No. 20-1158

In the Supreme Court of the United States

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,
Petitioner,
v.
WILL MCRANEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE NATIONAL ASSOCIATION OF EVANGELICALS; THE LUTHERAN CHURCH – MISSOURI SYNOD; CHURCH OF GOD IN CHRIST, INC.; CHRISTIAN LEGAL SOCIETY; JEWISH COALITION FOR RELIGIOUS LIBERTY; AND THE ISLAM & RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the Ethics & Religious Liberty Commission of the Southern Baptist Convention (ERLC), et al. respectfully move to file the attached brief as *amici curiae* in support of petitioner. All parties were timely notified of our intent to file an *amicus curiae* brief. Counsel for petitioner submitted a letter of blanket consent to the filing of all *amicus* briefs, which is on file with the Clerk of this Court. Counsel for respondents has not responded to repeated requests for consent.

ERLC and the other religious organizations on this brief represent some of the Nation's largest faith communities. They frequently participate as *amici* in cases before this Court that raise issues of concern to religious organizations. See, e.g., Br. *Amici Curiae* Religious Denominations and Other Religious Institutions Supporting Pet'rs, *Am. Legion* v. *Am. Humanist Assoc.*, 139 S. Ct. 2067 (2019). Collectively, they offer a distinct perspective on the questions presented and the implications of this case for religious freedom under the First Amendment. Because *amici* believe that the attached brief will assist the Court in deciding whether to grant the petition, they hereby request leave to file this brief as *amici curiae*.

Respectfully submitted,

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March 18, 2021

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INTERESTS OF *AMICI CURIAE*[1]

This case involves tort claims by a removed minister against the entity tasked with missionary work in North America by the Southern Baptist Convention. *Amici* are churches and other religious organizations with a substantial interest in the constitutional right of faith communities to govern their own ecclesiastical matters. Several *amici* have participated in previous cases before this Court involving related issues under the First Amendment. See, *e.g.*, *Our Lady of Guadalupe* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Church and Sch.* v. *EEOC*, 565 U.S. 171 (2012) (unanimous). We submit this brief out of concern that, without review, the Fifth Circuit's decision will severely undermine the freedom of faith communities to govern their own religious affairs.

SUMMARY OF ARGUMENT

The First Amendment to the Constitution bars judicial review of truly ecclesiastical matters like ministerial employment, as well as church polity and government. This doctrine of church autonomy[2] is a

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* certify that counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief.

[2] Both the Fifth Circuit and the district court labeled this rule the "ecclesiastical abstention doctrine." see Pet. App. 1a, but that nomenclature is mistaken. "Church autonomy doctrine" more accurately expresses the idea that, unlike some forms of abstention, the First Amendment leaves courts no discretion to adjudicate ecclesiastical matters. See *Bryce* v. *Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) ("This church

declaration of independence for churches and denominations, securing the freedom to govern their own internal religious affairs. Unfortunately, the Fifth Circuit's decision here threatens that independence.

The court of appeals concluded that the church autonomy doctrine does not bar Reverend Will McRaney's tort suit against The North American Mission Board of the Southern Baptist Convention, Inc. (NAMB). See Pet. App. 8a. Specifically, the court of appeals held that McRaney's complaint can be resolved by applying "neutral principles of tort law," that discovery should proceed to determine whether NAMB had "valid religious reason[s]" for the actions McRaney contests, and that dismissal would be "premature." Pet. App. 5a, 8a, 2a.

That result is startling. McRaney admits that the case originated as "a battle of power and authority between two religious organizations"—both of them Southern Baptist—over ministry strategy. Compl. 3. As executive director of the Baptist Convention of Maryland/Delaware (State Convention), McRaney rejected a partnership agreement proposed by NAMB that covered the "starting [of] new churches" and "the selection … of church planters." *Id.* at 4. Ultimately, the impasse was resolved after the State Convention's governing board voted to remove McRaney. He then sued NAMB.

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autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.") (citations omitted); see also Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 254 (2009) ("The essence of church autonomy is that the Catholic Church should be run by duly constituted Catholic authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law.").

