the religion."). And multiple courts have recognized that it "would violate the First Amendment" to have a civil court "assess the relative severity of [religious] offenses." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 139 (3d Cir. 2006); *see, e.g.*, *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000) ("If a particular

religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory.").

Finally, although *Brazauskas* and *McEnroy* are dispositive here, they are not alone. The Indiana Supreme Court first recognized that the Constitution bars civil courts from interfering in questions of church discipline more than 120 years ago. *Dwenger*, 14 N.E. 903. In *Dwenger*, the plaintiff claimed a contractual right to bury his son in a Catholic cemetery, despite the church declaring the son "forfeited his membership" in the church and rights to such burial by "a failure to observe [church] doctrines." *Id.* at 905. But the Indiana Supreme Court held that the church could establish "rules for the government of [its] cemetery" and that "[t]he court, having no ecclesiastical jurisdiction, cannot review or question ordinary acts of church discipline" like withdrawing membership in the broader church. *Id.* at 908-09. The same principle requires dismissal here: the Archdiocese has established "rules for the government of [Catholic schools]," and the trial court lacks jurisdiction to second-guess the Archdiocese's decision to tell Cathedral that only schools abiding by those rules are "rightfully declare[d] ... Catholic." *Id.* at 908.

In denying the Archdiocese's motion to dismiss, the prior special judge didn't address these points and didn't even attempt to distinguish *Brazauskas* or *Dwenger*. Instead, the judge relied on an argument Payne-Elliott never made (and declined to defend at the Indiana Supreme Court): that because Cathedral might have had "the ability to 'appeal' to Rome," the Archdiocese might not be "the highest ecclesiastical authority" over Cathedral under church law—in which case the church autonomy doctrine wouldn't apply. May 1 Order 5-7. But that ruling—made without the benefit of a hearing—was mistaken both factually and legally.

Factually, there is no dispute that the Archdiocese has ecclesiastical authority to set the terms for recognizing Cathedral as Catholic. Indeed, Plaintiff's complaint *concedes* that the Archdiocese has "control" over "recognition of Cathedral as a Catholic school." Compl. ¶ 8; Compl. Ex. C; *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020) (discussing the "canon law" setting forth the authority of "local bishops" over Catholic schools). And that concession makes sense, because Plaintiff's theory of causation (a necessary element of his claims) is premised on the notion that the Archdiocese's communication to Cathedral was indeed a "directive" Cathedral had to follow—meaning that if the Archdiocese *weren't* the relevant Church authority, Plaintiff's claims would collapse on their own terms. Compl. ¶¶ 16, 18, 31, 37; *see* State's S. Ct. Amicus Br. 10.

More to the point, the order on the motion to dismiss misstated the key legal doctrine. The church-autonomy doctrine "does *not* mean that a civil court need only defer to the 'highest' decision-making body of the church and may ignore the others." *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 186 n.2 (7th Cir. 1994). Instead, the doctrine "means that the civil court must defer to the highest body *to which the matter had been carried* prior to reaching the civil court." *Id.* (emphasis added); *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012) (courts defer to "the highest of [the] church judicatories *to which the matter has been carried*" (quoting *Watson*, 80 U.S. at 727; emphasis added)). Indeed, for a civil court to conduct its own "review of ecclesiastical law to determine which tribunal is the highest" would itself be an impermissible intrusion into church affairs, violating the First Amendment. *Lewis v. Seventh-Day Adventists Lake Region Conf.*, 978 F.2d 940, 943 (6th Cir. 1992); *see McEnroy*, 713 N.E.2d at 337 (whether a church authority "properly exercised [its] jurisdiction" is itself a matter of "ecclesiastical law" outside a civil court's jurisdiction).

Here, Payne-Elliott has never alleged that Cathedral "carried" the matter of the ecclesiastical directive to any religious body other than the Archbishop. *Hosanna-Tabor*, 565 U.S. at 185-86. To the contrary, the Complaint reflects that Cathedral stated that it "must follow the direct guidance given to us by Archbishop Thompson" and acknowledged the Archbishop's "responsibility to oversee faith and morals as related to Catholic identity." Compl. ¶ 24; Compl. Ex. C at 1; *see* State's S. Ct. Amicus Br. 10 (any question about the Archbishop's authority "would have been news to Cathedral High School, which readily acceded to the Archbishop's directive"). Thus, the Archdiocese is the highest ecclesiastical body to which the matter has been carried, and church-autonomy doctrine applies with full force to the Archdiocese's decision. *See Brazauskas*, 796 N.E.2d at 293 n.5 (regardless of whether the diocese had "decisive influence" over Notre Dame's hiring decision, "our conclusion would be the same").

