IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 19-60293

WILL McRANEY,

Plaintiff – Appellant

v.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,

Defendant – Appellee

On appeal from the United States District Court for the Northern District of Mississippi, Aberdeen Division; Civ. A. No. 1:17-cv-080-GHD-DAS

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Will McRaney, Plaintiff-Appellant
2. William Harvey Barton, II, Counsel for Plaintiff-Appellant
3. Barton Law Firm, PLLC, Counsel for Plaintiff-Appellant
4. The North American Mission Board of the Southern Baptist Convention, Inc., Defendant-Appellee
5. Kathleen Ingram Carrington, Counsel for Defendant-Appellee

6. Donna Brown Jacobs, Counsel for Defendant-Appellee
7. Joshua J. Wiener, Counsel for Defendant-Appellee
8. Butler Snow LLP, Counsel for Defendant-Appellee
9. Baptist Convention of Maryland/Delaware, Inc., Third-Party Respondent
10. Adam Stone, Counsel for Third-Party Respondent
11. Jackie R. Bost, II, Counsel for Third-Party Respondent
12. Jones Walker, LLP, Counsel for Third-Party Respondent

s/ Kathleen Ingram Carrington
One of the attorneys for Defendant-Appellee
The North American Mission Board of the
Southern Baptist Convention, Inc.

STATEMENT REGARDING ORAL ARGUMENT

This case concerns whether the District Court, under Fed. R. Civ. P. 12(b)(1), appropriately concluded it did not have jurisdiction to hear any of Plaintiff Will McRaney's ("Plaintiff") claims against The North American Mission Board of the Southern Baptist Convention, Inc. ("NAMB") under the Religion Clauses of the First Amendment. Applying the First Amendment's ecclesiastical abstention doctrine, the District Court found all of Plaintiff's claims were tied either to his termination as Executive Director of the Baptist Convention of Maryland/Delaware ("BCMD"), a religious organization working hand-in-hand with NAMB in their missional goals of evangelism and church planting, or his troubles with NAMB and BCMD arising from their collective spiritual work as Southern Baptists.

This Court has repeatedly precluded civil courts from interfering with the theological practices, internal affairs, and internal management of religious organizations such as NAMB and BCMD, and it treats the ecclesiastical abstention doctrine as a Rule 12(b)(1) jurisdictional bar. Because this case concerns clear precedent that the District Court correctly applied in dismissing Plaintiff's claims, NAMB does not believe oral argument would assist the Court in deciding this appeal.

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JURISDICTIONAL STATEMENT

This appeal concerns whether the District Court properly dismissed Plaintiff's claims against NAMB for lack of subject matter jurisdiction under the First Amendment's ecclesiastical abstention doctrine.

The District Court entered its final order dismissing Plaintiff's claims with prejudice on April 24, 2019. ROA.328. Plaintiff timely noticed his appeal on May 1, 2019. ROA.329. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the District Court correctly dismiss Plaintiff's claims against NAMB for lack of subject matter jurisdiction under the ecclesiastical abstention doctrine?

   A. Did Plaintiff waive his challenge regarding the "law of the case" doctrine by failing to raise it before the District Court?

   B. Did the District Court correctly find the ecclesiastical abstention doctrine applied to all of Plaintiff's claims?

   C. Did the District Court correctly treat the ecclesiastical abstention doctrine as a jurisdictional bar and dismiss the case under the futility exception to 28 U.S.C. § 1447(c)?

STATEMENT OF THE CASE

I. Facts Relevant to the Issues Submitted for Review

A. *The roles of, and relationships between, NAMB, Plaintiff, and BCMD.*

"The North American Mission Board exists to work with churches, associations and state conventions in mobilizing Southern Baptists as a missional force to impact North America with the gospel of Jesus Christ through evangelism and church planting." ROA.41. NAMB's ministry priorities include assisting churches "in planting healthy, multiplying, evangelistic SBC churches," "in appointing, supporting and assuring accountability for missionaries," and "by providing missions education and coordinating volunteer missions opportunities for church members." ROA.41.

In furtherance of these ministry priorities, NAMB partners with Baptist conventions across North America. ROA.41. The conventions are either state or regional, and they provide services for their cooperating churches such as assisting with "evangelism, church planting, volunteer partnership missions, leadership development, disaster relief mobilization, and spiritual growth and prayer support."[1]

Plaintiff is the former Executive Director of one of these conventions, namely the Baptist Convention of Maryland/Delaware ("BCMD"). ROA.14.

[1] Southern Baptist Convention: A Closer Look, *available at* www.sbc.net/aboutus/acloserlook.asp (last visited Sept. 2, 2019).

BCMD "exists to intentionally assist in the starting and strengthening of congregations so that together we can accomplish the Great Commission as given to us by our Lord in Matthew 28:19-20 and Acts 1:8." ROA.42.

BCMD and NAMB work hand-in-hand under a religious ministry agreement known as a "Strategic Partnership Agreement" ("SPA"). ROA.15. The SPA is "driven by shared values that reflect mutual respect and peer-to-peer relationships," including "Biblical Authority," "Kingdom Advancement," and "Evangelism and Missions." ROA.42. Together, BCMD and NAMB "develop, administer and evaluate a strategic plan for penetrating lostness through church planting and evangelism." *Id.* Further, the SPA's provisions "shall be consistent with the most recently adopted version of the Southern Baptist Convention Baptist Faith and Message."[2] ROA.43.