McRaney seeks judicial relief for NAMB's alleged role in his ouster and for related actions.[3] His tort suit is a stealth attack on the Baptist form of church government. Baptist ecclesiology means that spiritual authority is vested with individual, autonomous congregations that voluntarily join together in the cooperative mission of spreading the gospel of Jesus Christ. See S. Baptist Convention, *Baptist Faith & Message 2000* art. VI, *available at* https://bfm.sbc.net/bfm2000/; see also *id.* at art. XIV ("Christ's people should, as occasion requires, organize such associations and conventions as may best secure cooperation for the great objects of the Kingdom of God. Such organizations have no authority over one another or over the churches."). McRaney's claims invite federal courts to sit in judgment on a religious community's internal dispute over cooperative ministry strategy. And the Fifth Circuit's refusal to dismiss his case essentially makes federal courts arbiters of Baptist doctrine, policy, and church government. Adjudicating those matters inevitably violates the doctrine of church autonomy.

The petition describes multiple reasons why review is warranted. In addition, *amici* stress three points.

First, the conflicts between the Fifth Circuit's decision and this Court's precedents hold enormous importance for faith communities. Again and again, this Court has affirmed that the First Amendment bars judicial review of truly ecclesiastical matters like church government, internal administration, and the

[3] NAMB is right to say that McRaney directly challenges his removal. Although he did not sue his employer, the State Convention, McRaney's complaint "explicitly allege[s] that his termination was caused by tortious interference and defamation from the SBC Mission Board." Pet. 22.

selection of ministers. Churches and other religious organizations rely on that doctrine to secure their freedom from government intrusion into the entire range of religious activities. No one questions that churches can be held liable for slip-and-fall accidents or intentional torts causing physical harm. But the decision below crosses the constitutional line by ordering discovery and further proceedings to parse what aspects of McRaney's ministry dispute with NAMB might be amenable to judicial review. Unless this Court intervenes, the Fifth Circuit's decision will diminish the church autonomy doctrine and undermine the ministerial exception embraced in *Hosanna-Tabor*, 565 U.S. at 171 and *Our Lady of Guadalupe*, 140 S. Ct. at 2049.

Second, the question reserved in *Hosanna-Tabor*—whether the church autonomy doctrine bars judicial review of an employment-related tort suit by a minister against a religious organization—has gone unresolved long enough. A decade has passed since *Hosanna-Tabor*. Lower courts disagree how to answer the question. And there is no constitutionally relevant difference separating a tort suit from an employment discrimination suit if both are aimed at adjudicating ecclesiastical matters like a religious organization's selection of religious leaders. Because tort claims like McRaney's are all too common, the decision below will inevitably deny all faith communities the freedom to govern their own religious affairs.

Third, this case is an ideal vehicle to resolve the questions presented. No threshold issues preclude review on the merits. It is uncontested that McRaney is a minister, that NAMB is a religious organization, and that the complaint originated as "a battle of power and authority between two religious organizations"

over Baptist ministry strategy. Compl. 3. The Fifth Circuit addressed the questions presented. Additional percolation is unhelpful and unwise. Lower courts are already divided on the questions presented and the implications of the decision below are patently obvious. This Court should grant review to affirm that the First Amendment bars judicial review of truly ecclesiastical matters—even when those matters are couched in the language of tort law.

ARGUMENT

REVIEW IS WARRANTED TO RESOLVE WHETHER THE FIRST AMENDMENT BARS A MINISTER'S TORT SUIT CONTESTING HIS DISCHARGE AND RELATED MATTERS.

A. The Fifth Circuit's Departure From The Church Autonomy Doctrine Holds Exceptional Importance for Faith Communities.

The church autonomy doctrine, which bars judicial review of truly ecclesiastical matters, is a firmly established rule under the First Amendment.

