COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2015-CA-001613-MR

APPEAL FROM
JEFFERSON CIRCUIT COURT
HON. JUDITH McDONALD BURKMAN
CASE NO. 15-CI-002624

ROGER DERMODY **APPELLANT**

v.

PRESBYTERIAN CHURCH (U.S.A.) **APPELLEE**

BRIEF FOR AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY ON BEHALF OF APPELLEE PRESBYTERIAN CHURCH (U.S.A.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2016, a true and accurate copy of the foregoing was served by U.S. Mail, first class, postage prepaid, to Hon. Judith McDonald-Burkman, Jefferson Circuit Court Judge, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202, and counsel for appellants Stephen B. Pence, Esq., Pence & Whetzel, PLLC, 9300 Shelbyville Road, Suite 1205, Louisville, KY 40223, and counsel for appellees John O. Sheller, Joseph A. Bilby, Steven Clark, and Leah R. Smith, Stoll Keenon Ogden PLLC, 500 W. Jefferson Street, Suite 2000, Louisville, KY 40202. I further certify that the record on appeal has not been withdrawn from the office of the Jefferson Circuit Clerk for purposes of this brief.

Bryan H. Beauman
Counsel for Amicus Curiae

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This case is about whether a reverend, Appellant Roger Dermody, can sue his former employer, the Presbyterian Church (U.S.A.) ("PCUSA" or "the Church") based on statements it made to members about Reverend Dermody's violations of church ethics rules. The trial court concluded that the Church's statements about Reverend Dermody were true, and judgment was entered for the Church. Now on appeal, Reverend Dermody argues that his case turns on "[t]he distinction between" statements that he "acted unethically," as opposed to statements that he "violated [PCUSA's] ethics policy." Appellant's Br. at 11. The Court, however, need not engage in such fine line-drawing and, in fact is prohibited from engaging in such an inquiry.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the United States Supreme Court recently unanimously confirmed that—as a general rule—courts are barred from reviewing employment discrimination claims brought by ministerial leaders like Dermody against their religious employers. 132 S. Ct. 694 (2012). Rather, the Court held that, under the Free Exercise and Establishment Clauses of the First Amendment, "the authority to select and control who will minister to the faithful" is "a matter 'strictly ecclesiastical,'" and must remain "the church's alone." *Id.* at 709; *see also Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604-05 (2014) (adopting the "ministerial exception").

Reverend Dermody's defamation claims are little more than a back-door attempt to avert the ministerial exception. But the same constitutional protections that applied in *Hosanna-Tabor* to protect the right of religious organizations to control their missions also apply here. Because Dermody was a ministerial employee and his termination was

made for religious reasons announced within the general Church community, the First Amendment bars this Court from second-guessing the Church's decision and its related communications with its members. Concluding otherwise would interfere with the Church's selection of its leaders and entangle the Court in ecclesiastical affairs, violating both the Free Exercise and Establishment Clauses. For these reasons, the trial court's ruling dismissing Dermody's claims should be affirmed.

FACTUAL BACKGROUND

Reverend Dermody was a "teaching elder" and employee of PCUSA. Among other things, he was assigned oversight of the Church's "1001 Movement," a mission project with the aim of creating 1001 new worshiping communities. R5, ¶¶ 13-14. Under Reverend Dermody's general watch, although without his actual knowledge, two employees of the 1001 Movement created a new corporation outside PCUSA's control and transferred $100,000 from a PCUSA-authorized account into the new corporation. R6, ¶¶ 16-17. An internal audit revealed the improper transfer, and an external investigation followed. R7-8, ¶¶ 27-30; R612, ¶¶ 34-36.

Ultimately, the investigation determined that the new incorporation and transfer of funds had been done to promote certain aspects of the 1001 Movement and that no funds had been misused. R6, ¶¶ 18-20. Reverend Dermody, however, was issued an "Employment Warning" because he had "failed to manage and supervise a group of employees" and "failed to intervene to ensure policies were followed," which led to a violation of PCUSA's incorporation policy and a "transfer [of] grant funds" outside of PCUSA's oversight. R613 ¶40; R753. Reverend Dermody was also cited for contributing "to a culture that enabled noncompliance with organization . . . policies."

