McRaney vs. NAMB Oral Arguments
5th Circuit Court of Appeals
April 4, 2024

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Speakers:

- Court Reporter/Recorder
- Scott Gant attorney – McRaney
- Matthews Martens attorney – NAMB
- Chief Judge – Priscilla Richmond
- Judge – Andrew S. Oldham
- Judge – Irma Carrillo Ramirez (did not speak on mic in proceeding)

Link to audio recording of Oral Arguments: McRaney v. NAMB
https://www.ca5.uscourts.gov/OralArgRecordings/23/23-60494_4-4-2024.mp3?

Speaker 1 (court recorder) (00:00):

The first case on our docket this morning is 23 - 6 0 4 94 McRaney versus the North American Mission Board of the Southern Baptist Convention. Mr. Gant,

Speaker 2 (Scott Gant – attorney for McRaney) (00:10):

Good morning your honors. May I please the court Scott Gant from Boies Schiller and Flexner for Dr. Will McRaney, the District Court has now twice dismissed this case on the purported ground that there is a lack of subject matter jurisdiction even though the defendant NAMB has never made that argument below. In McRaney One, this court reversed explaining that the relevant question was whether resolution of claims will require the court to address purely ecclesiastical questions, that's from page 349 in McRaney One. That is still the relevant question today and the answer to that question is no. In order to adjudicate Dr. McRaney's claims which are now quite mature, this case was now dismissed a matter of weeks before trial was scheduled. It's clear looking at the record developed at the pleading which is different than the pleading that was before the court in McRaney One. The current pleading is in the record excerpts beginning of page 35.

(01:13): Gant

It was filed in December of 2022 entitled a Supplemental Pleading. It's clear that the answer to the relevant question is no for none of the six causes of action asserted in the operative pleading. Will the court be required to address purely ecclesiastical questions and that certainly the answer is no with respect to each of the six. The District Court in its order failed to address the claims one by one as is required and did not address the allegations in any detail. As I noted a moment ago, this case was dismissed the second time, a matter of weeks before trial. It was overseen almost entirely in the District Court before Magistrate Judge Sanders. The District court judge dismissed after fact discovery had concluded including discovery from BCMD, Dr. McRaney's former employer. During discovery there were no motions for protective order filed by NAMB nor did NAMB file any motions in limine on First Amendment grounds.

(02:18): Gant

The fact discovery was concluded. Expert discovery was concluded. Dr. McRaney submitted an expert report from a historian from Baylor named Dr. Hankins who's mentioned extensively in the briefing and also an economist who estimated actual damages. Summary Judgment briefing as you know was concluded and motion in limine briefing had been initiated. NAMB filed three motions in limine again none of them on First Amendment grounds. We responded to those and then the case was dismissed I believe two days before the Reply Brief some motions in limine were to be concluded and the parties also submitted their proposed final pretrial order to Judge Sanders electronically. So it's not in the record, but notably in that pretrial submission NAMB's portion told the court that this was "a relatively straightforward trial" and I agree that it was, this was an explanation of why only approximately one week was needed for trial. So if we look at the actual allegations, we look at the course of discovery, we could see what the court couldn't see in McRaney One, which is that there are no purely ecclesiastical questions to be decided.

(03:26): Gant

In fact, I contend that there are no ecclesiastical questions to be decided at all, purely or not, but surely not strictly and purely which is the language that I think originated in Watson and then made its way into this court's decision in McRaney One. This is not an ecclesiastical dispute nor is it an internal church dispute or a ministry dispute. Judge Oldham, I'm sure you've looked back at the opinion that you've wrote descending from the denial of her hearing in McRaney One, which is quite interesting read. I don't pretend to know what was in your mind when you wrote it, but I think it's possible that you were misled by the erroneous amicus brief that had been submitted to the court by

a co-agency of NAMB called the ERLC. The ERLC submitted a brief to this court, that made material misrepresentations to this court about the nature of Baptist polity. Those misrepresentations were conceded after the denial of rehearing four months after rehearing was denied.