Shortly after the Civil War, this Court held that courts possess "no jurisdiction" to decide any matter that is "ecclesiastical in its character." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 697, 733 (1871). This doctrine of church autonomy derives from the fundamental principle that our constitutional order "has secured religious liberty from the invasion of the civil authority." *Id.* at 730; see also Sanford H. Cobb, *The Rise of Religious Liberty in America* 12 (1902) ("[T]he American principle asserts an entire independence and separation, both as the Church might seek to control the organic action of the state, and as the state might affect to interfere with the faith or function of the Church."). Citing that principle, the Court

deferred to "the highest judicatory" of the Presbyterian Church, which had resolved an ecclesiastical battle over church property in favor of an anti-slavery faction in St. Louis. *Watson*, 80 U.S. at 734.

Church autonomy became a rule of constitutional law in *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). There, the Court concluded that the First Amendment guarantees religious organizations the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. So the Court voided a state statute purporting to transfer the authority to select an archbishop for New York City from the Russian Orthodox Church in Moscow to the church's American branch. See *id.* at 121. By transferring religious authority, the statute "prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Id.* at 120. It made no difference that deferring to the Russian Orthodox Church's choice effectively ceded control of New York real property to a person regarded by some church members as "an arm of the Soviet state." *Id.* at 127 (Jackson, J., dissenting). As the majority explained, "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion." *Id.* at 121.

Later decisions consistently follow *Kedroff* in denying judicial review of ecclesiastical matters. See, *e.g.*, *Kreshik* v. *Saint Nicholas Cathedral of the Russ. Orthodox Church of N. Am.*, 363 U.S. 190, 116 (1960) (per curiam); *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 447 (1969); *Serbian E. Orthodox Diocese for*

U.S. of Am. & Can. v. *Milivojevich*, 426 U.S. 696, 721–22 (1976); *Hosanna-Tabor*, 565 U.S. at 186–87; *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2061.

These decisions hold that the church autonomy doctrine embraces every matter that is "ecclesiastical in its character." *Watson*, 80 U.S. at 733. Ecclesiastical matters include at least six discrete areas of religious activity: (1) the development and teaching of religious doctrine, (2) a faith community's *ecclesiology* or form of church government, (3) administrative actions taken by a recognized authority within a faith community, (4) the appointment and removal of clergy and other employees who carry out religious functions, (5) the determination of who is admitted or expelled from membership in a faith community, and (6) internal communications by religious authorities about these matters. *See, e.g.*, *Kedroff*, 363 U.S. at 116 (the First Amendment guarantees "freedom for religious organizations" to determine "matters of church government as well as those of faith and doctrine"); *Milivojevich*, 426 U.S.at 710 (church autonomy includes "church disputes over church polity and church administration"); *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (the doctrine "protect[s] [religious organizations'] autonomy with respect to internal management decisions that are essential to the institution's central mission"); *id.* at 2060 (acknowledging the right to select clergy and other "individuals who play certain key roles"); *Bryce*, 289 F.3d at 658 n.2 (communications between a minister and his parishioners are covered by the church autonomy doctrine). In short, the First Amendment secures the freedom of faith communities to "'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Corp. Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S.

327, 341 (1986) (Brennan, J., concurring in the judgment) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1389 (1981)).

The rule established by these decisions reflects the combined force of both Religion Clauses of the First Amendment. See *Hosanna-Tabor*, 565 U.S. at 182–85 (recounting the historical background of the Religion Clauses). The Establishment Clause prohibits the government from telling a church how to govern itself in ecclesiastical matters. See *id.* at 180. At the same time, the Free Exercise Clause prohibits the government from thwarting the church's free choice in such matters. See *id.*

The church autonomy doctrine operates as a rule, not a balancing standard. Shutting the door to judicial review of ecclesiastical matters reflects the nature of the Establishment Clause as a structural barrier dividing the powers of church and state.See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 8–9 (1998). *Hosanna-Tabor* illustrates. Once the Court determined that Cheryl Perich was a minister in the constitutional sense, "the First Amendment *require[d]* dismissal of [her] employment discrimination suit against her religious employer." *Hosanna-Tabor*, 565 U.S. at 194 (emphasis added). When asked to weigh society's interests in ending discrimination against a religious institution's interest in governing itself, this Court did not pause. "[T]he First Amendment has struck the balance for us." *Id.* at 196.

