IN THE SUPREME COURT OF INDIANA

Cause No. _____

STATE OF INDIANA on the relation of ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.,	)	
Relator,	)	Original Action from the Marion County Superior Court
vs.	)	Lower Court Cause No. 49D01-1907-PL-27728
THE MARION COUNTY SUPERIOR COURT and THE HONORABLE STEPHEN R. HEIMANN, as Special Judge thereof,	)	
Respondents.		

BRIEF IN SUPPORT OF RELATOR'S VERIFIED PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

Luke W. Goodrich
(*pro hac vice* pending)
Daniel H. Blomberg
(*pro hac vice* pending)
Christopher Pagliarella
(*pro hac vice* pending)
The Becket Fund for Religious Liberty
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
(202) 955-0095
lgoodrich@becketlaw.org
dblomberg@becketlaw.org
cpagliarella@becketlaw.org

John S. (Jay) Mercer
#11260-49
Fitzwater Mercer
One Indiana Square, Suite 1500
Indianapolis, IN 46204
(317) 636-3551
jsmercer@fitzwatermercer.com

Attorneys for Relator

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INTRODUCTION

Over 100 years ago, this Court recognized that "No power save that of the church can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authorities." *Dwenger v. Geary*, 14 N.E. 903, 908 (Ind. 1888). Similarly, the United States Supreme Court has long held that "civil courts exercise no jurisdiction" over cases involving "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871)). In this case, however, the trial judge is attempting to assert jurisdiction over just such a matter of ecclesiastical government: the power of the Archbishop of Indianapolis to declare what institutions qualify as Catholic.

In 2019, the Archbishop of Indianapolis issued an ecclesiastical directive to Cathedral High School stating that the Archdiocese would no longer recognize the school as Catholic unless, in accordance with Catholic canon law, the school required its teachers to abide by the Church's moral teachings. This ecclesiastical directive was issued pursuant to the Archbishop's canon-law duty to ensure that Catholic schools are "grounded in the principles of Catholic doctrine" and that Catholic teachers are "outstanding in correct doctrine and integrity of life." 1983 Code of Canon Law c.803, § 2. Recognizing that "no school is to bear the name Catholic school without the consent of competent ecclesiastical authority," *id.* c.803, § 3, Cathedral complied with the Archbishop's directive, stating that it "must follow the direct guidance given to us by Archbishop Thompson." (R.17) Cathedral then separated from a teacher who had entered a same-sex union in open violation of longstanding Catholic teaching.

The teacher then sued the Archdiocese—not Cathedral—alleging that the Archbishop's religious directive constituted "tortious interference" with his contract with

Cathedral. Thus, the lawsuit seeks to punish the Archdiocese for an internal church order telling Cathedral what rules it needed to follow to remain Catholic.

Such a lawsuit is plainly barred by the First Amendment. Accordingly, the Archdiocese moved for dismissal based on lack of jurisdiction and clear conflict with controlling First Amendment precedent. But the trial judge refused. The judge's order admitted that binding caselaw "preclude[s] courts from having jurisdiction . . . where the Court would be interfering with the highest authority within an ecclesiastical body." (R.552) Nevertheless, the judge speculated that because Cathedral might have been able to appeal the ecclesiastical directive to Rome—even though it chose not to—there is a "reasonable chance" that the Archdiocese was not "the highest ecclesiastical authority regarding this matter." (R.555) He therefore ordered the parties to conduct discovery into "the exact relationship between Cathedral and the Archdiocese." (R.553) The judge issued this order despite Plaintiff's concession that the Archdiocese had "control" over the "recognition of Cathedral as a Catholic school" (R.2), and despite undisputed testimony from a canon-law expert that the Archdiocese *is* the highest ecclesiastical authority regarding this matter. (R.588) The judge also refused to certify his order for interlocutory appeal—cutting off any potential remedy by appeal.

Beyond that, at Plaintiff's request, the judge has now ordered the Archdiocese to begin producing hundreds of pages of sensitive internal church documents that go far beyond the relationship between Cathedral and the Archdiocese—including information on how the Archdiocese has privately applied the Church's moral teachings in numerous matters of internal church discipline. The judge has already ordered the Archdiocese to produce those documents under seal to the court, overruling the Archdiocese's repeated objections based on caselaw recognizing such disclosure as irreparable harm to First Amendment rights. (R.531-35) And now that the judge has possession of the documents, he has indicated that he will likely turn them over to

Plaintiff after a hearing on Plaintiff's motion to compel—which would expand and compound the ongoing, irreparable harm. (R.692)

Indeed, to "underscore why [he] firmly believes that [Plaintiff] is entitled to discovery," the trial judge revealed that "he has personally known a priest who is gay" and was not "removed," and he encouraged Plaintiff to seek discovery into "[w]hat has happened with [the priest]," as well as "[w]hether there is significant enough difference between [the gay priest], who vowed to be celibate upon being ordained[,] and [Plaintiff] who is not only gay, but is also married to another gay person." (R.691-93) Nevertheless, the judge expressed his own view that "this potentially presumed distinction does not appear to be great," particularly because "[a]t this point, there has been no evidence that [Plaintiff] has engaged in sexual relations with his spouse," and "[the gay priest] has refused to disclose whether he has remained celibate or whether he does engage in sexual relations." (R.692-93)

* * *

This lawsuit intrudes directly on a matter of ecclesiastical government, and the trial judge was a under a clear, mandatory duty to refrain from exercising jurisdiction and dismiss the case. There is no legal basis for the trial judge to proceed—much less to order discovery into hundreds of pages of internal Church documents and into the personal lives of many individuals not before the court. The question of whether the Archbishop can "rightfully declare who is a Catholic" was settled long ago; it is "purely [a question] of church government and discipline, and must be determined by the proper ecclesiastical authorities." *Dwenger*, 14 N.E. at 908. The trial judge's extraordinary effort to exercise jurisdiction over that question now requires extraordinary relief to prevent irreparable harm.

Accordingly, the Archdiocese respectfully requests a writ of mandamus and prohibition against the trial court requiring dismissal of the case. Alternatively, the

Archdiocese requests a writ of mandamus and prohibition requiring recusal of the trial judge for multiple violations of the Code of Judicial Conduct.