(04:35): Gant

And as we pointed out in our briefing, we also informed the Supreme Court when NAMB petitioned for certiorari, these material misrepresentations were before the court at the time that the court decided rehearing, and again, I don't pretend to speak for Judge Oldham or Judge Ho or any of the other judges who dissented, but some of the statements in there about the nature of the case and the nature of Baptist polity were clearly wrong. They have been corrected, we hope based on the undisputed factual record, we could look at the undisputed opinion of Dr. Hankins. I think even the NAMB witnesses conceded that the brief was wrong in material respects. We have citations to the record those in our briefs and when we look at that, we see that this is not an internal dispute. Also it's telling, I think that the only amicus brief that was submitted by Baptist leaders in this case who are not parties to the case support Dr. McRaney, that's the Michelle Stratton brief, the amicus brief from current and past Baptist leaders, including notably someone named Morris Chapman. If you look at that brief and you look at the biography of each of the leaders, he was and is a long time very senior leader of the Southern Baptist Convention, which is the parent of NAMB. NAMB is an agency of the SBC and even he and the other leaders recognize that this is not an internal church dispute.

Speaker 3 (05:59): Judge Oldham

Mr. Gant, can you help me? I understand your point about the previous amicus brief and I hear you. The thing I'm not sure I understand is why it matters, right? The Beckett fund files an amicus brief and they say, okay, Baptist, there's no Baptist church, just Baptist churches. Well, the same could be true about the Muslim faith. The same could be true about the Jewish faith. At the end of the day it's an ecclesiastical dispute regardless of the nature of the Baptist polity. What's your response to that?

Speaker 2 (06:29): Gant

I think there are separate questions of whether it's an ecclesiastical dispute and whether it's an internal dispute. The reason why it matters whether it's internal is that under current, I submit Supreme Court and Fifth Circuit Law, the parameters of the doctrines are framed in a way where whether the dispute is internal makes an enormous difference. If we look at the ministerial exception cases, although the language of internal precedes those cases, and again there's this nomenclature issue. I

think you frame this as religious autonomy in your opinion. I actually agree that emphasis on autonomy matters(?), and this goes to the question of internal because autonomy is, I again looked it up the definition last night. It is self governance.

(07:20): Gant

So the doctrine is designed and I view the ministerial exceptions as a subset of the broader doctrine. You may or may not agree, but that's how I look at it. The doctrine is set up so it's protecting some of the activities within a religious institution. Of course church I think is not limited to Christianity, it's meant more broadly. It doesn't even have, it could be a different kind of religious institution, but the doctrine is limited. Certainly the ministerial exception is to internal decision making and that's for good reason, which is because if you have to, the doctrines depend on making judgments about the relationship between two separate religious organizations that are not part of the same entity. Then you run into what Justice Alito described in our Lady of Guadalupe where he rejected having the doctrine turn on judgments about whether people are co-religionists, which I think is what NAMB is essentially arguing here.

(08:22): Gant

They say, yes, we recognize the principle of autonomy, it's central to Baptist polity, but we are co-religionists so you should treat this as an internal dispute and I think that that's wrong for right, and I think that our Lady Guadalupe suggests that's wrong because Justice Alito's point for the court in our Lady of Guadalupe when he was asked was addressing arguments that are based on identifying co-Religionists who said that entangles us in religion in a way that we should not be involved figuring out whether people are co-religionists. So you mentioned some other religions think he asked the question, are Orthodox Jews and reform Jews, are they co-religionists?

Speaker 3 (09:00): Judge Oldham

Yeah, but one of the principles that comes out of all of that is that we don't want secular courts making judgment calls about sectarian disputes and it doesn't really have anything to do with the nature of the polity that's involved or the nature whether it's interior. I mean as you point out, and I'm not sure if it's right, I'm not sure if it's wrong, but let's just take it because it's your point, which is that the ministerial exception perhaps is a subset of a broader ecclesiastical autonomy doctrine. If that's true, then the broader doctrine is not just about interior or sort of disputes within a given religious organization about who's going to be the minister. It includes other things. And so one hypothetical that I'm curious to get your reaction to is imagine that there in the Jewish faith that there's a contract for the provision of kosher meat and the allegation of the

breach of the contract is, well, I have it on good faith authority that you did not butcher this particular animal, this group of animals in a kosher way is your position that we are then going to have secular courts making judgment calls about, well, let's talk about the particular circumstances in this particular butchering of this particular animal and we're going to have sort of expert reports about this is what it means to be kosher meat and this is how this animal was executed.