In his role as Executive Director, Plaintiff's ministry included moving forward the ministry priorities of BCMD as an individual convention and the collective ministry priorities of BCMD in partnership with NAMB. ROA.14. *See also* ROA.41-43 (noting certain duties of the Executive Director under the SPA).

[2] The Baptist Faith and Message is a statement prepared by the Southern Baptists setting forth the Convention's generally held convictions, which "serves as a guide to understanding who they are." *See* Southern Baptist Convention, About Us: Basic Beliefs, *available at* www.sbc.net/about us/basicbeliefs.asp (last visited Sept. 2, 2019).

For each of the past five years (2013-2018), NAMB contributed 15-20 percent of the financial support BCMD needed for its day-to-day operations, totaling approximately $5.2 million. ROA.192, ROA.260.

B. *Plaintiff rejected the new SPA on behalf of BCMD.*

According to Plaintiff, NAMB leadership developed a new SPA in 2014 that NAMB began "pushing" on state conventions, including BCMD. ROA.15. The new SPA allegedly included a new funding arrangement designed to give NAMB more control over finances and the hiring, supervising, and firing of staff positions at the state conventions, including the elimination of all jointly funded staff positions. ROA.15. Plaintiff repeatedly rejected the SPA on behalf of BCMD, "viewing the proposed SPA as a weakening of the autonomy of BCMD and the relinquishment of all controls to NAMB in the specific area of starting new churches." ROA.16.

Plaintiff claimed he asked to meet with NAMB President Dr. Kevin Ezell, but Dr. Ezell and others at NAMB allegedly "wrote to various leaders within the BCMD that Plaintiff McRaney had repeatedly refused to meet with him [Dr. Ezell]." ROA.16. Plaintiff's complaint did not identify who these leaders are, and Plaintiff did not attach these communications to his Complaint. *See generally* ROA.13-19.

According to Plaintiff, his rejection of the new SPA "became the unstated reason that directly led [NAMB President Kevin] Ezell and NAMB Vice President Jeff Christopherson to give a one-year notice of cancellation between NAMB and BCMD." ROA.16. Plaintiff contended the notice letter included "false and libelous accusations" against him. ROA.16. Plaintiff did not identify to whom the notice letter was sent or the content of the allegedly false and libelous accusations, and he did not attach a copy of the letter to his Complaint. *See generally* ROA.13-19.

NAMB denies all of Plaintiff's allegations. ROA.31-39.

C. *Plaintiff and BCMD end their employment relationship.*

Plaintiff contended there were several meetings between Dr. Ezell, the BCMD general board director, and the BCMD president that resulted in Plaintiff's termination. ROA.16. Plaintiff and BCMD entered into a "Separation Agreement and Release" ("Separation Agreement") that said BCMD voted to end Plaintiff's employment on June 8, 2015. ROA.195. Plaintiff resigned from his employment the following day, and BCMD accepted his resignation. ROA.195.

The Separation Agreement included a "General Release" section that "forever discharges the Convention and its past, present and future affiliates, agencies, supporting organizations … (collectively, "Released Parties"), from any and all actions causes of action, suits, claims … from the beginning of time to the

date hereof … arising from or related to, directly or indirectly, Dr. McRaney's employment with the Convention, or the termination thereof." ROA.197.

Following certain enumerated exceptions to the foregoing, the "General Release" section stated "an employee of the Convention includes any individual who … performs services for the Convention as an employee of the North American Mission Board ("NAMB") or under a co-employment, shared employment, leased employee or similar contract or arrangement with NAMB." ROA.198.

Finally, the Separation Agreement included a "Covenant Not to Sue" wherein Plaintiff agreed not to file a lawsuit "against the Convention or any of the other Released Parties." ROA.199.[3]

D. ***NAMB's alleged "misconduct" post-termination.***

Sometime after ending his employment with BCMD, Plaintiff claimed he learned that NAMB, through Dr. Ezell, told BCMD it would withhold all funding unless BCMD terminated Plaintiff and accepted the new SPA. ROA.17.

Moreover, Plaintiff said NAMB, notwithstanding the termination, "continued a course of conduct designed to interfere with the business and contractual relationships of Plaintiff McRaney and various third parties," namely (1) getting him uninvited to speak at the Mission Symposium in Louisville,

[3] The District Court did not base its dismissal on the Separation Agreement. NAMB provides the Court with this information because it is relevant to the case's progression.

Mississippi, and (2) attempting, but not succeeding, to have him uninvited to speak at the Florida Baptist Convention Pastor's Conference. ROA.17-18.

He also contended NAMB placed an 8x10 photo of him at NAMB headquarters "in public view at NAMB's Welcome Desk" to communicate that Plaintiff "was not to be trusted and public enemy #1 of NAMB." ROA.18.

NAMB has denied, and continues to deny, all of Plaintiff's allegations against it. *See generally* ROA.31-39.

II. Relevant Procedural History

A. *Preliminary pleadings.*

Plaintiff filed suit against NAMB in the Circuit Court of Winston County, Mississippi on April 7, 2017, setting forth five claims: (1) intentional interference with Plaintiff's contractual relationship with BCMD; (2) defamation resulting in Plaintiff's termination from BCMD; (3) intentional interference with Plaintiff's speaking engagement in Mississippi; (4) intentional interference with Plaintiff's speaking engagement in Florida; and (5) intentional infliction of emotional distress by placing a photograph of Plaintiff at the reception desk of NAMB's headquarters. ROA.13-19. Plaintiff sought punitive damages for the foregoing conduct. ROA.19.