II. Plaintiff's claims are barred by the right of expressive association.

Plaintiff's claims are also barred by the First Amendment right of expressive association. As the U.S. Supreme Court has explained, "[a]n individual's freedom to speak [and] to worship ... could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Thus, the rights of free exercise and free speech include a corresponding right of expressive association: the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.*; *accord City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443, 454 (Ind. 2001).

The right of expressive association protects a wide variety of groups. It protects the right of political parties to select their own leaders, *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989), members, *N.Y. State Bd. of Elections v. Lopez*

Torres, 552 U.S. 196, 202 (2008), and primary voters, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000). It protects the right of parade organizers to exclude a group with an unwanted message on human sexuality. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 581 (1995). It protects the right of "a private club [to] exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581. And it protects the right of the Boy Scouts to exclude a scout leader who undermines the Scouts' message on human sexuality. *Boy Scouts v. Dale*, 530 U.S. 640, 659 (2000).

It also protects religious groups. This includes the right of a religious group to disassociate from leaders and members who disagree with its views on human sexuality, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006), and the right of a Catholic school to disassociate from teachers who disagree with its views on abortion, *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). If anything, religious groups receive heightened protection for their religious associations, because the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189; *id.* at 200 (Alito, J., joined by Kagan, J., concurring) (noting that the Court's "expressive-association cases" are useful in understanding "those essential rights").

When considering an expressive association defense, the Court must answer two questions. First, does the organization "engage in some form of expression, whether it be public or private"? *Dale*, 530 U.S. at 648. Second, would the government action at issue "significantly affect the [organization's] ability to advocate public or private viewpoints"? *Id.* at 641, 650. Here, the answer to both questions is yes.

First, the Archdiocese obviously engages in "some form of expression." It has a clear message on the nature of marriage that has remained unchanged for 2,000 years. It operates Catholic schools that are designed to communicate the Catholic

faith, including the Church's teaching on marriage. And it communicates with those schools to ensure that they are teaching the Church's message clearly.

Indeed, the Archdiocese's position is far stronger than the Boy Scouts' position in *Dale*. In *Dale*, the Boy Scouts arguably had no clear message on human sexuality. They disclaimed affiliation with any particular religion's teachings and required only that all scouts be "morally straight" and "clean"—a standard the dissent argued did not "say[] the slightest thing about homosexuality." 530 U.S. at 668 (Stevens, J., dissenting); *see id.* at 650 (majority op.) (agreeing the terms were "by no means self-defining" but deferring to organization's stated interpretation). Moreover, religious groups like the Catholic Church and Cathedral "are the archetype of associations formed for expressive purposes," since their "very existence is dedicated to the collective expression ... of shared religious ideals." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring); *see Walker*, 453 F.3d at 862 ("It would be hard to argue—and no one does—that [the Christian Legal Society] is not an expressive association" in light of its commitment to a statement of faith). As the Supreme Court recently noted, "religious education and formation of students is the very reason" most religious schools exist, and "[i]n the Catholic tradition," "religious education is 'intimately bound up with the whole of the Church's life.'" *Our Lady*, 140 S. Ct. at 2055; *id*. at 2065 (quoting the Catechism).

Second, imposing tort liability on the Archdiocese for telling Cathedral what rules it needed to follow to remain Catholic would "significantly affect the [Archdiocese's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 641, 650. The judiciary must "give deference to an association's view of what would impair its expression." *Id.* at 653. Here, the impairment is twofold. First, punishing the Archdiocese handicaps its ability to establish rules for which ministries qualify as Catholic—and, thus, which ministries will be held out to the world as Catholic. That is precisely the kind of "interfer[ence] with the internal organization or affairs of the group" forbidden

by the doctrine of expressive association. *See Walker*, 453 F.3d at 861 (quoting *Roberts*, 468 U.S. at 623). Second, punishing the Archdiocese would impair its ability to ensure that the individuals who serve as the voice and embodiment of its faith will "teach ... by example." *Dale*, 530 U.S. at 655. As the Seventh Circuit has said: "It would be difficult for [a religious organization] to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Walker*, 453 F.3d at 863; *see also Eu*, 489 U.S. at 230-31 & n.21 ("By regulating the identity of [an organization's] leaders," the government can "color the [organization's] message.").