(10:14): Judge Oldham

That just strikes me that that is the kind of entanglement this doctrine is supposed to prevent.

Speaker 2 (10:18): Gant

I think the case law on the broader doctrine and certainly on the ministerial exception, just based on the way they've developed a lot turns on whether it's internal about the degree to which the courts are going to reflexively remain in or out of the dispute. But I would agree with you that there can be a non ministerial exception case where the doctrine could apply if it's clear that it will require the court to resolve a purely and strictly ecclesiastical dispute. Now, I'm not sure that it would in your hypothetical, and I can come up with hypotheticals where it clearly, I mean, let's take another Jewish example. You may be familiar, I mean it may not be limited to the Jewish tradition, but male circumcision at eight days after birth and that's often performed in the religious ceremony. It's performed by someone mole and let's say that mole comes in and is drunk and maims the young boys' genitals and the family wants to sue. This dispute arose out of a religious ceremony, and yet I would contend that if they want to bring a claim for a tort that is not requiring the court to engage, decide, or resolve or get embroiled in a religious dispute, and of course we can come up with hypotheticals that are all across the range.

Speaker 3 (11:40): Judge Oldham

I guess my only, the reason I'm pressing it is not because you can't show a given set of facts that it does or doesn't apply. I mean that's true about whether it's this jurisdictional or it's affirmative defense or whatever you want to think of the label that's going to go on it, it may or may not apply. My only point is that it certainly could apply outside of purely employment relationships, pure polities that look more like the Catholic church perhaps than the Baptist church.

Speaker 2 (12:06): Gant

I agree, there are facts where it could, but here importantly, and I see I'm quickly running out of time is on these facts. I think it's now clear given where we are that the resolution of Dr. McRaney six claims will not require the court to resolve purely

ecclesiastical disputes. I don't think for any of the six, I think the arguments for four through six, which are the post-termination claims are even weaker. So we would submit that none of them are required, but what the District Court didn't do and what courts are supposed to do generally with respect to jurisdiction and otherwise is to actually go claim by claim an allegation by allegation like with respect to freedom of speech. You can't come in and say, oh, this is a speech issue. The courts have to bow out. We've developed doctrine, the courts have developed doctrines over hundreds of years to figure out when that's a defense or when they can adjudicate it and when they can't, this needs to be a chisel and not a sledgehammer. And what the district court did was use a sledgehammer, misunderstanding the facts, misunderstanding the allegations and misunderstanding the law and resulted in a decision as we submit that is wrong in almost every material respect, most of which we haven't covered yet, but we'll rest on our briefs if we don't have time to address.

Speaker 3 (13:21): Judge Oldham

Well, I certainly will intervene on your behalf and ask the chief for additional time if there's points that you'd like to make. I'm sorry for the number of questions that I have, but I do have one more and it's about the termination claim. So I am looking at the SPA, which I gather is the beginning, perhaps the font, perhaps the central document in at least the way that the termination was happens, and this looks to me like a sectarian document from the beginning to the end. This is not the kind of commercial dispute that perhaps Bush Schiller normally handles where we're going to provide a certain number of widgets at a certain rate over a certain period and you fail to deliver whatever. I mean, I don't understand how as to this particular claim, any claim actually surrounding the SPA, we're going to ask a secular court to have expert reports about what it means to help each convention penetrate lostness, for example. These are important sectarian goals, but I am mystified by how one would have a breach claim on a provision agreement for penetrating lostness

Speaker 2 (14:25): Gant

If that were the claim and that were the relevant issue. I would agree with you. Again, I think we shouldn't look at the SPA as a monolith if what was at issue were the provisions about what lostness means or whether it exists or doesn't exist or was being remedied or not. I would agree that certainly starts to look like it's an ecclesiastical question, but the SPA is only relevant here and this is why it's so important to ground this in the actual allegations and the actual facts. The relevant provision of the SPA was the assertion that there was a breach, and we detailed this in our reply brief, so I'm sure you've read it, but refer you back to it again, NAMB central allegation of breach was that Dr. McRaney failed to consult with NAMB in the hiring of personnel that were jointly funded.