Although noting in his Complaint that he and BCMD entered into a "severance agreement," he did not attach the Separation Agreement as an exhibit to the Complaint. ROA.16.

NAMB timely removed the case to the United States District Court for the Northern District of Mississippi, Aberdeen Division, on diversity jurisdiction grounds.[4] ROA.8-11.

B. *NAMB moved for a dismissal pursuant to the Religion Clauses of the First Amendment.*

On June 29, 2017, NAMB moved to dismiss all claims against it under Fed. R. Civ. P. 12(b)(6) pursuant to the Religion Clauses of the First Amendment, and specifically the ministerial exception and ecclesiastical abstention doctrine. ROA.72-76 (mot.), ROA.77-99 (mem. in support).

The ecclesiastical abstention doctrine is the broader of the two doctrines, applying generally "to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations." *Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 2007 WL 161035, at *4 (Tenn. Ct. App. Jan. 19, 2007). The ministerial exception, on the other hand, applies specifically to employees of religious organizations who are performing ministerial, religious functions, and precludes court interference with a

[4] Plaintiff is a citizen of Florida, NAMB is a citizen of Georgia, and the Complaint sought punitive damages. ROA.9-10.

religious group's freedom to "choose its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706, 710 (2012).

On January 19, 2018, the District Court granted in part and denied in part NAMB's motion to dismiss. ROA.123. The District Court held the ministerial exception did not apply "[b]ecause the relationship between McRaney and the NAMB was not one of employee-employer." ROA.137. As to the ecclesiastical abstention doctrine, it found Plaintiff's claims as stated in the Complaint "will not require the Court to impermissibly inquire into religious doctrine and practice, although the factual development of this case may later prove otherwise." *Id.* *See also* ROA.130 (noting District Court could not find ecclesiastical abstention doctrine applied "at this juncture"). The District Court dismissed the Florida speaking engagement count because Plaintiff's engagement went forward and, therefore, Plaintiff was not damaged by NAMB's alleged conduct. ROA.134-35.

NAMB timely moved for certification of the District Court's order for interlocutory appeal, asserting both the ministerial exception and ecclesiastical abstention doctrine precluded judicial review of Plaintiff's claims. ROA.138-51 (mot. & br.). The District Court denied NAMB's motion. ROA.152-56 (order & mem. op. denying mot.).

C. *NAMB served a subpoena duces tecum on BCMD for documents necessary to its defense.*

In accordance with the District Court's ruling, the case moved forward. The parties participated in a case management conference, the District Court entered a case management order, and the parties served written discovery requests. ROA.164-67, ROA.175, ROA.183-87. Faced with defending allegations that it tortiously interfered with Plaintiff's employment with BCMD and caused his termination, NAMB issued a subpoena *duces tecum* to BCMD for documents about Plaintiff's job performance, the circumstances surrounding the termination of his employment, and similar documents directly relevant to Plaintiff's claims against NAMB. ROA.169-74.

BCMD moved to quash NAMB's subpoena *duces tecum* pursuant to the ministerial exception, arguing the production of the subpoenaed documents would infringe on its rights as a religious organization under the First Amendment. ROA.189, ROA.210-18. It also attached the Separation Agreement executed by Plaintiff and BCMD in July 2015 that broadly released NAMB as a "supporting organization" and "Released Party." ROA.195-203, ROA.217-18.

D. *NAMB moved for partial summary judgment following BCMD's motion to quash the subpoena duces tecum.*

In light of BCMD's Motion to Quash, NAMB asked the Court to find the case had now reached a juncture mandating dismissal of Count I (intentional

interference) and Count II (defamation resulting in termination) under the First Amendment. ROA.238-43. It alternatively asked the Court to deny BCMD's Motion to Quash because NAMB would be significantly hindered in defending itself against Plaintiff's claims without access to BCMD's relevant documents. *Id.* NAMB separately moved for partial summary judgment based on the Separation Agreement. ROA.255-68.

On November 7, 2018, the Magistrate Judge granted BCMD's Motion to Quash, finding the ministerial exception applied and that the subpoena also "runs afoul of the 'ecclesiastical abstention" doctrine." ROA.270-71. Two days later, NAMB supplemented its Motion for Partial Summary Judgment with the Magistrate Judge's ruling, urging that a failure to dismiss Counts I and II would be inconsistent with the Magistrate Judge's findings. ROA.272-73.

In response to summary judgment, Plaintiff did not address in any manner the First Amendment issues raised by NAMB. ROA 276-78. Instead, Plaintiff focused only on the Separation Agreement, admitting he executed it but denying NAMB was a "supporting organization" and intended released party. ROA.276-78. Plaintiff relied on the conclusory affidavit of his former lawyer to suggest BCMD's financial contributions to NAMB outweighed the millions of dollars NAMB contributed to BCMD between 2013 and 2018. ROA.260, ROA.279-80NAMB moved to strike the affidavit in part. ROA.293-301. Plaintiff neither

responded to NAMB's Motion to Strike nor attempted to correct the errors in the affidavit.