The Fifth Circuit's decision conflicts with these precepts. Although McRaney's complaint directly assaults NAMB for its alleged role in his removal, or contests

NAMB's related actions, see Pet. 22, the court of appeals declined to dismiss McRaney's suit. Instead, the panel concluded unconvincingly that dismissal was "premature." Pet. App. 2a. That refusal, and the lower court's rationale, clashes with *Kedroff* and related decisions in at least three ways.

First, the court of appeals mistakenly recoiled from applying the church autonomy doctrine on the ground that it would allow religious organizations to "immunize themselves from suits against them." *Id.* at 8a. That concern is remarkably misplaced.

True, church autonomy operates much like sovereign immunity. When it applies, a court has no discretion to proceed. Immediate dismissal is the only permitted course. See *Hosanna-Tabor*, 565 U.S. at 194 (dismissing a minister's employment discrimination suit against her religious employer). Governments demand that when legal immunity applies courts will promptly dismiss the case. See *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Religious institutions deserve no less.

But the court of appeals was wrong to suggest that invoking or applying the church autonomy doctrine is somehow unseemly. It is the Constitution that denies courts authority to adjudicate ecclesiastical matters. In that sense, religious organizations are indeed immunized from certain kinds of suits. The church autonomy doctrine reflects the "special solicitude" that the First Amendment accords religious institutions. *Hosanna-Tabor*, 565 U.S. at 189. Applying that doctrine where appropriate manifests fidelity to the law—not indifference to individual rights.

This case turns on whether McRaney's complaint involves ecclesiastical matters. See *Watson*, 80 U.S. at 733. It does. The Fifth Circuit erred by saying that "McRaney is not challenging the termination of his employment …." Pet. App. 5a. Actually, the complaint squarely challenges NAMB's alleged role in McRaney's removal. It accuses NAMB of defamation for allegedly disparaging his reputation, "resulting in his ultimate termination." Compl. 6. The complaint also charges NAMB with intentional interference with business relationships for allegedly "interfering with the contractual relationship existing between" McRaney and the State Convention. *Id.* Faced with such claims, the district court stated the obvious. "Considering all the facts available to it, and not just those in the complaint, the Court finds that this case would delve into church matters." Pet. App. 37a. Judge Ho and Judge Oldham saw the same clash. See *id.* at 51a (Ho, J., dissenting from denial of rehearing en banc) ("[T]here's no way to adjudicate this dispute without violating the church autonomy doctrine."); 63a (Oldham, J., dissenting) ("This case should've ended with a straightforward application of that doctrine."). We agree.

Second, the Fifth Circuit departed from this Court's decisions by declining to apply the church autonomy doctrine on the dubious ground that McRaney's complaint can be adjudicated under "neutral principles of tort law." Pet. App. 5a. That conclusion is unprecedented. Courts may decide church property disputes through a "neutral-principles approach" based on "objective, well-established concepts of trust and property law." *Jones* v. *Wolf*, 443 U.S. 595, 603 (1979). But the Court has never suggested that a religious organization's autonomy over its religious affairs—especially the selection of its ministers—ends

where tort law begins. See Pet. App. 53a–57a (Ho, J., dissenting from denial of rehearing en banc). There's no "neutral-principles" carveout from the church autonomy doctrine. Creating one would gravely compromise church autonomy and blow a gaping hole in the ministerial exception.

Third, the Fifth Circuit turns settled precedent on its head by ordering discovery into whether NAMB had religious reasons for the actions McRaney complains of. See Pet. App. 8a. That inquiry is off-limits. Under the First Amendment, "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (citation omitted). Wary of trespassing into areas of religious sensitivity, the Court has acknowledged that "the very process of [judicial] inquiry … may impinge on rights guaranteed by the Religion Clauses." *NLRB* v. *Catholic Bishop Chi.*, 440 U.S. 490, 502 (1979). The Fifth Circuit's opposite course will deprive NAMB of its First Amendment rights even if it ultimately prevails.