(15:17): Gant

That aspect of the SPA does not the court, that is not an ecclesiastical dispute. Just like I think in your dissenting opinion on rehearing, you made the observation. I'm not saying you've committed yourself to any position that maybe defamation is now and perhaps for a long time an inherently secular claim. So you need to look at what the actual allegations are. What Dr. McRaney is complaining about is not the provisions of the SPA that you cited. He's saying that it would be similar to as if the allegation here was NAMB said falsely that he had stolen money that was used for joint funding of the positions under the SPA and in fact it turned out it wasn't true and NAMB went around and told BCMD that he had stolen when that was false and told the world that he had stolen and then told him as we allege actually occurred here.

(16:05): Gant

Well, it's undisputed that NAMB called him a liar, that he was delusional. He was the only person whose photo was ever put up at NAMB and it was put up for the purposes of non-entry, which made the world understand that he was a persona non grata. So we need to look, so I agree with you that if some of those portions of the SPA that have the language that you're referring to were what was at issue, then it might start to look like the court would need to decide an ecclesiastical question. But neither the fact finder nor the judge here will have to decide any of those things. They have to decide whether or not it's true that Dr and I see my time's up. If I could finish my question, your Honor, whether it's true that Dr. McRaney failed to consult as required and we put in evidence in our reply brief that they're actually wrong about that, that he did actually consult. But to the core of your question, it doesn't require the court to resolve an ecclesiastical matter. I'm happy to sit down. I reserve some time for rebuttal. Thank you.

Speaker 4 (17:16): Martens

May it please the court, Matthew Martens for the appellee defendant North American Mission Board of the Southern Baptist Convention. This dispute is fundamentally a ministry dispute. Will McRaney, a Christian minister and leader of a religious organization, is asking a civil court to adjudicate how two cooperating Baptist organizations interacted concerning his work as it related to those organizations joint ministry. That's fundamentally the dispute here and respectfully, civil courts have no say in a dispute of that sort. There's at least two constitutional doctrines that compel that result, ecclesiastical abstention and ministerial exception. But before turning to those doctrines, I'd like to first highlight two data points that I think are relevant to both of those doctrines. The first data point is this, as demonstrated through the factual record developed on remand Baptists interact through voluntary cooperative relationships or associations between autonomous entities rather than through hierarchies. So for

example, hundreds of Baptist churches in Maryland partner together with each other to form BCMD.

(18:42): Martens

They do that voluntarily while maintaining their autonomy. Likewise, NAMB partners with dozens of those state conventions, again, they each maintain their autonomy in separate legal existence and yet they partner together in joint ministry. Messengers, individuals from individual Southern Baptist churches are appointed to attend the Southern Baptist Convention where with other members who all maintain their autonomy in their local churches nonetheless vote together on convention business. Second data point in the Supreme Court's decision in Watson v Jones in 1871, the court made clear that voluntary religious associations not merely churches are entitled to freedom in their governance. And more recently the Supreme Court affirmed that concept in both Hosanna Tabor and our Lady of Guadalupe, where the court explained that religious autonomy extends not only to churches but also to religious organizations of all sorts. And what the Watson Court makes clear is that if you as an individual choose to “unite” with a “voluntary religious organization association”, you are deemed to have impliedly consented to that association's governance.

(20:08): Martens

And I think the passage from Watson is critical. The court said the right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and for the ecclesiastical government of all the individual members, congregations and officers within the association is unquestioned. All who unite themselves to such a body do so with an implied consent to this government and are bound to submit to it. But it would be a vain consent and would lead to a total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. Pages 728 and 729 of Watson. That Watson decision is phrased as applying to voluntary religious associations of all sorts because the government cannot preference one religious organizational structure over another, particularly when that structure is of doctrinal significance and basis but

Speaker 1 (21:18): Chief Judge Richmond

Doesn't depend on the claim, don't you have to examine exactly what the claim is to see if you run into these principles.