FACTUAL BACKGROUND

A. The ecclesiastical relationship between the Archdiocese and Cathedral.

The Roman Catholic Archdiocese of Indianapolis, Inc. ("Archdiocese") is an Indiana nonprofit corporation that has served Catholics and the community of central and southern Indiana since 1834. (R.27) The Archdiocese is governed by the Archbishop of Indianapolis ("Archbishop"), currently Archbishop Charles C. Thompson, and is a constituent entity of the broader Roman Catholic Church. (R.27) Like all such constituent entities, the Archdiocese's activities are governed by the Canon Law of the Catholic Church. (R.27)

Cathedral Trustees, Inc., doing business as Cathedral High School ("Cathedral"), was founded as a Catholic high school in 1918 under the control of the Archdiocese of Indianapolis. (R.16) It separately incorporated in 1972, and it has retained its affiliation as a constituent entity of the Catholic Church. (R.16)

The relationship between the Archdiocese and Cathedral is governed by the Code of Canon Law. 1983 Code c.796–806. The Code recognizes that the Archbishop "has the right to watch over and visit the Catholic schools" within the Archdiocese and to issue "prescripts which pertain to the general regulation of Catholic schools." 1983 Code c.806, § 1. These precepts are binding: "no school is to bear the name Catholic school without the consent of competent ecclesiastical authority"—in this case, the Archbishop. *Id.* c.803, § 3. The Archbishop, likewise, must ensure that the education in Catholic schools is "grounded in the principles of Catholic doctrine" and that its "teachers are . . . outstanding in correct doctrine and integrity of life." 1983 Code c.803 § 2. Further details on the ecclesiastical relationship between the Archdiocese and Cathedral are set forth in the Affidavit of Father Joseph L. Newton. (R.583-88)

B. The duties of Catholic teachers.

The Catholic Church requires teachers at Catholic schools to "bear witness to Christ, the unique Teacher" by "their life as much as by their instruction." (R.28) These requirements were reflected in the "Cathedral Employee Handbook," and thereby incorporated into Plaintiff's contract with Cathedral. The Handbook states that teachers are expected to "[s]upport[] the teachings and traditions of the Roman Catholic Church," "[s]erve[] as a role model for a Christ-centered lifestyle," "[d]isplay[] a lifelong faith commitment," "[i]nfluence[] others through his/her roles as servant, shepherd, and steward," and "[e]mbrace[] the sacramental life of the school and encourage[] students to do the same." (R.49; *see* R.9 (complaint exhibit incorporating the contract))

The Handbook also incorporates a morals clause which states that teachers, as leaders in a "ministr[y] of the Catholic Church . . . teaching the Word of God," must be "credible witnesses of the Catholic faith" and "models of Christian values." (R.50) Accordingly, they are required in their "personal conduct" to "convey and be supportive of the teachings of the Catholic Church," as set forth "in the Catechism of the Catholic Church." (R.50) Finally, the Handbook provides that "[d]etermining whether a faculty member is conducting his/herself in accordance with the teachings of the Catholic Church is an internal Church/School matter and is at the discretion of the pastor, administrator, and/or Archbishop." (R.50-51)

The official job description for Catholic teachers within the Archdiocese, as set forth in February 2016, states that teachers are expected to contribute to the religious formation of their students in the following ways:

- "Prays with and for students, families and colleagues and their intentions. Plans and celebrates liturgies and prayer services"
- "Teaches and celebrates Catholic traditions and all observances in the Liturgical Year."
- "Models Jesus, the Master Teacher, in what He taught, how He lived, and how He treated others."

- "Communicates the Catholic faith to students by direct teaching of Religion and/or, as appropriate, by the integration[] of moral values in all curriculum areas."
- "Conveys the Church's message and carries out its mission by modeling a Christ-centered life."
- "Participates in religious instruction and Catholic formation, including Christian services, offered at the school."
- "Participates in spiritual retreats, days of reflection, and spiritual formation programs as directed by the principal and as required by Archdiocesan faith formation expectations"

(R.75-76) This document likewise sets forth the requirement that teachers in Plaintiff's position, as "vital ministers" of the school ministry, "must convey and be supportive of the teachings of the Catholic Church." (R.77-78)

As incorporated in Cathedral's Handbook, the Catechism of the Catholic Church describes the Church's well-known, millennia-old teaching that marriage is between one man and one woman. (R.29) Thus, the 2016 job description for teachers emphasizes that they must, in word and deed, "convey and be supportive of . . . the belief that all persons are called to respecting human sexuality and its expression in the Sacrament of Marriage as a sign of God's love and fidelity to His Church." (R.77-78)

The Archdiocese likewise directs its schools to provide teachers with a 'Teaching Ministry Contract" that includes as grounds for default (1) "any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church," and (2) any "[r]elationships that are contrary to a valid marriage as seen through the eyes of the Catholic Church" (R.79-81 (2018–19 Ministry Contract))

C. The ecclesiastical directive from the Archbishop.

Plaintiff Joshua Payne-Elliott was a language and social studies teacher at Cathedral. (R.2) In 2017, he entered a same-sex marriage in violation of Catholic Church teaching. (R.2) The Archdiocese then engaged in "22 months of earnest discussion and

extensive dialogue" with Cathedral, to discern the most appropriate pastoral response based on canon law and Catholic teaching. (R.16)

To fulfill his ecclesiastical obligations under Canon 803, the Archbishop issued an ecclesiastical directive to Cathedral, informing it that if it wished to remain Catholic, "it needed to adopt and enforce morals clause language used in teacher contracts at Archdiocesan schools," (R.2-3)—meaning that Cathedral could not continue employing teachers who lived in open, unrepentant violation of Church teaching. Based on its desire to remain Catholic, Cathedral complied with this directive. (R.5) On June 23, 2019, Cathedral's leadership published a letter to the school community stating "[i]t is Archbishop Thompson's responsibility to oversee faith and morals as related to Catholic identity within the Archdiocese of Indianapolis," that "our Catholic faith is at the core of who we are and what we teach at Cathedral," and that "in order to remain a Catholic Holy Cross School, Cathedral must follow the direct guidance given to us by Archbishop Thompson and separate from the [Plaintiff]." (R.16-17)

D. The lawsuit.

After the separation, Payne-Elliott filed a complaint with the Equal Employment Opportunity Commission and reached a substantial monetary settlement with Cathedral. (R.521) Plaintiff then sued the Archdiocese, alleging that the Archbishop's religious directive to Cathedral was illegal under Indiana law.