These principles apply with special force to religious expression, since "there can be no doubt that ... the content and credibility of a religion's message depend vitally upon" the messenger. *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring). Thus, it is no surprise that a federal court recently upheld the associational right of Catholic schools in Missouri not to hire teachers who would not "follow, in their personal life and behavior, the recognized moral precepts of the Catholic Church." *Our Lady's Inn*, 349 F. Supp. 3d at 821. Otherwise, the "forced inclusion of teachers or other staff who do not adhere to those values would significantly affect the Archdiocesan Elementary Schools' ability to advocate their viewpoints, through its teachers and staff, to their students." *Id.* at 821-22. The same is true here.

The prior judge's May 1 Order rejected the expressive-association defense for two reasons, neither persuasive. First, the order tried to distinguish the cases above by saying that "[e]ach of these cases deals with the enforcement of a law," and "[i]n many of the cases, the State is seeking to enforce the law." May 1 Order 13-14. But that is no distinction at all; to state the obvious, the Indiana tort law invoked by Plaintiff here is "law" and the judiciary is part of "the State." Indeed, any notion that freedom of association doesn't apply to lawsuits brought by private plaintiffs invoking state tort law is squarely foreclosed by precedent. The U.S. Supreme Court has held that

"[t]he Free Speech Clause of the First Amendment"—the source of the expressive-association right—"can serve as a defense in state tort suits." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). And it has *applied* expressive association to dismiss suits brought by private plaintiffs asserting the *very same* tortious-interference claims that Plaintiff asserts here. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982); *accord, e.g.*, *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859, 861 (Colo. 2004); *cf. Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 880 (9th Cir. 1987) ("Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred."). So this argument fails.

Second, the order suggested that expressive association doesn't apply because this case "is not about the Archdiocese kicking out [Plaintiff] or excluding [him] from entering into a relationship with the Archdiocese." May 1 Order 14. But according to Plaintiff, that's exactly what this case is about—the very point of Plaintiff's lawsuit is that the Archdiocese's actions allegedly ended his "relationship" with Cathedral, which in turn is "control[led]" by the Archdiocese. Compl. ¶¶ 8, 31, 37. Moreover, the order completely overlooked the *other* association affected by this lawsuit—that between the Archdiocese *and Cathedral*. Plaintiff seeks to penalize the Archdiocese for stating the terms on which it would continue to recognize Cathedral as a fellow representative of the Catholic Church. That is a straightforward example of the Archdiocese exercising its "freedom not to associate" "presuppose[d]" by the First Amendment, *Roberts*, 468 U.S. at 623, and the imposition of liability for doing so would significantly affect its ability to communicate the moral teachings of the Catholic faith.

In short, just as political parties, parades, private clubs, and the Boy Scouts can exclude those who interfere with their message (*Lopez Torres*, *Hurley*, *Dale*), the

Archdiocese can exclude teachers (or schools) who reject its religious message. Judgment for the Archdiocese is required.

III. Plaintiff's claims are barred by the ministerial exception.

Plaintiff's claims also fail under the ministerial exception. The ministerial exception is a First Amendment doctrine that bars claims between religious organizations and their "ministers (broadly understood)." *Korte*, 735 F.3d at 677-78. The ministerial exception follows from the core First Amendment principle that the government may not interfere with churches' "autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines." *Id.* at 677; *cf. Ind. Area Found. of United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174, 1180 (Ind. Ct. App. 2011) ("The right of the Church to choose its ministers without court intervention is protected by the First Amendment"). Thus, the exception bars "any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006). Courts have repeatedly applied the ministerial exception to teachers like Plaintiff—on whom the Church "rel[ies] to do th[e] work" of "educating young people in th[e] faith." *Our Lady*, 140 S. Ct. at 2055, 2064.

A leading case is *Hosanna-Tabor*. There, an elementary teacher at a Lutheran school sued the school for employment discrimination. The Supreme Court, however, held that the claim was barred by the ministerial exception. 565 U.S. at 178. Given the teacher's religious title and "role in conveying the Church's message and carrying out its mission," the Court unanimously held that she was a "minister." *Id.* at 192. It concluded that "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" requires that "[t]he church must be free to choose those who will guide it on its way." *Id.* at 196. Justices Kagan and Alito observed by separate concurrence that "the constitutional guarantee of religious freedom" necessarily protects religious groups' rights "to choose the personnel who

are essential to the performance" of "the critical process of communicating the faith" such as "teacher[s]." *Id.* at 199 (Alito, J., joined by Kagan, J., concurring); *see NLRB*, 440 U.S. at 501 (noting "the critical and unique role of the teacher in fulfilling the mission of a church-operated school").