That loss is especially objectionable when NAMB's reasons for its ecclesiastical actions are irrelevant. Like the ministerial exception, the doctrine of church autonomy "ensures that the authority to select and control who will minister to the faithful … is the church's alone." *Hosanna-Tabor*, 565 U.S. at 195–96. Faith communities have the right to select leaders and form internal partnerships—no matter what reasons guide a particular choice. Discovery into its ministry activities, actions, and communications that may have affected McRaney's removal by the State Convention will force NAMB to defend ministry decisions that courts have no authority to question.

The Fifth Circuit was too confident, perhaps, that the district court can parse out secular elements from McRaney's claims. Pet. App. 5a–6a. That enterprise is doomed. His allegations are inseparable from NAMB's right to choose how it cooperates with the State Convention and, in turn, the State Convention's right to select key ministry personnel. Moreover, subjecting ecclesiastical matters to minute legal analysis contravenes the "spirit of freedom for religious organizations" radiated by *Watson*, *Kedroff*, and the Court's other decisions. *Kedroff*, 344 U.S. at 116.

The Fifth Circuit's departures from this Court's decisions hold exceptional importance for faith communities.

For them, few rules of constitutional law compare in importance with the doctrine of church autonomy. It is for religious institutions the keystone of religious freedom. Dividing the powers of church and state secures the freedom of faith communities to develop their own doctrine, form their own communities, and run their own institutions without governmental interference. Without these freedoms, faith communities could not flourish.

This Court's decisions show that preserving church autonomy has safeguarded religious freedom for many faiths. Presbyterian and Lutheran, Catholic, and Orthodox communities—all have benefited. See *Watson*, 80 U.S. at 681 (Presbyterian); *Hull Church*, 393 U.S. at 441–42 (same); *Hosanna-Tabor*, 565 U.S. at 177 (Lutheran); *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (Catholic); *Kedroff*, 344 U.S. at 95–96 (Russian Orthodox); *Milivojevich*, 426 U.S. at 698–99 (Serbian Eastern Orthodox). All these have enjoyed constitutional shelter for their ecclesiastical affairs.

Lower court decisions demonstrate that church autonomy has also safeguarded a diverse range of minority faiths:

- An Orthodox Jewish organization contested New York's limits on religious gatherings. The Second Circuit cited church autonomy as a reason for rejecting the state's generalizations about the health risks of religious worship. See *Agudath Isr. of Am.* v. *Cuomo*, 983 F.3d 620, 633–34 (2d Cir. 2020) (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2055).
- The son of Unification Church leader Reverend Sun Myung Moon sued his mother for judicial confirmation that he was the rightful leader of the church. The district court dismissed his claim "as barred by the First Amendment." *Hyung Jin Moon* v. *Hak Ja Han Moon*, 431 F. Supp. 3d 394, 409 (S.D.N.Y. 2019).
- A former member brought suit against The Church of Jesus Christ of Latter-day Saints for alleged injuries arising from counseling she received from religious leaders. The Utah Supreme Court dismissed her claims of negligence and breach of fiduciary duty. Central to its reasoning was the principle that "civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment …." *Franco* v. *The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 203 (Utah 2001).
- An organization of Buddhist temples resisted a discrimination suit by its former national director, an ordained Buddhist minister. The

> district court dismissed her claim of retaliation under Title VII of the Civil Rights Act on the ground that adjudicating that claim would necessarily involve "judgments on matters of faith and doctrine, as well as matters of general church governance." *Himaka* v. *Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995).