Specifically, the Complaint alleged that under Catholic canon law, "[t]he Archdiocese exercises significant control over Cathedral, including, but not limited to, its recognition of Cathedral as a Catholic school." (R.2) And by exercising that control in a way that was "not justified," the Archbishop's ecclesiastical directive constituted intentional interference with Plaintiff's contractual relationship with Cathedral and intentional interference with his employment relationship. (R.5-6) The Complaint demands a jury trial, compensatory damages, emotional distress damages, punitive damages, and attorneys' fees. (R.5-6)

E. Procedural history.

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

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

(R.98, 100, 113-14, 121)

On August 21, the Archdiocese moved to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim. T.R.12(B)(1), (6). The motion identified three independent First Amendment grounds imposing an absolute duty to dismiss the case: interference with church autonomy, infringement of freedom of expressive association, and violation of the ministerial exception. (R.25-45) On the same day, the Archdiocese also moved for a protective order staying discovery until resolution of the motion to dismiss, based on the First Amendment protection from disclosure of certain internal church documents. (R.84-92)

On September 25, the United States Department of Justice filed a Statement of Interest stating that "[t]he First Amendment demands that this lawsuit be dismissed." (R.254) As the Department explained, Plaintiff's suit would require the Court to "'second-guess[] the Archdiocese's interpretation and application of Catholic law" and would "interfer[e] with the Archdiocese's right to expressive association," both in clear violation of the First Amendment and controlling precedent. (R.253-54)

Before ruling on the motion to dismiss, the court on September 10, 2019, denied the Archdiocese's motion for protective order staying discovery. (R.138) Plaintiff then filed a motion to compel, and the court ordered the Archdiocese, over the Archdiocese's prior objections and before the Archdiocese filed its response to the motion, to produce to the court hundreds of pages of internal Church documents it had marked as privileged under the First Amendment. (R.416-17, R.531-35) The court likewise issued an order compelling discovery from nonparty Cathedral High School to Plaintiff, and ordering that other documents be produced to the Court, over Cathedral's First Amendment objections. (R.525-30)

On December 5, the judge emailed the parties saying, "I feel that there is a pretty realistic possibility that it can be settled with both sides benefitting. I've spent many a night wrestling this matter through my head and have come up with a proposal that will benefit both sides." (R.817-18) On January 6, 2020, the Court set a settlement conference, which was held February 7. (R.544) At the conference, the judge announced for the first time that he would conduct the conference by engaging in alternating *ex parte* communications with the parties and their counsel. (Certified Tr. 4-5; R.807)

Following the brief session on the record, the judge met *ex parte* with counsel for the Archdiocese and its client representative. (R.808) In that meeting, the judge stated that the Archdiocese should remember that the Catholic Church was "wrong on slavery" as well as "Galileo" and should try not to drive young people away from the Church in a changing time. (R.808) The judge also warned the Archdiocese that, whatever the merits of its legal arguments, the law on religious liberty is "in flux" and that "Trump could implode." (R.808)

After those prefaces, the judge offered his own settlement proposal based on a conflict involving a different Catholic school in Indiana—Brebeuf Jesuit Preparatory School. Brebeuf, like Cathedral, employed a teacher in a same-sex marriage and was

given an ecclesiastical directive from the Archbishop. (R.808) But unlike Cathedral, Brebeuf disobeyed the Archbishop's directive, was de-recognized as Catholic, and filed a canon-law appeal with the Vatican. (R.3; R.808) Drawing on his personal knowledge of the Brebeuf controversy—which was not described in the parties' briefing—the judge proposed a settlement agreement that would condition liability in this civil case on the outcome of the canon-law case at the Vatican. (R.808-09) Specifically, the judge proposed that if the Vatican sided with the Archbishop, the case would be dismissed, and the Plaintiff would take nothing; but if the Vatican sided with Brebeuf, the Archdiocese would be liable for damages and attorneys' fees. (R.808-09) After talking *ex parte* with Plaintiff's counsel, the judge informed the Archdiocese that Plaintiff was willing to accept the judge's settlement proposal. (R.809)

The Archdiocese, however, believed that the judge's proposal raised significant church–state problems by entangling a civil-court proceeding with a canon-law proceeding and by impermissibly placing civil judicial pressure on the Vatican's religious decisionmaking process. (R.809) The Archdiocese also believed that the judge's proposal rested on a mistaken view of the ecclesiastical status of Brebeuf and Cathedral, which are canonically different. Counsel informed the judge that they had consulted with the Archbishop by telephone and did not have authority to agree to such a settlement but were willing to consider other proposals. The judge then became visibly angry, began yelling, and said that he had ordered the Archdiocese to bring to the settlement conference a party representative with authority to resolve the case. (R.809) He then asked why the Archbishop was not in attendance. (R.809-10) When counsel said that the client representative had full authority to resolve the case, the judge threatened that if the Archbishop did not come to the courtroom by 1:00 pm—within a matter of hours—he would find the Archdiocese and Archbishop in contempt. (R.809-10) In reply, the Archdiocese stated that it was not possible for the Archbishop to come to the courtroom by 1:00 pm because he was in another state, and the judge

left the room. (R.810) The settlement conference concluded without agreement. (R.810)

On May 1, the judge denied the Archdiocese's Motion to Dismiss without a hearing. (R.565) Despite extensive briefing by the parties, the court's opinion rested on an argument that Plaintiff had never presented—namely, that it was "unknown" whether the Archdiocese was "the highest ecclesiastical authority" with respect to the ecclesiastical directive telling Cathedral what actions it needed to take to remain Catholic. (R.554-55) This theory was not presented by Plaintiff's briefing and was in conflict with Plaintiff's complaint, which alleged that the Archdiocese exercised "control" over "recognition of Cathedral as a Catholic school." (R.2) And in rejecting the Archdiocese's argument on church autonomy, the opinion reasoned that "some entities within some ecclesiastical bodies formerly were slaveholders," but "[t]oday, this would certainly not be permitted . . . ." (R.552)

Because the court denied the Motion to Dismiss without a hearing and on a theory not raised by the parties, the Archdiocese filed a motion to reconsider, explaining why the trial judge's theory was foreclosed by binding precedent. (R.567-80) And because the court had expressed uncertainty about the canon-law relationship between the Archbishop and Cathedral, the Archdiocese included a declaration by a canon lawyer addressing the court's stated uncertainty about whether the Archdiocese was the "highest ecclesiastical authority" in this matter. (R.583-88) That declaration addressed the court's confusion about the ecclesiastical status of Brebeuf and Cathedral and explained why, under canon law, the Archbishop was the highest ecclesiastical authority in the matters at issue. Specifically, because Cathedral is a "private association of the faithful," it is subject to the "governance" of the Archbishop. (R.587) And because Cathedral obeyed the Archbishop's ecclesiastical directive, there was nothing as a matter of canon law that Cathedral could "appeal" to Rome. (R.585-86) The trial court denied the motion for reconsideration by operation of rule without issuing an

opinion. However, the judge stated in a later opinion that he "did not consider[]" the canon lawyer's declaration. (R.688)