Speaker 4 (21:26): Martens

So the ecclesiastical abstention doctrine could turn on the specifics of the case and I can talk about each of those claims here. So to take defamation, the claim of defamation is that Mr. Dr. McRaney was defamed when a claim was made that the SPA, the joint ministry document that defined the relationship between the two documents that literally governed the relationship between the two organizations was breached. You cannot decide whether someone was defamed with a statement that they breached a governance document without reaching a governance question. And that governance question, while my colleague Mr. Gant wants to say, well, it's just about whether he consulted appropriately. Well, consulting appropriately is part of the cooperation. In fact, the paragraph two under general principles of the SPA says, the strategic partner agreement shall be driven by shared values that reflect mutual respect and peer-to-peer relationship. These values include biblical authority, kingdom advancement partnership evangelism and missions, mutual accountability, autonomy of individual Baptist entities.

(22:44): Martens

And so to decide whether someone consulted appropriately in the hiring of a minister, whether they breached in the way they consulted, has to look back at these questions that are driving. To use the word of the strategic partnership agreement the cooperation. You cannot answer the question, did Dr. McRaney consult appropriately with NAMB without answering a governance question? You also can't answer it without answering a theological question. Dr. Warren testified that the document has to be interpreted and cannot be understood apart from an understanding of the Baptist Faith and Message 2000. The document itself makes that clear over and over. It states what the purpose of the document is, what the purpose of the partnership, what the purpose of the, to use Watson Word, voluntary religious association is namely to spread the gospel, to penetrate lostness, to advance the great commission. So you can't pull one clause out of it and say, well, that's the one you have to interpret because as with any document, any clause in it has to be interpreted in light of the document as a whole.

(23:51): Martens

So it is fundamentally a governance question because it is a governance document governing a voluntary religious association and it is, it would require theological determinations in order to interpret. So that's defamation. Tortious interference, the argument is the tortious interference was the defamation, was the statement that by NAMB, the alleged statement by NAMB to BCMD that Dr. McRaney had breached the SPA. So the same analysis applies to determine whether or not that conduct was tortious you'd have to answer was it false? If it's a true statement about him, there's no tortious interference. It ultimately comes back on the same question. And likewise, the

intentional infliction of emotional distress claim in claims one through three again turns on. Was there outrageous conduct a truth?

Speaker 1 (24:43): Chief Judge Richmond

Doesn't it depend again on the facts? For example, if consultation simply in the agreement was contemplated, I'm going to send you notice and give you 10 days to respond, and if you don't, I can hire this person that turns on whether the notice was sent and whether there was a response. I mean that to me could be argued without getting into any kind of ecclesiastical issues. It just doesn't depend on what's alleged.

Speaker 4 (25:11): Martens

So I would say I actually disagree with that because I think it's a governance question, but even if that's the case as to just a simple provision like notice when the whole premise of the way Baptists operate is through cooperative voluntary associations, a statement that someone breached the document by not interacting with one another appropriately by not consulting appropriately is necessarily a question about how Baptists should interact with one another.

Speaker 1 (25:41): Chief Judge Richmond

Well, if the grievance said we have to consult appropriately, that's probably correct, but if the grievance says you need to send me a written notice and I have X days to respond, if I don't respond, you're free to hire this person. I mean, it seems to me you could have a breach question of an agreement if we're talking about terms that don't require any kind of analysis of faith,

Speaker 4 (26:06): Martens

But it may not require, but that's not the only test. Respectfully, that's one of the tests is does it require a faith question? But the ecclesiastical abstention doctors also required when the question is one of governance. And so courts for example have said when you have to interpret, this is the Oklahoma case, we cite when you have to look at an underlying church governing document that describes how the church operates the book of order. I think it was the court said, we can't do that because answering that question would be interpreting a governance document. And that's the problem here is this document is governing the voluntary cooperative relationship between NAMB and BCMD and that governance question, regardless of whether it's a faith question, the governance question is beyond the bounds of the court and that's why the ecclesiastical abstention document doctrine as this court articulated it in McRaney One had to ask, does it raise governance questions? Does it raise faith questions? Does it raise doctrine questions? Any one of those would be sufficient to invoke the doctrine. We argue here

that there are faith and doctrine questions under the Baptist faith, the message, but even more fundamentally and easily, it's a governance question how these two interact is the definition of a governance question. And so the governance prong of the ecclesiastical abstention doctrine, we believe requires application of that.