E. *The District Court entered a show cause order on subject matter jurisdiction.*

Three months later (March 5, 2019), the District Count entered an order requiring the parties to show cause as to why the entire case should not be remanded for lack of subject matter jurisdiction. ROA.308-10. The Court explained that although it initially applied Fed. R. Civ. P. 12(b)(6) to evaluate the ecclesiastical abstention doctrine, it "should have instead used the Rule 12(b)(1) subject-matter jurisdiction standard in determining whether the ecclesiastical abstention doctrine applied." ROA.309-10. Moreover, because NAMB removed the case, the District Court observed that 28 U.S.C. § 1447(c) may require remand rather than dismissal. ROA.310. As the Court said, "NAMB has asked and continues to ask for dismissal, not remand, and their current briefing does not address remand at all." ROA.310.

Both parties responded to the show cause order. NAMB responded that the futility exception to 28 U.S.C. § 1447(c) permitted the District Court's dismissal of Plaintiff's claims because dismissal on First Amendment grounds would be required in state court upon remand. ROA.311-16. Plaintiff responded that the Court had diversity jurisdiction and "Plaintiff is without an arguable reason as to why the case should be remanded." ROA.318-19.

F. *The District Court dismissed Plaintiff's claims against NAMB with prejudice.*

On April 24, 2019, the District Court entered a memorandum opinion and separate order dismissing Plaintiff's claims against NAMB because "[c]onsidering all the facts available to it, and not just those in the complaint, the Court finds that this case would delve into church matters." ROA.324. *See also* ROA.323 (noting under Rule 12(b)(1), "the district court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case").

As to the wrongful termination counts sounding in intentional interference with contract and defamation, the Court explained that it would have "to determine why the BCMD fired McRaney—whether it was for a secular or religious purpose," and "whether the NAMB had a valid religious reason for its actions." ROA.324-25. As to the speaking engagement in Mississippi, the Court found it would, again, have to assess whether valid religious reasons existed for the mission event leaders to cancel the engagement. ROA.325. Finally, the Court concluded Plaintiff's intentional infliction of emotional distress claim "will touch on matters of religious belief" because the Court would need to assess whether religious reasons existed for NAMB believing Plaintiff "was not to be trusted and public enemy #1 of NAMB," as Plaintiff claimed. ROA.325.

In light of these findings, the Court dismissed the case with prejudice, holding the futility exception to 28 U.S.C. § 1447(c) permitted dismissal rather

than remand because the state court "also clearly lacks subject matter jurisdiction" to hear Plaintiff's claims. ROA.327. Plaintiff timely appealed. ROA.329

III. Rulings Presented for Review

Plaintiff challenges the District Court's dismissal of Plaintiff's claims against NAMB for lack of subject matter jurisdiction under the ecclesiastical abstention doctrine. *See generally* Pl.'s Br.

SUMMARY OF THE ARGUMENT

The Religion Clauses of the First Amendment protect religious organizations from unwarranted secular interference into their internal affairs, and affords them the freedom to choose their ministers. Although the ecclesiastical abstention doctrine has its limits, Plaintiff's claims against NAMB do not exceed those limits.

As a Rule 12(b)(1) jurisdictional bar, the District Court appropriately concluded the ecclesiastical abstention doctrine precluded it from hearing Plaintiff's claims, even though it reached this decision years after Plaintiff filed his lawsuit. To that end, Plaintiff waived his "law of the case" doctrine argument, which stemmed from the District Court's initial conclusion under Fed. R. Civ. P. 12(b)(6) that the First Amendment permitted the case to proceed, as Plaintiff never raised it before the lower court. The doctrine, nevertheless, does not apply in this context because the District Court, as a court of limited jurisdiction, has a continuing duty to assess its ability to hear a case, and the District Court

appropriately found under Rule 12(b)(1) that the First Amendment halted any further consideration.

Plaintiff's intentional interference with contract and defamation claims are directly tied to his termination from BCMD, and matters related to "hiring, firing, discipline or administration of clergy" are jurisdictionally off-limits to secular courts. *Higgins v. Maher*, 210 Cal. App. 3d 1168, 1175 (1989). Moreover, Plaintiff's speaking engagement claim and intentional infliction of emotional distress claim unquestionably concern Plaintiff's troubles with NAMB and BCMD, and whether NAMB had a "valid religious reason" for any of its alleged actions is not appropriate for secular inquiry. Plaintiff's efforts to untangle his claims from the religious nature of his work and the work of these religious organizations fall short.

Because the District Court could not hear Plaintiff's claims under the Religion Clauses of the First Amendment, neither could a state court. Accordingly, the District Court correctly applied the futility exception to 28 U.S.C. § 1447(c) when it dismissed Plaintiff's claims with prejudice instead of remanding for the same result. The District Court's dismissal should be affirmed.

ARGUMENT

I. Standard of Review.

This Court reviews the District Court's dismissal of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1) *de novo*. *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014). In so reviewing, this Court "must accept the court's factual findings unless they are 'clearly erroneous.'" *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992). Moreover, because the issue is whether the court has the power to hear the case, there is no presumption of truth that attaches to Plaintiff's claims. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Instead, the trial court may freely weigh the evidence and satisfy itself that there is jurisdiction to proceed. *Id.*

II. The District Court correctly dismissed Plaintiff's claims against NAMB for lack of subject matter jurisdiction under the ecclesiastical abstention doctrine.