The Archdiocese then sought certification of the order denying the motion to dismiss so that it could pursue an interlocutory appeal. On June 10, 2020, while the certification motion was pending, the judge sent an email to counsel for the parties and the United States Department of Justice urging the parties to consider settlement. Noting that "I've been thinking about the current situation relating to racism," the email said that "church doctrine," "church autonomy," and the "law as it relates to individual's rights" are "no longer set in bedrock." (R.819-21)

Next, stating that "I AM NOT ATTEMPTING TO FORCE YOU TO SETTLE" (capitalization in original), the judge again proposed having the parties settle the case by agreeing to tie liability to "the decision from Rome regarding Brebeuf." (R.819-21) Specifically, he proposed that "[i]f Rome sides with the Archdiocese, then this matter is dismissed and completely resolved. If Rome sides with Brebeuf, then the issue of damages would be forwarded to an independent Arbitrator to determine appropriate damages." (R.819-21) Further, he suggested that "[i]f Rome rules in a fashion where both Plaintiff and Defendant herein believe that their side prevailed, then you could assign that issue to the arbitrator, or allow the judge herein to resolve it." (R.819-21) The judge stated he would decide the motion for certification only if the parties did not agree to his proposal by June 24. (R.819-21)

With the Archdiocese unwilling to agree to his proposal, the judge on June 29 issued an order denying certification. (R.688-93) In his order, the judge stated that the Archdiocese's concerns about the continued subjection of its religious beliefs and decision-making to judicial process and discovery were unfounded, because the parties "will have the opportunity to seek an appeal after a decision on summary judgment (which is 99.9999999999999% likely to occur)." (R.690) After that statement, the judge introduced new information which he noted Plaintiff "may not be aware of,"

as it was information not provided to the Court by any party. (R.691) The judge stated that he "came to know" a priest named Fr. Raymond Shafer as one of his pastors at his "home parish" in Columbus; that Fr. Shafer "is gay" and was "permitted . . . to retire early" following a sabbatical; and that Fr. Shafer's treatment "may well be relevant" to Plaintiff's claims. (R.691-93 & n.i) Accordingly, the judge encouraged the Plaintiff to seek discovery into "[w]hat has happened with [the priest]." (R.692) The judge further elaborated that "Fr. Shafer has refused to disclose whether he has remained celibate or whether he does engage in sexual relations." (R.692-93) And the judge said that even if Fr. Shafer could be presumed celibate, and Plaintiff presumed not to be (given his spouse), "the potentially presumed distinction does not appear to be great." (R.692-93)

With no avenue for immediate appeal, and facing the irreparable loss of its First Amendment rights, the Archdiocese on July 7 requested a certified record and transcript so it could file this original action. The Archdiocese also filed a motion to recuse the trial judge based on multiple violations of the Code of Judicial Conduct. (R.783-821)

On July 8, the judge set a discovery hearing for August 24, 2020 (R.696), at which the judge indicated he would determine which of the hundreds of pages of internal church documents will be provided to the Plaintiff over the Archdiocese's First Amendment objections—having already "underscore[d] why this Court firmly believes that Payne-Elliott is entitled to discovery" into, for example, the past internal discipline applied to the judge's former parish pastor. (R.691)

With no action from the trial court on the Archdiocese's request for the certified record and transcript, the Archdiocese requested the certified record and transcript again on July 16. Due to delay by the trial court, the record was not certified until August 12. The trial judge also withheld his certification of the transcript until August 13. (J. Certif. of Tr. at 1)

Also on August 13, the trial judge issued an order setting an August 24 hearing on the Archdiocese's recusal motion, stating that he "has given strong thought to recusing" and would like to "try to come to some agreement about some recusal issues" in advance of a "jury trial, if needed." (R.834-35) The order also noted that discovery issues remain "outstanding." (R.835) However, the court did not notify the parties of this order until August 14.

That day, the Archdiocese requested that the clerk's office re-certify the record to include this new order, which it did. The Archdiocese filed this original action the next business day.

STANDARD OF REVIEW

"This Court has exclusive, original jurisdiction to supervise the exercise of jurisdiction by other Indiana courts." *State v. Marion Super. Ct.*, 54 N.E.3d 995 (Ind. 2016) (citing Ind. Const. art. 7, § 4). Pursuant to this supervisory authority, the Court may issue a writ of prohibition "upon a showing that the respondent court is attempting to act or is acting without jurisdiction," *State ex rel. Wonderly v. Allen Cir. Ct.*, 412 N.E.2d 1209, 1211 (Ind. 1980), or a writ of mandamus upon a showing that "a trial court is under an absolute duty to act or refrain from acting." *State ex rel. Coleman v. Hendricks Super. Ct. II*, 396 N.E.2d 111, 111-12 (Ind. 1979); Ind. Original Action Rule 2(A). Original actions "are viewed with disfavor and may not be used as substitutes for appeals." *State ex rel. W.A. v. Marion Cty. Super. Ct.*, 704 N.E.2d 477, 478 (Ind. 1998) (quoting Ind. Original Action Rule 2(E)). However, where "the normal appellate process is unavailable, inadequate, or incomplete as an avenue for seeking appellate redress," and where "the denial of the writ would result in extreme hardship," a writ is appropriate. *State ex rel. Petty v. Super. Ct. of Marion Cty.*, 378 N.E.2d 822, 822-23 (Ind. 1978); *see also* Ind. Original Action Rule 3(A)(5), (6) ("the remedy available by appeal will be wholly inadequate" and "the denial of the application will result in extreme hardship").

"An original action may be pursued *whenever* a trial court exceeds its jurisdiction." *State ex rel. Paynter v. Marion Cty. Super. Ct.*, 344 N.E.2d 846, 851 (Ind. 1976) (citing *State ex rel. Ely v. Allen Cir. Ct.*, 304 N.E.2d 777 (Ind. 1973)) (emphasis added). This Court has issued writs to bar the exercise of jurisdiction by an inferior court acting without such jurisdiction in a variety of circumstances. *See, e.g.*, *State ex rel. Curley v. Lake Cir. Ct.*, 899 N.E.2d 1271, 1273 (Ind. 2008) (granting writ to resolve jurisdictional conflict); *State ex rel. Camden v. Gibson Cir. Ct.*, 640 N.E.2d 696, 702 (Ind. 1994) (granting writ to block exercise of jurisdiction by court lacking subject matter jurisdiction); *State ex rel. Ely*, 304 N.E.2d at 779-80 (resolving dispute as to whether personal jurisdiction was properly obtained; writ of prohibition and writ of mandate made permanent).