Following *Hosanna-Tabor*, numerous federal courts—including the Seventh Circuit—determined that *Hosanna-Tabor* applied to teachers serving in religious schools, even when they lacked the formal religious title or substantial religious training of the *Hosanna-Tabor* plaintiff. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658-62 (7th Cir. 2018) (Hebrew teacher at Jewish day school); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) ("lay principal" at Catholic high school); *Yin v. Columbia International Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (teacher of English as a Second Language at Christian school); *Ciurleo v. St. Regis Par.*, 214 F. Supp. 3d 647, 649-52 (E.D. Mich. 2016) (Catholic elementary-school teacher).

In *Our Lady*, the U.S. Supreme Court agreed. *Our Lady* involved two "lay" teachers at Catholic elementary schools. 140 S. Ct. at 2056. The teachers "were not given the title of 'minister' and ha[d] less religious training than" the *Hosanna-Tabor* plaintiff. *Id.* at 2055. But the Court nonetheless determined that they fell within the exception. *Id.* The Court explained "that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2064. Thus, because the plaintiffs' "employment agreements and faculty handbooks specified in no uncertain terms that [the plaintiffs] were expected to help the schools carry out this mission," "judicial intervention" into their dispute would violate the First Amendment. *Id.* at 2066, 2069.

Here, Plaintiff's "employment agreement[] and faculty handbook[]" show that he, too, was "entrust[ed] ... with the responsibility of educating and forming students in"

the Archdiocese's faith. *Id.* at 2069. Cathedral's employee handbook, incorporated into Plaintiff's most recent employment agreement (Complaint Exhibit A), tasked Plaintiff with "leading [his] students toward Christian maturity and with teaching the Word of God," encouraging his students' participation in the Catholic sacraments (the center of Catholic worship), and supporting and modeling Catholic teaching. Ex. 1 at 3-4; *see* U.S. S. Ct. Amicus Br. 26-30 (ministerial exception applies not because "any and every [Catholic school] employee" is a minister, but because Payne-Elliott had specific undisputed responsibilities "to inculcate the faith among his students, including on … the Church's teaching on marriage"). Thus, to entertain this suit "would undermine" the Archdiocese's "independence … in a way that the First Amendment does not tolerate." *Our Lady*, 140 S. Ct. at 2055.

The May 1 Order—which did not have the benefit of the recent *Our Lady* decision—rejected application of the ministerial exception for two reasons, both unavailing. First, the order said the ministerial exception was "tangled up" with the question of who was the "highest ecclesiastical authority" over Cathedral. May 1 Order 14-15. But as we've explained, that theory misunderstands both the allegations in this case and the First Amendment. *Supra* pp. 20-21. It is also irrelevant to application of the ministerial exception. *Cf. Fratello*, 863 F.3d 190 (applying ministerial exception to foreclose suit against both school employer and diocese without conducting any "highest ecclesiastical authority" inquiry); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (same); *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 918 (N.D. Ohio 2002) (same).

Second, the trial judge concluded that the ministerial exception might not apply because discovery might show that Plaintiff was not fired for "violating his position as a minister" but "for some other reason." May 1 Order 16-17. But *Hosanna-Tabor* already rejected this precise argument, saying that it "misses the point of the ministerial exception." 565 U.S. at 194. "The purpose of the exception is not to safeguard a

church's decision to fire a minister only when it is made for a religious reason," but to "ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone." *Id.* at 194-95; *see also Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (where the ministerial exception applies, "[t]he church need not ... proffer any religious justification for its decision"). Any ambiguity about the reason for Cathedral's actions—though in fact there is none—is therefore irrelevant.[3]

Finally, the recent *Our Lady* decision further underscores why this is such a clear case under the doctrine of church autonomy. There, the Court emphasized that the First Amendment protects a religious group's "autonomy with respect to *internal management decisions* that are essential to the institution's central mission." 140 S. Ct. at 2060 (emphasis added). And it held that choosing "individuals who play certain key roles" in a religious school qualifies. *Id.* But here, the Archbishop was not merely choosing a single teacher; he was issuing an ecclesiastical directive about the Catholic status of an entire Catholic school. So if setting the terms of employment for a single teacher is an essential "management decision[]" protected under *Our Lady*, *id.*, setting the terms of affiliation for an entire school is an *a fortiori* case.

IV. Plaintiff fails to state a claim for intentional interference.

Finally, judgment should be entered for the Archdiocese because Plaintiff's complaint fails to allege any facts demonstrating malice or absence of justification for the Archdiocese's actions—both of which are necessary elements of a claim for intentional interference with contract or a business relationship.