A. *Plaintiff waived his challenge regarding the "law of the case" doctrine by failing to raise it before the District Court.*

Plaintiff challenges the District Court's adherence to its continuing duty to assess subject matter jurisdiction based upon a misunderstanding of "the doctrine of 'Law of the Case.'" *See* Pl.'s Br. at 13 (stating "this duty seems to be in direct contradiction to the doctrine of 'Law of the Case'"). This Court should not entertain this alleged error because Plaintiff has raised the argument for the first time in his appellate brief. "[A]rguments not raised before the district court are

waived and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.'" *State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 456 (5th Cir. 2009). *See also Quest Med. v. Apprill*, 90 F.3d 1080, 1088 (5th Cir. 1996) ("We are a court of errors, and will not consider matters raised for the first time on appeal, unless our failure to do so would result in manifest injustice.").

No extraordinary circumstances compel consideration of this issue. The District Court gave Plaintiff the opportunity to raise this very issue when it ordered the parties to show why the case should not be remanded "for lack of subject matter jurisdiction." ROA.310. Despite the District Court's unequivocal language, Plaintiff's response addressed diversity jurisdiction without mention of the "law of the case" doctrine. ROA.318-19. Plaintiff contends on appeal that he "mistakenly believed that the subject matter issue was already resolved." Pl.'s Br. at 12. Plaintiff offers no legal authority for this Court to find a mistaken belief equates to extraordinary circumstances. Common parlance suggests it does not.

In any event, the "law of the case" doctrine does not apply to this issue. Courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Rule 12 makes clear that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must

dismiss the action." Fed. R. Civ. P. 12 (h)(3). *See also Arbaugh*, 546 U.S. at 506 ("The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.").

The case of *Sarmiento v. Texas Board of Veterinary Medical Examiners*, 939 F.2d 1242 (5th Cir. 1991), illustrates the federal courts' continuing duty to examine subject matter jurisdiction. The plaintiff obtained a jury verdict in his favor, and the defendant waited until the appeal to challenge the district court's jurisdiction. *Id.* at 1245. This Court vacated the judgment and remanded with instructions to dismiss for lack of subject matter jurisdiction. *Id.* at 1248. In so holding, this Court explained that because district courts are "courts of limited jurisdiction," "a lack of subject matter jurisdiction may not be waived by the parties by consent, conduct, or even by estoppel…. Therefore, even at this late stage of the proceedings, we are bound to determine whether the district court properly exercised jurisdiction…." *Id.* 1245.

Plaintiff relies on *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), in support of his "law of the case" argument. *See* Pl.'s Br. at 13. But *Christianson* supports not applying the doctrine to this particular issue. As the United States Supreme Court explained, "the law-of-the case doctrine 'merely expresses the practice of courts generally to refuse to open what has been decided,

not a limit to their power.'" *Id.* at 817 (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). Like this Court in *Sarmiento*, the Supreme Court in *Christianson* held, "once [the Federal Circuit] concluded that the prior decision was 'clearly wrong' it was obliged to decline jurisdiction." *Id.*

For these reasons, should the Court reach the merits of Plaintiff's "law of the case" argument, it should find no error and affirm.[5]

B. *The District Court correctly found the ecclesiastical abstention doctrine applied to all of Plaintiff's claims.*

The ecclesiastical abstention doctrine is a First Amendment protection afforded to religious organizations from the interference of secular courts into ecclesiastical matters. *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008). "[C]ivil courts should not review the internal policies, internal procedures, or internal decisions of the church." *Ginyard v. Church of God in Christ Ky. First Juris., Inc.*, 6 F. Supp. 3d 725, 729 (W.D. Ky. 2014).

[5] Actually, the District Court applied the "law of the case" doctrine, albeit in a different context. It applied the Magistrate Judge's findings on BCMD's Motion to Quash when ruling on NAMB's Motion to Dismiss. *Compare* ROA.271 n.3 ("The subpoena also runs afoul of the "ecclesiastical abstention" doctrine. Submitting the personnel file would subject BCMD to review of 'internal policies, internal procedures, or internal decisions of the church,' which the doctrine forbids." (citation omitted)) *with* ROA.324-25 (with regard to the subpoena *duces tecum* for Plaintiff's personnel file, "[r]eview of these claims will require the Court to determine why the BCMD fired McRaney—whether it was for a secular or religious purpose. It will require the Court to determine whether the NAMB's actions were done 'without right or justifiable cause'—in other words, whether the NAMB had a valid religious reason for its actions. That the Court cannot do.").

The doctrine extends to, *inter alia*, "disputes concerning theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required." *Klouda*, 453 F. Supp. 2d at 611 (citing *Watson v. Jones*, 80 U.S. 679, 733 (1871)). And it applies with full force to a religious organization's ministry. As this Court explained,

> The relationship between an organized church and its ministers is its life blood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.