A writ of mandamus is also available "where the trial judge has failed to perform a clear, absolute, and imperative duty imposed by law." *State ex rel. Koppe v. Cass Cir. Ct.*, 723 N.E.2d 866, 869 (Ind. 2000). This Court has granted such writs where the "duty imposed by law" arose by statute, *State ex rel. Commons v. Pera*, 987 N.E.2d 1074, 1080 (Ind. 2013) (granting writ to require compliance with Ind. Code. § 33-33-45-21(e)), by rule, *Marion Super. Ct.*, 54 N.E.3d 995 (granting writ to require compliance with Ind. Trial R. 76(C)(3)), or by precedent, *State ex rel. Crawford v. Del. Cir. Ct.*, 655 N.E.2d 499, 500-01 (Ind. 1995) (applying rule from *State ex rel. Miller v. Reeves*, 120 N.E.2d 409 (Ind. 1954), to recount proceedings); *State ex rel. Meade v. Marshall Super. Ct. II*, 644 N.E.2d 87, 88-89 (Ind. 1994) (applying rule from *State ex rel. Int'l Harvester Co. v. Allen Cir. Ct.*, 352 N.E.2d 487, 489-90 (Ind. 1976), permitting a party to move for dismissal under Ind. Trial R. 12(B)(2) on the grounds that an action pending in another Indiana court is "substantially the same").

LEGAL ARGUMENT

I. The trial court was under an absolute duty to refrain from exercising jurisdiction and to dismiss this ecclesiastical dispute.

The underlying lawsuit seeks to enlist the judiciary to punish the Archdiocese for telling a religious school what rules it needs to follow to be Catholic. But binding First Amendment precedent—under the church-autonomy doctrine, freedom of association, and the ministerial exception—mandates that "civil courts exercise no jurisdiction" over matters of "ecclesiastical government." *Milivojevich*, 426 U.S. at 713-14. Accordingly, the trial court had an absolute duty to dismiss Plaintiffs' claims—justifying a writ of mandamus and prohibition from this Court ordering it to do so now. *See Camden*, 640 N.E.2d at 697.

A. Dismissal was required under the First Amendment doctrine of church autonomy.

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

In applying the doctrine, the key question is whether the lawsuit's subject is a matter of "theological controversy, church discipline, [or] ecclesiastical government." *Watson*, 80 U.S. (13 Wall.) 733. If so, the court's duty is clear: it must "dismiss." *Stewart v. McCray*, 135 N.E.3d 1012, 1029 (Ind. Ct. App. 2019). "Religious questions are

to be answered by religious bodies." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013). So when a plaintiff's claim challenges an essentially ecclesiastical decision, the court "cannot review or question" it; it must dismiss the case. *Dwenger*, 14 N.E. at 908 (dismissing state contract claim); *Stewart*, 135 N.E.3d at 1025-29 (dismissing state tort claim); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655-59 (10th Cir. 2002) (dismissing federal employment-discrimination claim).

Plaintiff's lawsuit on its face trenches on church autonomy. Plaintiff seeks to invoke state tort law to punish the Archdiocese for issuing an ecclesiastical directive telling a Catholic school what religious guidelines it needed to follow to be Catholic. But whether and on what terms an Archbishop recognizes another organization as Catholic is a matter of "church discipline" and "ecclesiastical government," *Watson*, 80 U.S. (13 Wall.) at 733—"not the proper subject of civil court inquiry," *Milivojevich*, 426 U.S. at 709, 713; *see Dwenger*, 14 N.E. at 908 ("No power save that of the church can rightfully declare who is a Catholic."). The trial court therefore had "a clear, absolute, and imperative duty" to dismiss this case, justifying mandamus. *Koppe*, 723 N.E.2d at 869; *see Dwenger*, 14 N.E. at 908; *Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007) (tort claim that "unconstitutionally impinges upon internal matters of church governance . . . affirmatively negates the court's subject-matter jurisdiction"); *Myhre v. Seventh-day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928 (11th Cir. 2018) ("Civil courts lack jurisdiction to entertain disputes involving church doctrine and polity."), *cert. denied*, 139 S. Ct. 175; *Byrd v. DeVeaux*, No. CV-DKC-17-3251, 2019 WL 1017602, at *7 (D. Md. Mar. 4, 2019) (same); Victor E. Schwartz & Christopher Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. Cin. L. Rev. 431, 461-75 (2011) (collecting cases where tort claims "conflict[ed] with the church autonomy doctrine").

Multiple Indiana decisions binding on the trial court require this result. Twice Indiana courts have confronted lawsuits on indistinguishable fact patterns from this

case. *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003), *cert. denied*, 541 U.S. 902 (2004); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999). And twice Indiana courts have held that adjudicating those disputes would violate church autonomy—requiring dismissal.

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

Second, in *McEnroy*, a Catholic seminary professor was removed after she publicly opposed the Pope's teaching on women's ordination. 713 N.E.2d at 335-36. The professor then sued the Archabbot for tortious interference, because he had directed the seminary's president to remove the professor on the ground that the professor's actions rendered her "seriously deficient" as a teacher under "the Church's canon law." *Id.* at 336. But the Court of Appeals affirmed the trial court's dismissal for lack of jurisdiction. Resolving the professor's claim, the court explained, would require the court to determine whether her conduct caused her to be "seriously deficient" as a teacher as a matter of Church doctrine, and whether the Archabbot "properly exercised his jurisdiction over" the seminary. *Id.* at 336-37. The claim would thus "clearly and excessively entangle" the trial court "in religious affairs." *Id.* at 337.

Brazauskas and *McEnroy* are dispositive of this case. Both cases—like this one—involved an employee (or prospective employee) of a Catholic educational institution.

In both cases—like this one—the employee brought a claim of tortious interference not simply against the employer but against the Church body that exercised its ecclesiastical authority to bring about the adverse employment action. And in both cases, the court held that resolving that claim would require impermissible interference by civil courts "in matters of church discipline, faith, practice and religious law," *McEnroy*, 713 N.E.2d at 336, mandating dismissal under "the church autonomy doctrine," *Brazauskas*, 796 N.E.2d at 294. *Brazauskas* and *McEnroy* imposed a clear duty on the trial court to reach the same result here. *See Crawford*, 655 N.E.2d at 500-01; *Meade*, 644 N.E.2d at 88-89.