R753. In a separate "Response to Employee Warning," Reverend Dermody acknowledged his failure of oversight, stating "I deeply regret that these incidents happened. I acknowledge that the incidents . . . should not have occurred. I take responsibility for the fact that the issues occurred on my watch, and that there may have been more that I could have done to prevent them from happening." R756-R758.

The incident was reported to the wider PCUSA denomination in a variety of ways. First, the internal Audit Committee Report was posted on the PCUSA website to explain what had happened and "some of the corrective actions" being taken. R227; *see also* R219-R222 (Audit Committee Report). The Audit Report concluded that "four named staff members were concluded to have violated the [PCUSA] Ethics Policy." R220; *see also* R717-719 (Ethics Policy).

Second, PCUSA's executive director sent a letter to Reverend Dermody's home presbytery, the Presbytery of the Pacific, to report the incident. R613, ¶ 40; R760. The home presbytery had been required to approve Reverend Dermody's "written call" when he was first employed by PCUSA, R611 ¶¶ 27-28, and PCUSA policies require that any disciplinary action against him be reported back to the home presbytery, R611 ¶ 29. The letter attached the Audit Committee Report, explained Reverend Dermody's role in the incident, and reported that he had "fully cooperated" in the investigation and "expressed remorse for his role." R613 ¶ 41; R760.

Third, the Presbyterian Outlook, an "independent periodical that reports on Presbyterian news," R614, ¶ 46 published an article about the scandal. Citing the Audit Committee Report, the article stated that "four employees of the [PCUSA] national staff were involved in an unauthorized plan in which funds were channeled from the

denomination to an outside entity." R186-R187. The article noted that the employees had "not been identified" by PCUSA in the Audit Report. *Id.* Reverend Dermody, however, was directly interviewed for the article and "confirmed" that he was "[one] of the four employees involved and that mistakes were made." R187. He was again quoted acknowledging his errors, stating, "I take full responsibility for the fact that this happened on my watch. . . . I deeply regret that it did. . . . I should have caught some things that I didn't." R189.

News of the incident apparently caused significant concern within the PCUSA community. Because the 1001 Movement was "supported financially by [PCUSA] members" and represented the Church's "faith in action," the Church felt it had "a responsibility to provide the wider denomination with information related to its activities," including "the allocation of its budget, and other issues that may cause concern, such as [the] violations of policies and procedures." R613-R614, ¶ 44. Thus, PCUSA posted statements to its webpage "informing the wider denomination of the unauthorized incorporation . . . and its subsequent dissolution." R613, ¶ 43. Subsequent posts included a letter from PCUSA's executive director to address "lingering questions among supporters of the 1001 [Movement] and the church at large," R227-R228, and a press release noting that a "Nashville attorney" had been "hired to conduct independent investigation of [the] '1001' controversy," R230-R231.

Although PCUSA's Board initially determined that Reverend Dermody could remain in his position, as the broader community demanded greater accountability, Reverend Dermody was later placed on administrative leave, R614, ¶ 48, and ultimately terminated from employment. While Reverend Dermody was on administrative leave, an

acquaintance named Neal Neuenschwander from "First Pres[byterian] San Pedro" emailed to say he had "really enjoyed meeting [Dermody]" at a General Assembly and "learning about the 1001 [Movement] initiative." R225. He then said, "[r]ecently, I've heard some controversy about 'ethical lapses' in that program. What's that all about?" R225. The PCUSA employee filling in for Reverend Dermody responded by forwarding two statements from the PCUSA website and inviting Neuenschwander "to join with me and many others in praying for [Reverend Dermody] and his family during this difficult time." R224.

Finally, at some point, Reverend Dermody became aware that "a Louisville-based PCUSA minister preached a sermon to his congregation referring to the alleged ethics violations and the 'four men who set up the [illicit] corporation.'" R10, ¶ 38.

Based on all these statements concerning the reasons for his eventual termination, Reverend Dermody sued PCUSA for defamation and defamation *per se*. R12. Under the First Amendment, this Court should decline to consider Reverend Dermody's claims.

ARGUMENT

I. The First Amendment extends religious groups significant immunity from lawsuits by ministerial employees concerning the organization's internal affairs.