Simpson v. Wells Lamont Corp., 494 F.2d 490, 493-94 (5th Cir. 1974).[6]

To be clear, NAMB does not assert, nor has it ever asserted, that all disputes involving churches are shielded from secular scrutiny. There are indeed such disputes that secular courts have jurisdiction to resolve. *Pleasant Glade v. Schubert*, 264 S.W.3d 1 (Tex. 2008), a case Plaintiff cites here, *see* Pl.'s Br. at 15, collected examples of such cases, which include false accusations of assault, sexual misconduct of a priest, a minister's affair with the wife of a couple in marital

[6] No party disputes that Plaintiff's role as Executive Director of BCMD was ministerial in nature. This includes the District Court, even though it found the ministerial exception did not apply. *See* ROA.128 ("NAMB argues that because McRaney was the Executive Director of the BCMD, his duties included "ministry direction," and that because McRaney was thus the employee tasked with directing the ministry efforts of the BCMD, he qualifies as a 'minister' to whom the exception applies. The Court agrees, and finds that McRaney is indeed the type of ministerial employee to whom the exception potentially applies.").

counseling, a minister spreading false accusations after family counseling, and cases generally that "threaten the public's health, safety, or general welfare." *Id.* at *12. The same is true for fraud claims. *See, e.g.*, *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 831 (Miss. 2009).

Similarly, there is a plethora of case law precluding churches from improperly diverting designated funds, an act which does not concern religious doctrine. *Id.* at 830 (collecting cases). In *Schmidt*, another case Plaintiff cites, *see* Pl.'s Br. at 8-10, the court correctly found it had subject matter jurisdiction (1) to determine whether donations made for a specific purpose were held in trust and (2) to hear an intentional misrepresentation claim against a pastor who allegedly solicited contributions to rebuild a church that he knew would never be rebuilt. This is because "neutral principles of law" can be applied to church property and trust disputes, *i.e.* courts can engage in a "completely secular examination" of property and trust documents "without relying on religious precepts." *Id.* at 824 (quotations marks and citations omitted). *See also* Pl.'s Br. at 16-17 (citing *Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church*, 489 A.2d 1317 (Pa. 1985) (disputes as to the meaning of wills, trusts, contracts, and property ownership "are questions of civil law and are not predicated on any religious doctrine")).

Plaintiff cites *Tubra v. Cooke*, 225 P.3d 862 (Ore. App. 2010), to suggest the District Court had subject matter jurisdiction over his defamation claim, but the defamation claim in *Tubra* arose after church officials publicly announced to a congregation their allegedly false accusations of a pastor stealing church funds. *Id.* at 865-66. The nature of the representation neither concerns religious belief or practices, nor is it inherently religious, thus precluding an ecclesiastical shield from secular consideration. *Id.* at 873.

What the secular courts may not consider are "matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). As explained more fully below, all of Plaintiff's claims concern "matters of church government as well as those of faith and doctrine." *Id.* The District Court properly found it lacked subject matter jurisdiction to hear them.

i. The Court correctly dismissed Plaintiff's termination-based claims—interference with contractual relations and defamation—under the ecclesiastical abstention doctrine.

Despite his efforts on appeal, Plaintiff cannot escape his own pleadings, namely that he put his termination front and center in this lawsuit by tying two of his causes of action to that event. In Count I, Plaintiff contended NAMB intentionally interfered with the relationship between Plaintiff and BCMD "by interfering with the contractual relationship existing between the two," *i.e.* the

employment contract. ROA.28. In Count II, he alleged NAMB intentionally defamed him, "resulting in his ultimate termination." ROA.28. As the District Court correctly stated:

> Review of these claims will require the Court to determine why the BCMD fired McRaney—whether it was for a secular or religious purpose. It will require the Court to determine whether NAMB's actions were done "without right or justifiable cause"—in other words, whether the NAMB had a valid religious reason for its actions. That the Court cannot do.

ROA.324-25.

Plaintiff suggests that because BCMD is separate from and independent of NAMB, the Court can resolve Plaintiff's claims "without delving into ecclesiastical questions." Pl.'s Br. at 17. Plaintiff offers no authority for the distinction he makes here. More to the point, this argument ignores the fundamental relationship between these religious organizations under the Southern Baptist Convention umbrella and the religious work they do together. As one of 12 boards / entities within the Southern Baptist Convention, NAMB partners—via the SPA—with state conventions like BCMD "in mobilizing Southern Baptists as a missional force to impact North America with the gospel of Jesus Christ through evangelism and church planting." ROA.14, ROA.41. Plaintiff's employment with BCMD was in furtherance of this jointly stated religious purpose. His termination cannot be untangled from the ecclesiastical nature of his employment.

Indeed, with the SPA as backdrop, discovery and trial will require the production of internal records from BCMD, NAMB, and various other ministry organizations, and will require ordained clergy to testify in open court regarding the nature of the religious mission at hand, the theological principles and standards at work, and why Plaintiff proved to be an unsuitable minister. Weighing the evidence as Rule 12(b)(1) permits, the District Court properly concluded this is a religious dispute between the principals and organizations involved. It is not the subject of a secular judicial proceeding in which monetary damages are the object.