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

Moreover, here, unlike in *Brazauskas* and *McEnroy*, the question whether adjudicating Plaintiff's claims would require the court to "entangle [itself] in religious matters" isn't merely hypothetical. *Cf. McEnroy*, 713 N.E.2d at 335. To the contrary, the trial court has *already* begun doing so. The judge has indicated that Plaintiff may attempt to prove his claim by showing disparate treatment of a "gay" priest known personally to the judge, reasoning that although the priest, unlike Plaintiff, "vowed

to be celibate," this "presumed distinction does not appear to be great." (R.692-93) Beyond that, Plaintiff has acknowledged that he intends to prove that other Archdiocesan employees violated other Church teachings—such as prohibitions on "divorce and re-marriage without annulment, unmarried co-habitation, marriage without the sacrament, or other practices" (R.185)—and that it is "unjustified" for the Archdiocese to draw distinctions between these behaviors and entering a same-sex union.

But whether these various situations are comparable for the Archdiocese's purposes is a "religious question[]" outside the competence of civil courts, *Korte*, 735 F.3d at 678—and indeed one that Church teaching answers in the negative. Courts "have no business" independently interpreting religious doctrines, much less telling the religious party himself "that [his] beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 450 (1969) ("Plainly, the First Amendment forbids civil courts from" "interpret[ing] particular church doctrines and the importance of those doctrines to the religion."). And multiple courts have recognized that it "would violate the First Amendment" to have a civil court "assess the relative severity of [religious] offenses." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 139 (3d Cir. 2006); *see also Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000) ("If a particular religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory.").

Finally, although *Brazauskas* and *McEnroy* are dispositive here, they aren't alone. This Court first recognized that the Constitution bars civil courts from interfering in questions of church discipline more than 120 years ago. *Dwenger*, 14 N.E. 903. In *Dwenger*, the plaintiff claimed a contractual right to bury his son in a Catholic cemetery, despite the church declaring the son "forfeited his membership" in the church and rights to such burial by "a failure to observe [church] doctrines." *Id.* at 905. But

this Court held that the church could establish "rules [for] the government of [its] cemetery" and that "[t]he court, having no ecclesiastical jurisdiction, cannot review or question ordinary acts of church discipline" like withdrawing membership in the broader church. *Id.* at 908-09. The same principle requires dismissal here: the Archdiocese has established "rules [for] the government of [Catholic schools]," and the trial court lacks jurisdiction to second-guess the Archdiocese's decision to tell Cathedral that only schools that abide by those rules are "rightfully declare[d] . . . Catholic." *Id.* at 908.

In refusing to dismiss this case, the trial court had little to say about any of this. The court didn't even attempt to distinguish this Court's two on-point decisions, *Brazauskas* and *Dwenger* (R.550-57), though both were briefed extensively (R.26, 36-38, 219-20). Nor did it dispute the general proposition that the First Amendment "preclude[s] courts from having jurisdiction" over ecclesiastical disputes. (R.552) Instead, it concluded that this principle didn't apply in this case because Cathedral might have had "the ability to 'appeal' to Rome." (R.554-55) If so, the court reasoned, the Archdiocese would not have been "the highest ecclesiastical authority regarding this matter." (R.555) And without further discovery on that issue—including on questions like "What is the relationship between Cathedral and the Archdiocese?", "What is the relationship between the Archdiocese and the Roman Catholic Church?", and "What is the relationship between Cathedral and the Roman Catholic Church?"—the court said dismissal of Plaintiffs' interference claims would be inappropriate. (R.552, 555-56, 561)

This was a theory the trial judge invented *sua sponte*. Plaintiff never disputed the Archdiocese's authority to set the terms by which Cathedral would be recognized as Catholic, but instead conceded the opposite—that the Archdiocese has "control" over "recognition of Cathedral as a Catholic school." (R.2) This concession makes sense, for if the Archdiocese *didn't* have authority to tell Cathedral what rules it needed to

follow to be recognized as a Catholic school, then the Archdiocese's alleged "directive" to Cathedral would have been meaningless—dooming Plaintiff's own legal theory that his termination was the "result of" the Archdiocese's issuing it. (R.5-6) This concession is also consistent with the only evidence on this point—the uncontested affidavit of a canon-law expert explaining why the Archbishop is, in fact, the highest authority in this matter under canon law. (R.585-88)

More to the point, the judge's theory is mistaken as a matter of First Amendment law. The church-autonomy doctrine is indeed sometimes articulated as requiring deference to the "highe[st ecclesiastical] authority." (R.553) (quoting *Watson*, 80 U.S. at 722)). But the trial judge quoted only half of the governing rule—courts must defer to "the highest of [the] church judicatories *to which the matter has been carried*." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012) (emphasis added) (quoting *Watson*, 80 U.S. at 727); *accord Ramsey v. Hicks*, 91 N.E. 344, 349 (Ind. 1910). In other words, the issue (where relevant) isn't whether any higher ecclesiastical authority *exists*; it's whether any higher ecclesiastical authority made a contrary decision. Otherwise, Catholic defendants would be entitled to protection under the church-autonomy doctrine only if the challenged decisionmaker were the Pope—a result that would defy both common sense and *Brazauskas* (diocese), *McEnroy* (Archabbot), and *Dwenger* (bishop).

Plaintiff makes no allegation that Cathedral "carried" the matter of the alleged directive to any religious body other than the Archbishop. *Hosanna-Tabor*, 565 U.S. at 185-86. To the contrary, the Complaint reflects that Cathedral responded by stating that it "must follow the direct guidance given to us by Archbishop Thompson." (R.16) Thus, the church-autonomy doctrine applies with full force to the Archdiocese's decision.

Beyond that, the trial court's proposed independent inquiry into the Archdiocese's ecclesiastical authority to issue the alleged directive would itself violate the First

Amendment. Just as the First Amendment prohibits a civil court from second-guessing a religious body's substantive ecclesiastical decisions, it *also* prohibits civil courts from determining whether the decisionmaking process "compl[ied] with [the] church's own rules or practices." *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994). Such an inquiry would require the court to "probe deeply enough into the allocation of power within a (hierarchical) church" to decide "religious law," which is impermissible. *Milivojevich*, 426 U.S. at 709 (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)). Or, as the Sixth Circuit put it: "requir[ing] a civil court to conduct a review of ecclesiastical law to determine which tribunal is the highest . . . is exactly the sort of inquiry that the First Amendment forbids." *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 943 (6th Cir. 1992). Thus, whether a church authority "properly exercised [its] jurisdiction" is itself a matter of "ecclesiastical law" outside a civil court's jurisdiction. *McEnroy*, 713 N.E.2d at 337; *see also* (R.252-54) (United States' Statement of Interest).