These and other faith communities stand to lose precious First Amendment freedoms because of the Fifth Circuit's decision. Its refusal to dismiss McRaney's case means that churches and other religious institutions face the prospect of litigation over ecclesiastical matters. That prospect will burden and distort the exercise of religion. No denomination[4] is free to govern itself without state interference if it must answer to a court for why a minister was removed from his ministerial position or what administrative measures were taken against him. Forcing NAMB to defend its actions vis-à-vis the State Convention in court defeats the purpose of the church autonomy doctrine. Like other forms of immunity, the doctrine safeguards a religious community not only from liability but from the "burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 536 (1985). Each day this case persists is, by itself, a denial of NAMB's First Amendment rights.

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[4] For Baptists, the term *denomination* is somewhat imprecise. Southern Baptist churches have created state conventions and a national convention, all of which are autonomous. The national convention in turn created NAMB. Baptists are therefore not organized hierarchically but are rather "bound together by a large measure of agreement with regard to doctrines and polity and by a desire for cooperation among the various churches holding these tenets." 1 *Encyclopedia of S. Baptists* 360 (Clifton J. Allen ed., 1958).

The loss of constitutional rights will only intensify on remand. NAMB stands to endure discovery into its religious affairs. It potentially stands to incur the cost of a final judgment against it, as well as the stigma associated with a judicial decision concluding that NAMB acted wrongly when carrying out its ecclesiastical activities. Punishing NAMB for its exercise of religion and declaring its governance of ecclesiastical matters wrongful would doubly offend the First Amendment. See *Hosanna-Tabor*, 565 U.S. at 188 ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so … interferes with the internal governance of the church ….''). Immediately at risk is the genuine independence of Southern Baptist institutions.

It makes no difference that NAMB and the State Convention are separate legal entities when both are tasked with serving Southern Baptist churches in the same denomination. The First Amendment bars judicial review of ecclesiastical controversies from the same faith community regardless of how those matters arise and regardless of how the faith community is organized. *Kedroff* established that point long ago. See 363 U.S. at 115 (acknowledging that the dispute between Russian- and American-led factions of the Russian Orthodox Church is "strictly a matter of ecclesiastical government").

Nor does it matter that the Southern Baptist Convention is governed by its churches. The Baptists' choice of church government can have no bearing on NAMB's rights. That choice presents "an issue at the core of ecclesiastical affairs." *Milivojevich*, 426 U.S. at 721. Courts must defer to NAMB's ecclesiastical posi-

tion as understood within the Baptist community. Judge-made categories like *congregational* or *hierarchical* may not supplant the form of church government freely chosen by those practicing the Baptist faith. See Douglas Laycock, 7 Geo. J.L. & Pub. Pol'y at 258 ("Differences in church governance reflect deep theological disagreements" and "[r]eligious liberty includes the right to choose from among these forms of church organization").

Giving NAMB less deference because of the Baptist form of governance than if NAMB and the State Convention belonged to a single legal entity whose internal organization was strictly hierarchical offends both Religion Clauses. Discriminating against NAMB because of Baptist beliefs about church polity defies "[t]he clearest command of the Establishment Clause." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). It likewise burdens the Baptists' chosen form of church governance contrary to the Free Exercise Clause. See *Kedroff*, 344 U.S. at 116 (acknowledging that the right of free exercise encompasses "matters of church government").

Faith communities have reason to find this case extremely troubling. Religious beliefs about church government and church policy may be distorted even by the prospect of litigation. See *Amos*, 483 U.S. at 336 ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."). Besides, the decision below risks "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Hull Church*, 393 U.S. at 449.

These intolerable burdens on religious freedom will follow from the decision below unless this Court grants review.

B. Faith Communities Urgently Need The Court To Resolve Whether The First Amendment Bars Tort Suits By Ministers Contesting Their Discharge Along With Related Matters.

Hosanna-Tabor held that the ministerial exception bars "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her." 565 U.S. at 196. The Court reserved the question "whether the exception bars … actions by employees alleging … tortious conduct by their religious employers." *Id.* NAMB asks the Court to take up that question now. We agree that the time is ripe.

Nearly a decade has passed since *Hosanna-Tabor*. Lower courts have divided over the validity of tort suits like the discrimination suits subject to the ministerial exception. See Pet. 24–32. Further percolation is neither necessary nor wise. Judge Oldham endorsed that question as important. Pet. App. 77a.