Plaintiff's relies on *Marshall v. Munro*, 845 P.2d 424 (Ala. 1993), to suggest this Court can hear Plaintiff's interference with contract and defamation claims, but his reliance falls short. After serving two years as a pastor in Anchorage, the plaintiff in *Marshall* sought employment with another congregation. *Id.* at 425. He accepted a position at a church in Tennessee, but was notified upon arrival that the employment could not go forward "because of derogatory information" the church received from a pastor at another church, whose church duties included "respond[ing] to inquiries from other Presbyterian Churches which are considering 'calling' a specific pastor." *Id.* The plaintiff filed claims for defamation, breach of contract, and interference with contract against the other pastor, and the other pastor argued all of the claims concerned hiring and firing decisions unavailable for a secular court's consideration. *Id.*

The Supreme Court of Alaska affirmed the First Amendment-based dismissal of the breach of contract claim but reversed on defamation and interference with contract because the breach of contract claim "would require the court to interpret [the plaintiff's] and [the other pastor's] employment relationship," whereas the other counts did not. *Id.* at 428. As the court explained, "First Amendment concerns forbid us to imply contractual duties on religious entities. [The plaintiff] must rely upon administrative remedies the church provides for his contract claim, even if 'the church itself may be inadequate to provide a remedy.'" *Id.* (quoting *Higgins*, 210 Cal. App. 3d at 1175). As to the "derogatory information" the other pastor allegedly provided, *i.e.* that the plaintiff "was divorced, was dishonest, was unable to perform pastoral duties due to throat surgery, and had made an improper advance to a member of the Anchorage congregation," *id.* at 425, none of it concerned the plaintiff's qualifications as a pastor and, therefore, did not "involve an ecclesiastical dispute or an internal discipline proceeding." *Id.* at 428.

Unlike the interference with contract and defamation claims in *Marshall*, Plaintiff's interference with contract and defamation claims, as pled, "involve an ecclesiastical dispute" which is rooted in and intertwined with the primary ministry strategies of various religious organizations. Plaintiff put his own "firing" at issue in this lawsuit when he accused NAMB of causing it, and "secular courts will not

attempt to right wrongs related to hiring, firing, discipline or administration of clergy." *Higgins v. Maher*, 210 Cal. App. 3d 1168, 1175 (1989). Those claims would clearly require the court to interpret Plaintiff's and BCMD's employment relationship, and NAMB's role, if any, in the decision-making process.

The District Court did not clearly err in weighing the evidence to determine it did not have jurisdiction to hear these claims. The dismissal should be affirmed. *See* Fed. R. Civ. P. 12(b)(1)*; MDPhysicians & Assocs., Inc.*, 957 F.2d at 181; *Williamson*, 645 F.2d at 413.

ii. The Court correctly dismissed Plaintiff's speaking engagement claim and intentional infliction of emotional distress claim.

The breadth of the ecclesiastical abstention doctrine is worth repeating. Religious institutions have the "power 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 in N. Am.*, 344 U.S. 94, 116 (1952). And matters relating to ministry "must necessarily be recognized as of prime ecclesiastical concern." *Simpson*, 494 F.2d at 494.

To that end, it is not the place of a secular court to delve into the decision-making process of the Mississippi religious organization that initially hired Plaintiff to speak at the Mission Symposium and subsequently cancelled the engagement. *See id.* ("Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany

such a selection."). Plaintiff did not allege, and there is no support that, the engagement was cancelled because of a libelous accusation, such as that he embezzled from BCMD. The Complaint is abundantly clear that the cancelled engagement tied back to Plaintiff's troubles with BCMD and NAMB.

Similarly, it is beyond a secular court's jurisdiction to ascertain whether an internal policy or governance reason prompted NAMB to place a small photograph of Plaintiff behind a reception counter at NAMB's home office. *See Anderson*, 2007 WL 161035, at *4 (ecclesiastical abstention intended "to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations"). In fact, Plaintiff conceded in response to NAMB's first motion to dismiss that "perhaps the posting of Plaintiff's picture at NAMB headquarters may have a religious purpose." ROA.108.

Plaintiff relies on *Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989), to suggest the Court should not have dismissed his speaking engagement and intentional infliction of emotional distress claims because they occurred post-termination. *See* Pl.'s Br. at 24-27. But *Guinn* concerned a church member completely detaching herself from the church, unlike Plaintiff here. In *Guinn*, the plaintiff filed suit after the church Elders publicly branded her a "fornicator," and shared the information with four area churches as part of the disciplinary process for her "sin." *Guinn*, 775 P.2d at 768-69. The court

concluded the Elders' disciplinary actions were not reviewable by a secular court while the plaintiff was a member of the congregation and consented to the disciplinary protocol, but they became viable for secular consideration when the plaintiff withdrew her membership from the church and no longer consented to its disciplinary proceedings. *See id.* at 774-76.

Here, although Plaintiff is no longer employed by BCMD, he is still an active member of the Southern Baptist Convention who is continuing in his ministry efforts. Two of his original causes of action demonstrate as much, namely speaking engagements at "a large mission emphasis" in Mississippi and at the Florida Baptist Convention Pastor's Conference. ROA.17. Plaintiff must recognize the distinction, as he quotes portions of *Guinn* in his appellate brief that make this very point. *See* Pl.'s Br. at 25-26 (quoting in part *Guinn*, 775 P.2d at 783) (explaining that in another case wherein pastor sued Elders for post-termination defamation, "the Elders had a 'qualified privilege' to communicate the reasons for the disciplinary withdrawal-of-fellowship proceedings" because, *inter alia*, "the congregation had a common interest in being informed about the questionable conduct of one among them who expressed the desire to continue ministering to them or to one of their neighboring assemblies").