For precisely these reasons, neither *Brazauskas* nor *McEnroy* even mentioned, must less turned on, any inquiry into whether the plaintiffs there could "'appeal' to Rome." (R.554-55) Quite the opposite: in *Brazauskas*, this Court explicitly rejected the trial judge's theory, holding that *regardless* of whether the diocese there had "decisive influence" over Notre Dame's hiring decision, "our conclusion would be the same." 796 N.E.2d at 293 n.5. Accordingly, the trial judge's reframing of the question in this case—from whether the Archdiocese's directive was unjustified as a matter of tort law (Plaintiff's theory) to whether the Archdiocese had ecclesiastical authority to issue it (the trial judge's)—doesn't change the result: the trial court had an absolute

duty to refrain from exercising jurisdiction and to dismiss this case under the church-autonomy doctrine and this Court's unambiguous precedent.[1]

B. Dismissal was required under the First Amendment right of expressive association.

Plaintiff's claims are also barred by the First Amendment right of expressive association—an independent constitutional basis for the trial court's "clear, absolute, and imperative duty" to dismiss this case. *Koppe*, 723 N.E.2d at 869.

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

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[1] Some cases question whether dismissal under the church-autonomy doctrine is more appropriate under Rule 12(B)(1) or under Rule 12(B)(6). *Brazauskas* said at least some church-autonomy defenses are not resolved under 12(B)(1). *See* 796 N.E.2d at 289-90. However, many Indiana cases (before and after *Brazauskas*), U.S. Supreme Court cases, and cases from other jurisdictions say that church autonomy is a matter of "jurisdiction," is a form of immunity from suit, or both. *See Stewart*, 135 N.E.3d at 1026-27; (R.35-38, R.217-18 (collecting cases)). This likely reflects the fact that "[j]urisdiction . . . is a word of many, too many, meanings." *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (internal quotation marks and citation omitted). But the issue is irrelevant here. Regardless whether church autonomy is best raised by 12(B)(1) or 12(B)(6), entertaining a suit barred by the doctrine is an example of a court deciding an issue that is "not the proper subject of civil court inquiry" and over which "civil courts exercise no jurisdiction," *Milivojevich*, 426 U.S. at 713-14—which is precisely the sort of overstepping that warrants mandamus. *See Crawford*, 655 N.E.2d at 500-01; *Meade*, 644 N.E.2d at 88-89; *see also* (R.217-18) (noting this point).

The right of expressive association protects a wide variety of groups. It protects the right of political parties to select their own leaders, *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989), members, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008), and primary voters, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574–75 (2000). It protects the affiliation choices of voters themselves. *See Ray v. State Election Bd.,* 422 N.E.2d 714, 723 (Ind. Ct. App. 1981). It protects the right of parade organizers to exclude a group with an unwanted message. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 581 (1995). It protects the right of "a private club [to] exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581. And it protects the right of the Boy Scouts to exclude a scout leader who undermines the Scouts' message on human sexuality. *Boy Scouts v. Dale*, 530 U.S. 640, 659 (2000).

It also protects the right of a religious group to decline to select leaders and members who disagree with its religious views on human sexuality. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir 2006). This includes the right of a Catholic school to select teachers who do not oppose its views on abortion. *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). If anything, religious groups receive heightened protection for their religious associations, because the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189; *id.* at 200 (Alito, J., joined by Kagan, J., concurring) (noting that the Court's "expressive-association cases" are useful in understanding "those essential rights").

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

First, the Archdiocese obviously engages in "some form of expression." It has a clear message on the nature of marriage that has remained unchanged for 2,000 years. It operates Catholic schools that are designed to communicate the Catholic faith, including the Church's teaching on marriage, to the next generation. And it communicates with those schools to ensure that they are fulfilling their mission of teaching the Catholic faith.

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

Second, punishing the Archdiocese for telling Cathedral what rules it needed to follow in order to remain Catholic would "significantly affect the [Archdiocese's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 641, 650. The judiciary must "give deference to an association's view of what would impair its expression." *Id.* at 653. Here, the impairment is twofold. First, punishing the Archdiocese impairs its ability to establish rules for which ministries qualify as Catholic. That is precisely the kind of "interfer[ence] with the internal organization or affairs of the group" forbidden by the right of expressive association. *See Walker*, 453 F.3d at 861 (quoting

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

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

The trial court didn't contest the Archdiocese's showing on either of these two elements of the expressive-association analysis set out by *Dale*. Instead—correctly noting that the Archdiocese had cited "numerous cases regarding this doctrine" but declining to "go[] through each and every" one of them, (R.561-62)—it rejected the expressive-association argument for two other reasons, neither persuasive.

First, the trial court attempted to distinguish the Archdiocese's precedent *en masse*, arguing that "[e]ach of these cases deals with the enforcement of a law," and "[i]n many of the cases, the State is seeking to enforce the law." (R.561-62) But that

is no distinction at all; to state the obvious, the Indiana tort law invoked by Plaintiff here is "law" and the trial court is part of "the State." And indeed, any notion that freedom of association doesn't apply to lawsuits brought by private plaintiffs invoking state tort law is squarely foreclosed by precedent. The U.S. Supreme Court has held that "[t]he Free Speech Clause of the First Amendment"—the source of the expressive-association right—"can serve as a defense in state tort suits." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). And it has *applied* expressive association to dismiss suits brought by private plaintiffs asserting the very same tortious-interference claims that Plaintiff asserts here. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982); *accord, e.g., Krystkowiak v. W.O. Brisben Companies, Inc.,* 90 P.3d 859, 861 (Colo. 2004); *cf. Paul v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987) ("Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred."). So this argument casts no doubt on the trial court's clear duty to dismiss this case.

Second, the trial court suggested that expressive association doesn't apply because this case "is not about the Archdiocese kicking out [Plaintiff] or excluding [him] from entering into a relationship with the Archdiocese." (R.562) But according to Plaintiff, that's exactly what this case is about—the very point of Plaintiff's lawsuit is that the Archdiocese's actions allegedly ended his "relationship" with Cathedral, which in turn is "control[led]" by the Archdiocese. (R.2, 5-6) Moreover, the trial court's argument overlooks entirely the *other* association affected by this lawsuit—that between the Archdiocese *and Cathedral*. Plaintiff seeks to hold the Archdiocese liable for stating the terms on which it would continue to recognize Cathedral as a fellow representative of the Catholic Church. That is a straightforward example of the Archdiocese exercising its "freedom not to associate" "presuppose[d]" by the First Amendment,

Roberts, 468 U.S. at 623, and for the trial court to punish it for doing so would significantly affect its ability to communicate—to central and southern Indiana and to the world—the moral teachings of the Catholic faith. Freedom of association is fully implicated by this lawsuit.