Amici agree. Discharged ministers often raise tort claims in response to their dismissal. See 2 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 14:54 (2020) ("Wrongful termination claims are often joined with claims of common law torts such as defamation and intentional or negligent infliction of emotional distress."). McRaney's claims of tortious interference with business relationships, intentional infliction of emotional distress, and defamation are commonplace. See *id.*[5]

[5] Defamation poses an acute threat to church autonomy. Religious disputes are often marked by jarring rhetoric, as an incident from the life of Maimonides illustrates. When censuring another man's Talmudic commentaries, he asked "why should

The same constitutional logic that supports the ministerial exception justifies review and reversal here. Adjudicating a minister's tort claims against a religious institution, based on disputes over church policy and church government, bears the same constitutional defects as adjudicating an employment nondiscrimination claim. In either instance, adjudication "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. The prospect of official interference in ecclesiastical matters—not the source of law fueling that interference—should be the decisive factor under the First Amendment. See *id.*

Repeatedly, this Court has voided statutes to the extent that they authorize judicial interference with truly ecclesiastical matters. New York could not transfer ecclesiastical authority, even to avoid the prospect of Communist subversion. See *Kedroff*, 344 U.S. at 117–18. Nor could a disabled minister obtain relief for her discharge under the Americans with Disabilities Act. See *Hosanna-Tabor*, 565 U.S. at 196. Judge-made law is no less subject to the same constitutional limitation. *Watson*, 80 U.S. at 734; *Kreshik*, 363 U.S. at 116; *Hull Church*, 393 U.S. at 447; *Milivojevich*, 426 U.S. at 721–22. But under the Fifth Circuit's logic, a constitutional rule powerful enough to bar discrimination claims under civil rights law, see *Hosanna-Tabor*, 565 U.S. at 196, cannot withstand

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I pay attention to an old man who is really miserable, *an ignoramus in every respect*?" Letter from Moses b. Maimon to Joseph b. Judah, *in Iggerot ha-Rambam* 54 (D.H. Baneth ed., 1946) (emphasis added). However harsh, such language is not amenable to judicial review when it addresses religious controversy.

ordinary tort claims. A more perverse outcome would be difficult to imagine.

The Fifth Circuit's holding that McRaney's complaint merely requires the district court "to apply neutral principles of tort law" invites unprecedented and unbounded incursions into church autonomy. Pet. App. 5a. Virtually anything that a religious organization does in an ecclesiastical dispute can be reframed as a tort. Statements during a "theological controversy" can be described as defamation; actions taken to mete out "church discipline" or to maintain "the conformity of the members of the church to the standard of morals required of them" can be relabeled as the intentional infliction of emotional distress; and decisions intended to preserve a religiously inspired form of "ecclesiastical government" through the removal of an unwanted minister can be shoehorned into a claim for tortious interference with business relations. *Watson*, 80 U.S. at 733. Allowing such claims would mean the end of religious freedom for faith communities.

Nor is there any reason to believe that a tort-law exception to the church autonomy doctrine could be readily administered under a "neutral principles" approach. Courts will find it no easier to discern the precise boundary separating religious from secular elements in this context than finding that line under Title VII. See *Amos*, 483 U.S. at 336 (explaining that the line between an employee's religious and secular activities "is hardly a bright one"). Errors, which are inevitable, come at the expense of religious freedom. See *Hull Church*, 393 U.S. at 449 (warning of judicial review that risks "inhibiting the free development of religious doctrine and of implicating

secular interests in matters of purely ecclesiastical concern").

That McRaney has sued a Southern Baptist religious organization other than his employer has no bearing on the application of the church autonomy doctrine. The First Amendment bars judicial review of truly ecclesiastical matters regardless of whether the defendant is a minister's employer. McRaney's complaint against NAMB stems from an intra-denominational contest over church policy and church government. Under the Constitution, his attempt to bring plainly ecclesiastical matters into court is the critical fact.