In any event, *Guinn* does not support Plaintiff's position, as demonstrated by a later Oklahoma decision wherein the plaintiff unsuccessfully tried to apply *Guinn*

in the same manner as Plaintiff tries here. In *Trice v. Burress*, 137 P.3d 1253 (Okla. Civ. App. 2006), the plaintiff filed a defamation claim for statements allegedly made by the church's Senior Minister six months after the plaintiff was terminated as Youth Director, namely that he was terminated because "he was questioning his sexuality." *Id.* at 1255-58. The court dismissed the claim, explaining that "statements by and between church members relating to the Church's reasons and motives for terminating parishioners' membership require an impermissible inquiry into Church disciplinary matters, and that the First Amendment precludes a member's defamation claim which clearly involves an internal conflict within the Church." *Id.* at 1258 (internal quotation marks and citation omitted).

It bears repeating that NAMB "exists to work with churches, associations and state conventions in mobilizing Southern Baptists as a missional force to impact North America with the gospel of Jesus Christ through evangelism and church planting." ROA.41. NAMB's interactions with other ministries and its internal administrative decisions are all in furtherance of this religious purpose. As the District Court stated here, there may be a "valid religious reason" for any of NAMB's alleged actions regarding the Louisville, Mississippi speaking engagement and the placement of Plaintiff's photo behind a desk in the NAMB office reception area. ROA.325. The First Amendment affords NAMB and other

religious organizations the freedom to make such administrative decisions free from state intervention and judicial inquiry.

Because there is no basis to find District Court's conclusions are clearly erroneous, this Court should affirm. *See* Fed. R. Civ. P. 12(b)(1); *MDPhysicians & Assocs., Inc.*, 957 F.2d at 181; *Williamson*, 645 F.2d at 413.

C. *The District Court correctly treated the ecclesiastical abstention doctrine as a jurisdictional bar and dismissed the case under the futility exception to 28 U.S.C. § 1447(c).*

The District Court properly construed the ecclesiastical abstention doctrine as depriving it of subject matter jurisdiction. Although courts in other jurisdictions treat the doctrine as a Rule 12(b)(6) affirmative defense, the Fifth Circuit applies the majority view and treats it as a Rule 12(b)(1) jurisdictional bar. *See Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); *see also Gregorio v. Hoover*, 238 F. Supp. 3d 37, 45 (D. D.C. 2017) (noting the majority approach recognizes "the long-standing practice of treating questions of ecclesiastical entanglement as jurisdictional").

To that end, the ecclesiastical abstention doctrine is not merely a bar to federal jurisdiction, but also a bar to state jurisdiction. When both federal and state courts lack subject matter jurisdiction over a case, the Fifth Circuit recognizes a futility exception to 28 U.S.C. § 1447(c), which permits a district court to dismiss an action, rather than remand it, for lack of subject matter jurisdiction. *See, e.g.*,

Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990) (where state court would be bound by ruling of federal court in case originally brought in state court, "remand thus would be a futile gesture, wasteful of scarce judicial resources"); *Boaz Legacy, L.P. v. Roberts*, 528 F. App'x 318, 319 (5th Cir. 2016) (affirming district court's decision to dismiss, rather than remand, because "the state court in which it was brought also would lack jurisdiction"); *Underhill v. Porter*, 35 F.3d 560, at *2 (5th Cir. Aug. 24, 1994) (per curium) (affirmed dismissal, rather than remand, in sovereign immunity context because waiver of immunity "is a prerequisite to the exercise of jurisdiction over the United States by any court, state or federal"); *see also Advocates for Individuals with Disabilities LLC v. MidFirst Bank*, 279 F. Supp. 3d 891, 895 (D. Ariz. 2017) ("The federal court's decision to dismiss the case rather than remand it for the inevitable dismissal in state court prevented any further waste of valuable judicial time and resources, not to mention waste of the parties' legal fees." (internal quotations marks and citation omitted)).

The ecclesiastical abstention doctrine applies with equal force in both state and federal courts. *See, e.g.*, *Mallette v. Church of God Int'l.*, 789 So. 2d 120, 124 (Miss. Ct. App. 2001) (noting the ecclesiastical abstention doctrine applies to "civil courts," and its reach "includes church-related questions of discipline, faith, rule, custom, or law" (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976))). Even Plaintiff agrees "that if the federal lower court lacks

subject matter jurisdiction then so would the State Court." Pl.'s Br. at 27. With fundamental religious liberty guaranteed by the First Amendment, application of the futility exception is even more appropriate here than in the above-cited cases, as remand would require further entanglement by another civil court into affairs which have already been ruled constitutionally off-limits.

The District Court's application of the futility exception to dismiss the case with prejudice should be affirmed.

CONCLUSION

Plaintiff's claims cannot be untangled from the ecclesiastical nature of Plaintiff's employment with BCMD and the evangelism and church planting work Plaintiff, BCMD, and NAMB do as Southern Baptists. Consideration of any of Plaintiff's claims would improperly delve into internal church affairs and management, and would result in a secular court questioning the religious decision-making of a church. The District Court, correctly applying Rule 12(b)(1), appropriately found the case could no longer proceed, and this Court should not disturb that conclusion.

For all of these reasons, NAMB respectfully requests that this Court affirm the District Court's dismissal of Plaintiff's claims for lack of personal jurisdiction under the ecclesiastical abstention doctrine. NAMB requests all other and further relief which the Court may deem appropriate.

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CERTIFICATE OF SERVICE

I certify that on September 11, 2019, this document was served via the Court's CM/ECF Document Filing System upon the following registered CM/ECF users:

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