Speaker 3 (27:33): Judge Oldham

Can we talk a little bit about where this doctrine fits into the broader taxonomy of federal courts? So I noticed this morning you're using federal ecclesiastical autonomy abstention. You're calling it an abstention doctrine.

Speaker 4 (27:49): Martens

There are lots of different phrases, ecclesiastical, abstention, church autonomy, religious autonomy. I'm treating them all as of a piece, getting at this idea that religious organizations govern themselves free from civil court interference.

Speaker 3 (28:03): Judge Oldham

So it strikes me that at least when we go to operationalize this, we have to figure out a way to make it work consistent with what the Supreme Court has said and consistent with the way that federal rules work. So on one hand, Watson speaks in jurisdictional terms that makes it sound like this is a 12 B 1. No different than saying the amount in controversy is below $75,000. Please dismiss if that were true, then obviously the plaintiff could refile in state court. If it's just a question of federal jurisdiction, just like every other 12 B 1 defense that I can think of, there's another forum open to the dispute, and it could be some of those 12 B 1 things are waivable, some of them are not.

Speaker 4 (28:47): Martens

I would actually say that's not quite true in this instance. So there's a doctrine called direct. It's a subset of collateral estoppel, called direct estoppel, which says that even if it's not a decision on the merits in one court, if there's a issue, decided that that issue is binding in the other court. And so I think it would be potentially sanctionable where this court to conclude to rule that there is a prohibition from civil courts adjudicating this matter.

Speaker 3 (29:20): Judge Oldham

Well, this is actually getting kind of at my concern, which is that absolutely could be true, but what I meant was that 12 B 1 motions generally, right, 12 B 1 motions generally if you win as the movant, then the plaintiff can refile somewhere else. It could look more like sovereign immunity or qualified immunity, right? So sovereign immunity makes some sense that the other courts and other judges across the country have said

now it's kind of like qualified immunity. It could look like abstention, right? Abstention doctrines really don't adjudicate anything, right? As you know, I mean if Pullman abstention, Younger (?) abstention, Colorado River abstention, those are non adjudications. And so I guess my biggest question for you is what is your preference for the way that this fits, how it gets moved? I should also have said there's also the affirmative defense thing that comes from footnote four and Hosanna Tabor, or how is it that you see this being operationalized and what are the doctrinal consequences of succeeding or failing?

Speaker 4 (30:18): Martens

So I have two concerns to be honest. As someone who's representing a party in this particular case, what I would prefer is a ruling from this court that puts this to an end and doesn't send us back to state court. And I've explained why I think under either 28 USC 2111, the harmless error provision or under a waiver theory or under a constitutional exception to 1477, that there could be a basis not to remand the jurisdictional question. I also have concern as somebody who just litigates religious liberty cases, which is that if you don't have it as a jurisdictional concept and it's merely an affirmative defense, it could be more difficult to raise it on a motion to dismiss and you could force religious organizations through extended litigation that is itself intrusive into the religious operations.

Speaker 3 (31:12): Judge Oldham

So I guess what I'm wondering is if it were treated sort of like qualified immunity, does that not address everything you just listed? And by that I mean you can move at the very beginning. You can say it's claim by claim. So that fixes some of the problems we've been talking about today. You say this is I have an immunity from this claim. I get collateral order review if it's denied, right? Just like you would in a QI case, it's an immunity from suit, right? So it prevents having this battle of experts about who penetrated lostness and who consulted in what way in the management document you see?