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[3] The trial judge suggested that Cathedral might have separated from Plaintiff because, if the Archdiocese no longer recognized it as a Catholic school, it would lose "its tax-exempt status." May 1 Order 15-16. Private schools of course do not have to be Catholic in order to be tax-exempt, and Plaintiff himself has since "agree[d] with the Archdiocese that Cathedral's tax-exempt status was not actually in jeopardy." Resp. Opp. Mot. Reconsider May 1 Order 7 n.3.

Malice. To bring an intentional interference claim, "[a] plaintiff must state more than a mere assertion that the defendant's conduct was unjustified." *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000). The *Morgan* case explains that "[t]o satisfy the element of lack of justification, the breach must be malicious and exclusively directed to the injury and damage of another." *Id.* (quoting *Winkler v. V.G. Reed & Sons, Inc.,* 619 N.E.2d 597, 600-01 (Ind. Ct. App. 1993), *aff'd*, 638 N.E. 2d 1228 (Ind. 1994)) (formatting omitted). Payne-Elliott has previously suggested that the Indiana Supreme Court's decision in *Winkler* disclaims a malice requirement, Resp. Opp. Mot. Dismiss 6, but that disposition does consider whether "the defendant's motive" arose from "spite or ill will" or "legitimate business intent." 638 N.E. 2d at 1235-36.

Since Payne-Elliott's prior brief, the Indiana Supreme Court has acknowledged—and declined to resolve—the division of authority on whether malice is an absolute prerequisite. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208, 215 (Ind. 2019). But the weight of recent authority supports requiring malice or at least giving it significant weight. *Duty v. Boys & Girls Club of Porter Cnty.*, 23 N.E.3d 768, 775 (Ind. Ct. App. 2014) (adopting *Morgan* rule of malice as prerequisite); *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 157 (Ind. Ct. App. 2005) (same); *see Am. Consulting, Inc.*, 136 N.E.3d at 215 (noting the court below found that the question of "whether defendant acted maliciously and without a legitimate business purpose" would "necessarily" be a part of analyzing any intentional interference claim); *City of Lawrence Util. Serv. Bd. v. Curry*, 68 N.E.3d 581, 589 (Ind. 2017) (David, J., concurring in part and dissenting in part) ("[l]ack of justification" requires establishing malice and "exclusive[] direct[ion] to the injury and damage of another").

Payne-Elliott has not offered any fact in his complaint by which malice could be inferred. The only allegations in the complaint and attached exhibits relating to the

Archdiocese's motivation in giving Cathedral guidance suggest its motivation was to uphold Catholic teaching in a Catholic school. Compl. ¶ 23; Compl. Ex. B & C.

Absence of Justification. Even if the Court assumes that an interference-tort defendant can act without ill will and still not have acted "fair[ly] and reasonabl[y] under the circumstances," *Winkler*, 638 N.E. 2d at 1235, the complaint again does not allege any facts that would show unfairness or unreasonableness. The Archdiocese's intent to ensure Catholic teaching is modeled at Catholic schools—all that can be inferred from the facts alleged—is plainly a "legitimate … purpose." *Am. Consulting, Inc.*, 136 N.E.3d at 215; *Winkler*, 638 N.E. 2d at 1236.

The May 1 Order speculated that unfairness could be shown if the Archdiocese had failed to follow church procedures in its directive, but that would be a constitutionally impermissible inquiry even if the complaint made such an allegation (and it does not). As discussed *supra* Part I, the First Amendment bars civil courts from determining whether a religious decision-making process "compl[ied] with [the] church's own rules or practices." *Young*, 21 F.3d at 187. And as also explained above, Payne-Elliott's own theory of lack of justification—that intrusive discovery *may* show the Archdiocese is treating different Church teachings differently—is also barred by the First Amendment. The Religious Clauses both protect the right of religious communities "to differentiate between the severity of violating two tenets of its faith," and protect those communities from intrusive review of any such differentiation. *Hall*, 215 F.3d at 626; *see supra* Part I. And in any event, Payne-Elliott's complaint does not actually allege inconsistency—only *consistency* in the Archdiocese's approach to the same conduct across Catholic schools. Compl. ¶¶ 13-16 (Brebeuf).

CONCLUSION

This Court should enter judgment for the Archdiocese. Alternatively, if the Court finds it lacks subject matter jurisdiction over this action, it should dismiss the claims.

Respectfully submitted,

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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, January 26, 2021:

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