Indeed, McRaney's decision to sue NAMB instead of his employer only succeeds in making the constitutional violation more serious and widespread. If a court had denied the church autonomy doctrine only as touching the State Convention's discharge of McRaney, that decision would affect an organization that comprises 560 churches in Maryland and Delaware. But by denying the church autonomy doctrine with respect to NAMB, the Fifth Circuit affects an organization with responsibilities toward *thousands* of churches in the entire Southern Baptist denomination. By the same principle, a discharged Catholic priest can sue a diocese and win even if he would have lost the same suit against his parish employer. National religious organizations from many faith communities, which often influence local ministerial employment decisions, will face novel litigation risks because of the lower court's faulty analysis.

Finally, the Fifth Circuit's neutral-principles holding seriously undermines the ministerial exception. Simple torts can be expected to replace nondiscrimination suits as the instrument of choice for aggrieved

ministers. That would allow civil courts to do exactly what this Court's precedents forbid—to compel a religious institution to reinstate a discharged minister or to impose money damages as a penalty for his or her discharge. See *Hosanna-Tabor*, 565 U.S. at 188. In this way, the First Amendment would be reduced to little "more than a pleading requirement, and compliance with it to be [little] … more than an exercise in cleverness and imagination." Cf. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987).

C. This Case Offers An Ideal Vehicle for Resolving the Questions Presented.

No threshold obstacles like standing preclude review on the merits. Indeed, the essential facts necessary for review are undisputed. Reverend McRaney is an ordained Baptist minister. Both NAMB and the State Convention are Southern Baptist religious organizations. *See* Pet. 3. And McRaney's complaint contests NAMB's role in his removal along with its other actions in response to their dispute over church policy and church government. See Compl. at 6.

The questions presented have been thoroughly ventilated in the lower courts. Both the district court and the Fifth Circuit panel squarely addressed NAMB's assertion of church autonomy. *See* Pet. App. 1a, 26a, 37a. That panel decision was presented to the entire court of appeals for consideration. Although a bare majority of the court of appeals denied en banc review, Judge Ho and Judge Oldham authored detailed and thoughtful opinions in dissent. *See* Pet. App. 45a, 63a.

The Fifth Circuit's decision holds implications that are uncommonly clear. NAMB will endure discovery and further judicial proceedings, all of which robs it of

rights this Court has said the First Amendment guarantees. Even if NAMB ultimately prevails, it will have to endure judicial inquiries into its religious decision-making. Other faith communities will learn from NAMB's experience that, at least in the Fifth Circuit, the church autonomy doctrine is less reliable than this Court's precedents say. Denying review here could induce some faith communities to make internal management decisions with one eye toward the prospect of judicial review. Religious doctrine and canons of church government would then be distorted or even supplanted by perceived litigation risk.

Additional percolation is pointless and unwise. Lower courts are already in substantial disarray over the questions presented. *See* Pet. 24–33. Allowing further lower-court decision-making will not clarify the issues. Even if lower courts were not divided, review is warranted to resolve an outstanding question raised in *Hosanna-Tabor*—whether the First Amendment bars a tort suit by a minister who contests his discharge and related actions of a religious organization. We are convinced that the same reasoning that swayed the Court there ought to prevail here. Because the Constitution safeguards the right of religious organizations to select their own leaders and manage their own internal religious affairs, the First Amendment precludes McRaney's suit.

* * *

We end where we began—with the settled rule that the First Amendment bars judicial review of truly ecclesiastical matters like ministerial employment and disputes over church policy and government. Reverend McRaney's complaint unmistakably falls within that rule. His attempt to hold NAMB legally

responsible for his termination and for other administrative actions in response to his dissent over ministry strategy challenges NAMB's ability to carry out its religious mission. The Fifth Circuit's decision is a misstep with serious implications. It departs from this Court's precedents and offers an opportunity to resolve the validity of ministerial employment-related tort suits—an issue reserved in *Hosanna-Tabor*. The questions presented are exceptionally important to faith communities like *amici*. We therefore urge the Court to grant review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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March 18, 2021