The principles that govern this case were first set forth by the U.S. Supreme Court nearly 150 years ago in *Watson v. Jones*, in response to a schism over slavery in the Walnut Street Presbyterian Church of Louisville, Kentucky. Although the First Amendment's Religion Clauses did not at that time apply to the state courts, where the case had arisen, the Supreme Court limited the courts' authority to intrude into religious affairs, citing basic principles of religious freedom intrinsic in "[t]he structure of our government" that "secured religious liberty from the invasion of the civil authority." 80

U.S. 679, 730 (1871). In this spirit, the Court concluded that "whenever the questions of discipline, or of faith, or ecclesiastical rule" have been determined by a religious organization, "the legal tribunals must accept such decisions as final." *Id.* at 727.

The Court recognized that this deference to religious organizations was essential to the formation of "voluntary religious associations" that could engage "in the expression and dissemination of any religious doctrine," resolve "controverted questions of faith within the[ir] association[s]," and ensure the "ecclesiastical government" of their "individual members, congregations, and officers." *Id.* at 728-29. The Court emphasized that "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Id.* at 729. Thus, particularly with respect to decisions concerning religious discipline of individual members, courts simply "cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." *Id.* at 730. Simply stated, "[t]he judgments . . . of religious associations, bearing on their own members, are not examinable" in the civil courts. *Id.* at 730-31.

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, this principle of non-interference in religious affairs by the civil authorities was given root in the First Amendment. 344 U.S. 94 (1952). There, the state of New York had enacted legislation transferring control of the Russian Orthodox Church in America away from the Soviet-influenced "Mother Church" to an American body, ostensibly to resolve an intra-church dispute and minimize "political use of church pulpits" during the Cold War. *Id.* at 109. The Supreme Court, however, struck down the legislation, concluding that the dispute was "strictly a matter of ecclesiastical government." *Id.* at 115. Relying

upon its earlier decision in *Watson v. Jones*, the Court noted that "the opinion radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. The Court concluded that these freedoms—including the "[f]reedom to select the clergy"—"must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.*

In further applying these principles of "church autonomy" or "ecclesiastical abstention," the Supreme Court has—among other things—upheld the right of a religious organization to determine the qualifications of a chaplaincy applicant, despite the intentions the chaplaincy trust's founder, *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), refused to interpret church documents to resolve a property dispute, *Presbyterian Church in U.S. v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), and declined to second-guess a church's decision to defrock a priest and transfer properties from under his control, *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976).

Most recently, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court applied the church autonomy doctrine to hold that religious organizations must be exempted from employment non-discrimination laws as applied to their "ministers," holding that "it is impermissible for the government to contradict a church's determination of who can act" in that capacity. 132 S. Ct. at 704. The Court grounded its ruling in both the Free Exercise and the Establishment Clauses of the First Amendment. First, it held that, by "imposing an unwanted minister," the state would infringe the Free

Exercise right of a religious group "to shape its own faith and mission through its appointments." *Id.* at 706. Second, giving the state "power to determine which individuals will minister to the faithful" would violate the Establishment Clause's prohibition against "government involvement in . . . ecclesiastical decisions." *Id.* Notably, the plaintiff in *Hosanna-Tabor* was not seeking reinstatement to her job, but rather sought "backpay, compensatory and punitive damages, and attorney's fees." *Id.* at 709. But the Court deemed this "immaterial," noting that "[a]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination." *Id.* "[P]unishing a church" in this manner would still "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 706. This reasoning applies with equal force in the present case.

II. Under the church autonomy doctrine, defamation claims like Dermody's are barred.

Although the Supreme Court has never directly addressed whether the church autonomy doctrine extends to defamation claims, state and federal courts have widely and uniformly held that this doctrine bars at least those claims brought by ministerial employees in the context of a religious disciplinary proceeding or a religious organization's internal affairs. As in *Hosanna-Tabor*, such claims violate both the Free Exercise and Establishment Clauses by interfering with the religious organization's ability to decide who will embody its message and how it will carry out its mission.

A. Adjudicating defamation claims like Dermody's would impede the right of religious groups to choose their leaders without government interference.