Speaker 4 (31:44): Martens

Yes. And that is one of the, I do agree that the court, if the court treat it is jurisdictional that allows the parties to raise it right at the outset of the motion to dismiss stage. One of the other options that I did think about this during preparation was that if it was like a qualified immunity and if this court gave direction to the district courts that when they hear cases of this type, they should in the first instance resolve the question of ecclesiastical abstention and or ministerial exception and have discovery limited to those issues at the outset with an opportunity, essentially a bifurcated proceeding, sort of like qualified immunity with the right of interlocutory appeal that could ameliorate

the concerns that were real here we were cross-examining a minister over his understanding of the Bible.

(32:33): Martens

I was forced to do that because of the posture and the court sending us back down to do that. But I can't say that that's something that I prefer or would like to see as the standard going forward. I do think that there should be a mechanism to try to limit the intrusion. I mean, we have 1200 pages of a record. We submitted internal minutes of meetings of religious bodies and their discussion, their prayer, their invocation of the Holy Spirit, I mean all of those things work real harm to religious organizations to subject those to examination by the courts. But this court respectfully sent us back down to do that. And so we followed that directive, but I am concerned about that posture. I also want to respond, and I think this is important, this discussion about internal decision making versus external decision making. To answer internal, you have to say internal to what?

(33:34): Martens

What's the bounds by which you decide internal, there's individual churches as part of the BCMD, but once they form in the BCMD decisions outside a church, but inside the BCMD could be internal, all the state conventions are themselves religiously are autonomous, both doctrinally and legally organizations. And yet they, in this instance, one of them BCMD joined into a partnership with NAMB. So when you ask internal, you have to say internal to that partnership. And in fact, that's exactly what the court at the fourth Circuit said in Bell versus Presbyterian Church. In that instance, 20 some different religious organizations, including the American Baptist churches, including the Presbyterian church, USA, including the United Methodist Church, all partnered together and funded a separate entity called Interfaith Action. And the fourth Circuit recognized that when you think about internal, it's not well internal to the United Methodist Church. In that context, it's internal to the interfaith joining together, the interfaith partnership.

(34:47): Martens

And so the court rejected on ecclesiastical abstention grounds efforts by the director of interfaith action to bring suit against one of the supporting organizations against the Presbyterian church and the other churches. So even though it was separate legal entities, frankly, separate faith traditions, the court recognized that internal in that context had to look at internal with regard to the voluntary Religious Association to use Watson's words that was formed in that context. And here, what Mr. McRaney wants to

do is say, look only at the Voluntary Religious Association of BCMD, and that's not the only voluntary religious association on site here. There's also a voluntary religious association between BCMD and NAMB. And what Watson recognizes is it's not only within an individual in that case congregation, but Watson references congregations who join together in an association here. It's not congregations, but the religious entities that are joining together.

(35:53): Martens

And so when Mr. McRaney puts so much effort or emphasis on the fact that he was an employee of BCMD and not of NAMB, legal employment status can't drive the application of these doctrines in many denominations, in many faith traditions, the ministers aren't employees at all. They're lay elders. They're volunteer ministers who hold other secular jobs but also hold offices in the church. And yet they're every bit as much ministers regardless of whether they're employees of the organization. The question isn't driven by legal employment relationship. It's not driven by what's the legal bounds of the entity that was the person's employer. The question is what is internal? What is the voluntary religious association that the dispute is internal to? And here, the Voluntary Religious Association is between NAMB and BCMD and Mr. McRaney having chosen to use Watson's words to unite himself to that organization is subject to its governance, unreviewable governance by this court. Thank you

Speaker 2 (37:10): Gant

Madam. Chief Judge, how much time do I have left? Do I have my full five minutes? Yes. Thank you. Okay, let's start off with the last Mr. Marten's first and last point about Watson and this notion of implied consent. I can hear the Baptist world jumping out of their seats at this. I direct you back to the Baptist leader amicus brief on this point, as Professor Hankins pointed out, there's very little that ties Baptist together. The one substantive thing that they agree on emphatically is the principle of autonomy. Mr. Marten seems to be suggesting that somehow because BCMD and NAMB agreed to do some work together, that Immunizes NAMB from claims by Dr. McRaney on the notion and he cites Watson for this notion of implied consent. The language in Watson says, all who unite themselves to such a body. What Watson was talking about with respect to implied consent was the reason why the court thought at that point in time that it should abstain or refrain from intervening in religious disputes.