Courts consistently reject defamation claims brought by ministerial leaders against their religious employers in the context of adverse employment actions. "The relationship between an organized church and its ministers is its lifeblood," as "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose." *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (quoting *McClure v. Salvation Army,* 460 F.2d 553, 558-59 (5th Cir. 1972)). "Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* Thus, when "allegedly defamatory statements" are "made as part of [a religious organization's] employment decision," they are "properly dismissed." *Patton v. Jones*, 212 S.W.3d 541, 552 (Tex. App. 2006). The courts in agreement are legion. *See, e.g.*, *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader."); *Connor v. Archdiocese of Philadelphia*, 601 Pa. 577, 617-18 (2009) (concluding that cases concerning "the unique context of a religious institution's freedom to choose its clerical leader" are "a special class" and "courts understandably are particularly reluctant to encroach on the institution's decision-making process in selecting such employees"); *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986) (dismissing defamation claim where plaintiff was "really seeking civil court review of subjective judgments made by religious officials and bodies that he had become 'unappointable' due to recurring problems in his relationships with local congregations"); *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616, 625-26 (1996) (holding that defamation claim fell

"squarely within the protective ambit of the First Amendment" because "the very heart of the action is a decision by appellant's clerical supervisors to prevent him from becoming a priest"); *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 615 (2001) (dismissing plaintiff's defamation claim because it could not be "considered in isolation, separate and apart from the church's decision to terminate his employment").

This bar against defamation claims by ministerial leaders remains in place even if the alleged statements "do not express any religious principles or beliefs." *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am.*, 860 F. Supp. 1194, 1198 (W.D. Ky. 1994); *Patton*, 212 S.W.3d at 552 (statements "protected from secular review, even if the statements do not expressly involve religious doctrine"). This is because "[w]hose voice speaks for the church is *per se* a religious matter." *Yaggie*, 860 F. Supp. at 1198 (quoting *Minker v. Baltimore Annual Conf.*, 894 F.2d 1354, 1357 (D.C. Cir. 1990)).

Moreover, statements that "do not, *on their face*, implicate religious doctrine" may in fact have religious significance to the religious organization, and "a determination of the truth or falsity of these statements would require an inquiry into the church's reasons" for selecting its leaders. *Patton*, 212 S.W.3d at 554 (emphasis added). "[T]his is precisely the type of inquiry protected from secular review by the ecclesiastic abstention doctrine." *Id.* at 554-55; *Yaggie*, 860 F. Supp. at 1198 ("We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the gifts and graces of a minister must be left to ecclesiastical institutions.") (quoting *Minker*, 894 F.2d at 1357). As noted by the Supreme Court in *Hosanna-Tabor*, "[t]he purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will

minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." 132 S. Ct. at 709 (internal citation omitted).

Again, it is immaterial that Dermody seeks only damages, and not reinstatement of employment. The same was true in *Hosanna-Tabor*. 132 S. Ct. at 709. Yet the Court still held that "[a]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister," *id.*, essentially creating a back-door means of penalizing religious organizations for decisions about who is best suited to lead their followers. Under the Free Exercise Clause, such interference is prohibited.

B. Adjudicating defamation claims like Dermody's would entangle courts in religious groups' internal affairs.

Immunity for religious organizations from defamation claims brought by ministerial leaders is further warranted when the allegedly defamatory statements relate to the organization's employment decisions or other internal affairs. Because reviewing such claims would entangle the courts in religious doctrines and decision making, the courts uniformly dismiss them. *See, e.g.*, *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999), *aff'd*, 263 F.3d 158 (3d Cir. 2001) (dismissing defamation claims based on allegation of bigamy, because court would have to determine whether the plaintiff "engaged in bigamy *within the meaning of the Orthodox Jewish faith,* which by its very nature necessitates an inquiry into religious doctrine"); *Warnick v. All Saints Episcopal Church*, No. 01539 Dec. Term 2011, 2014 WL 11210513, at *9 (Pa. Com. Pl. Apr. 14, 2014), *aff'd*, 116 A.3d 684 (Pa. Super. Ct. 2014) (dismissing defamation claim where "Court would not only have to invade the Church's process for choosing clergy, but also challenge the Church's understanding of its own Constitutions and Canons"); *Winbery v. Louisiana Coll.*, 124 So. 3d 1212, 1218-19 (La. Ct. App.

2013), *writ denied*, 137 So. 3d 1215 (La. 2014) (dismissing defamation claim arising from dispute "on the nature of Baptist theology and church governance," which would have "require[d] the court to impermissibly entangle itself in deciding ecclesiastical matters"); *Black v. Snyder*, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991) (dismissing defamation claim because it "would require . . . review of the church's reasons for discharging [the plaintiff], an essentially ecclesiastical concern").