(38:19): Gant

It said, okay, you have, and it's maybe borrowing ideas from Locke, you have decided to associate together in a group. And if you do that, you've impliedly consented to the

discipline process or the governance of that body. Dr. McRaney never submitted himself in any respect to NAMB. So NAMB'S reliance on the implied consent language and concept from Watson is entirely misplaced and an anathema to Baptist polity. With respect to McRaney one NAMB told the Supreme Court that it was erroneous and cited Bell urging the Supreme Court to observe, believe that there was a circuit split. The Supreme Court denied certiorari without any dissents, but then and now NAMB cannot win under existing Fifth Circuit and Supreme Court law with respect to the arguments that it's advancing here. It wants you to adopt a legal framework that has no support in this court's jurisprudence or the Supreme Court's jurisprudence.

(39:29): Gant

They're running away from a McRaney one, but it is the law of this circuit and well-reasoned it is consistent with Supreme Court jurisprudence on the doctrine, whatever name you want to apply to it, religious autonomy, church autonomy. It is fully consistent with it, but NAMB can't live with it because it doesn't allow them to do or escape in the way it wants to. Chief Judge Richmond, you are absolutely right in asking Mr. Martens don't we have to look at the claims. We have to look at the allegations. NAMB wants to do a broad brush. They want to say, ah, there's a whiff of religion in the air. You cannot inquire. But that's not what the courts are supposed to do. They're supposed to use the Colorado River Language Unflagging jurisdiction. To the extent that this is a jurisdictional exception or even a defense, it should be narrowly construed and done delicately just like it's done with respect to speech claims because the court, all the people of the country are entitled to constitutional protections.

(40:28): Gant

This is not a case where it's pro religion versus anti-religion. We've explained in our brief, Dr. Hankins has explained, the Baptist leader brief has explained that there's pro religion on both sides. NAMB's view would do violence to the religious liberty of people like Dr. McRaney and other people who want to work in religious settings. If you adopt NAMB'S view of the world, which is that you can have someone working for one organization have tortious conduct by a different organization and have the civil courts step aside and say, sorry, there's nothing we can do. We cannot apply neutral tort laws in order to adjudicate your claims. There can be scenarios where those tort claims could implicate purely and strictly ecclesiastical questions. I'm sure we can come up with both hypotheticals and probably comb the law books for real world examples of it, but this isn't one, and we know it isn't one.

(41:24): Gant

Now, based on the fully developed record, Mr. Marten says, oh, I spent time deposing Dr. McRaney about the Bible. Well, I sat through that deposition, I defended it. It was completely irrelevant, and we know it was irrelevant because not one iota of it that I can recall ended up in the summary judgment briefing. It was an exercise in intellectual stimulation by Mr. Martens who has an advanced degree, and I think it's theology, but I apologize if I've gotten it wrong. Mr. Martens is very smart and very interested in these issues, but that examination had nothing to do with the case. If you look at the actual allegations, this is a case about garden variety tortious conduct, and Dr. McRaney should be entitled to pursue his claims. But I encourage the court to look in detail, the actual claims and the actual allegations, including the citations to the record and our reply brief.

(42:16): Gant

And you'll see that there's no purely or strictly ecclesiastical question to decide at all, and certainly not with respect to all the causes of action. And finally, if I just may, I hope I haven't lost you yet, Judge Oldham, but certainly the best argument they have is that there's ecclesiastical issues with respect to claim one, the predetermination tortious interference because of the SPA issue. I've given you an explanation about why that's wrong, but even if they're correct about that, you need to go claim by claim claims four through six are post-termination. They have nothing to do with the SPA or the BCMD. So unless the court has further questions, I thank you for your time and indulge in me a few seconds extra. Thank you, counsel. Thank you.