Reverend Dermody's own arguments make clear that the Court could not resolve his claims without becoming entangled in doctrinal questions. For example, he claims not to challenge the "assertion that he violated PCUSA's policy," only the claim that he "acted unethically." Appellant's Br. at 9-10. He admits that statements that he "had been found to violate PCUSA policy (or even its ethics policy) would be true. But a statement . . . that [he] had acted unethically is not the same thing." *Id.* at 10 n. 4. And, finally, he challenges PCUSA's statement "that he engaged in unethical conduct" when "in truth, he at most committed a managerial oversight." *Id.* at 11.

Even assuming that PCUSA had called Dermody "unethical" (which is not at all apparent from the record), drawing such fine distinctions would require this court to delve into PCUSA's financial and management policies to determine what it means to "act unethically" *within the meaning of those canons and the PCUSA faith generally. See, e.g.*, R717 (PCUSA's Standards of Ethical Conduct for Employees). Such questions are beyond the scope of this Court's proper authority. *See Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (dismissing defamation claims arising from allegations of financial mismanagement because questions about plaintiff's "actions and abilities" under church's "internal procedures" were "an ecclesiastical

concern"); *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988) (dismissing defamation claim that would have required court to "investigate the propriety of proceedings conducted by [the] church in the interpretation and application of church rules"). It would also require this court to punish the PCUSA for communicating its own religious understanding of ethics to its own members—a clear violation of the First Amendment.

III. There are no exceptions that apply in this case.

Reverend Dermody's suggestion that his defamation claims may be resolved by applying "neutral principles" of law is unavailing. Appellants' Br. at 14-15. While courts frequently will resolve church *property* disputes when possible to do so under neutral principles of law, courts—including the Supreme Court of Kentucky—have roundly rejected that exception in disputes over internal church affairs. *St. Joseph Catholic Church Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 739 (Ky. 2014) ("[T]he neutral principles doctrine should not be extended to religious controversies in the area[] of church government.") (citations and quotation marks omitted); *Hutchison*, 789 F.2d at 396 ("The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be."); *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 541 (Minn. 2016) ("[A]djudicating a defamation claim . . . necessarily fosters an excessive entanglement with religion . . . and precludes the application of neutral principles of law.").

Similarly, although the Supreme Court has left open the possibility that there may be room for "marginal civil court review" of cases involving church doctrine or polity in cases involving "'fraud or collusion' when church tribunals act in bad faith for secular

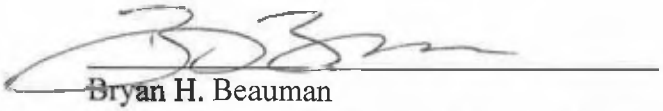
purposes," *Milivojevich*, 426 U.S. at 713, no such allegations have been here. Indeed, Dermody's only allegation that might even remotely imply "bad faith" is his claim that PCUSA's allegedly defamatory statements were published to third parties. Appellant's Br. at 13. But that allegation is insufficient for at least two reasons.

First, Dermody never directly contends that publication to third parties constitutes bad faith for purposes of averting the ecclesiastical abstention doctrine, thereby waiving that argument. Second, the record is devoid of evidence that PCUSA in fact did publish statements to parties outside of its membership. All of its statements were to the broader membership of the PCUSA to assure them that necessary steps had been taken to ensure that the 1001 Movement was being properly operated. *See supra* at 3-5. Even the statements by the independent Presbyterian Outlook were directed toward the PCUSA community. Such statements to a religious organization's own followers fall well within the church autonomy doctrine. *See, e.g.*, *Kavanaugh v. Zwilling*, 997 F. Supp. 2d 241, 244, 245, 254 (S.D.N.Y. 2014) (dismissing defamation claim brought by priest after Archdiocese published finding of guilt for sexual abuse in the Archdiocesan newspaper and "informed the media of [the priest's] suspension"). In short, Reverend has identified no exceptional circumstances that would remove this case from within the scope of the ecclesiastical abstention doctrine. Indeed, doing so in this case would be an egregious violation of the most fundamental principles of the First Amendment as consistently applied in decades of jurisprudence at the Supreme Court and across the court system.

CONCLUSION

For all the foregoing reasons, this Court is barred from furthering reviewing Reverend Dermody's claims and should affirm the lower court's ruling dismissing them.

Respectfully submitted,



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