In short, just as political parties, parades, private clubs, and the Boy Scouts can exclude those who interfere with their message (*Lopez Torres*, *Hurley*, *Dale*), the Archdiocese can exclude teachers (and schools) who reject its religious message. The trial court thus had an absolute duty to dismiss this case—justifying a writ from this Court requiring it to do so.

C. Dismissal was required under the ministerial exception.

The trial judge also had a duty to dismiss this case under the ministerial exception. The ministerial exception is a First Amendment doctrine that bars certain "claims . . . between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188. Tortious-interference claims like Plaintiffs' are among the claims covered by the exception. *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330 (4th Cir. 1997); *see Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) ("The ministerial exception . . . operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."). And teachers like Plaintiff—teachers on whom the Church "rel[ies] to do th[e] work" of "educating young people in th[e] faith"—fall within the exception. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055, 2064 (2020). Plaintiffs' lawsuit is thus barred.

Hosanna-Tabor is the seminal case. There, an elementary teacher at a Lutheran school sued the school for employment discrimination. But the Supreme Court held that the claim was barred by the ministerial exception. 565 U.S. at 178. Given the teacher's religious title and her "role in conveying the Church's message and carrying out its mission," the Court unanimously held that she was a "minister." *Id.* at 192. It

concluded that "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" requires that "[t]he church must be free to choose those who will guide it on its way." *Id.* at 196. Justices Kagan and Alito observed by separate concurrence that "the constitutional guarantee of religious freedom" necessarily protects religious groups' rights "to choose the personnel who are essential to the performance" of "the critical process of communicating the faith" such as "teacher[s]." *Id.* at 199 (Alito, J., joined by Kagan, J., concurring); *see NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) (noting "the critical and unique role of the teacher in fulfilling the mission of a church-operated school").

Following *Hosanna-Tabor*, numerous federal courts—including the Seventh Circuit—determined that *Hosanna-Tabor* applied to teachers serving in religious schools, even when they lacked the formal religious title or substantial religious training of the *Hosanna-Tabor* plaintiff. *See, e.g., Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658-62 (7th Cir. 2018) (Hebrew teacher at Jewish day school); *Ciurleo v. St. Regis Par.*, 214 F. Supp. 3d 647, 649-52 (E.D. Mich. 2016) (Catholic elementary-school teacher). In *Our Lady*, the U.S. Supreme Court agreed. *Our Lady* involved two "lay" teachers at Catholic schools. 140 S. Ct. at 2056. The teachers "were not given the title of 'minister' and ha[d] less religious training than" the *Hosanna-Tabor* plaintiff. *Id.* at 2055. But the Court nonetheless determined that they fell within the exception. *Id.* The Court explained that "that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2064. Thus, because the plaintiffs' "employment agreements and faculty handbooks specified in no uncertain terms that [the plaintiffs] were expected to help the schools carry out this mission," "judicial intervention" into their dispute would violate the First Amendment. *Id.* at 2066, 2069.

Here, Plaintiff's "employment agreement[] and faculty handbook[]" show that he, too, was "entrust[ed] . . . with the responsibility of educating and forming students in" the Archdiocese's faith. *Id.* at 2069. Cathedral's employee handbook, incorporated into Plaintiff's contract, tasked Plaintiff with "leading [his] students toward Christian maturity and with teaching the Word of God," encouraging his students' participation in the Catholic sacraments (the center of Catholic worship), and supporting and modeling Catholic teaching. (R.49-50) Plaintiff has offered no allegation that these were not his duties or that he wasn't expected to carry them out. (R.192-94) To entertain this suit then "would undermine" the Archdiocese's "independence . . . in a way that the First Amendment does not tolerate." *Our Lady*, 140 S. Ct. at 2055.

The trial judge offered two reasons for rejecting the Archdiocese's ministerial-exception argument, both unavailing. First, the trial judge stated that the ministerial-exception issue "is tangled up with the issue of whether the decision to terminate [Plaintiff] was made by the highest ecclesiastical authority" because the Archdiocese may not have had the ecclesiastical "authority to terminate [Plaintiff] or to discipline him." (R.562-64) But again, the trial judge's "highest ecclesiastical authority" theory is both inconsistent with the First Amendment and self-defeating, for if the Archdiocese lacked the authority to issue the ecclesiastical directive in this case, then it couldn't have caused Plaintiff's firing. *Supra* at 21-22. Either way this case would require dismissal. *Cf. Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (applying ministerial exception to dismiss suit against both school employer and diocese without conducting any "highest ecclesiastical authority" inquiry); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (same); *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 918 (N.D. Ohio 2002) (same).

Second, the trial judge argued that the ministerial exception might not apply because discovery might show that Plaintiff was not fired for "violating his position as a minister" but "for some other reason." (R.564-65) But *Hosanna-Tabor* already

rejected this precise argument, saying that it "misses the point of the ministerial exception." 565 U.S. at 194. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason," but to "ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone." *Id.* at 194-95; *see also Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (under the ministerial exception, "[t]he church need not . . . proffer any religious justification for its decision"; "the only question is that of the appropriate characterization of [the plaintiff's] position"). Any ambiguity about the reason for Cathedral's actions—though in fact there is none—is therefore irrelevant.[2]

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

[2] The trial judge suggested that Cathedral might have separated from Plaintiff because, if the Archdiocese no longer recognized it as a Catholic school, it would lose "its tax-exempt status." (R.556-57) But private schools of course do not have to be Catholic in order to be tax-exempt; they can simply apply for 501(c)(3) status like any other nonprofit. (R.574-75 & n.2) Unsurprisingly, Plaintiff himself has since "agree[d] with the Archdiocese that Cathedral's tax-exempt status was not actually in jeopardy." (R.611 n.3)

was under an absolute duty to refrain from exercising jurisdiction over this core ecclesiastical decision, and mandamus is thus required.

II. Denial of the application would result in extreme hardship that cannot be remedied by appeal.

The trial court's exercise of jurisdiction has also imposed ongoing, extreme hardship that cannot be remedied by appeal. That hardship takes three forms: (1) irreparable loss of the Archdiocese's immunity from suit; (2) irreparable loss of First Amendment protections for internal church communications; and (3) irreparable entanglement of a civil court in ecclesiastical questions.

1. Loss of immunity. The Supreme Court has warned that "the very process of inquiry" into internal church affairs can "impinge on rights guaranteed by the religion clauses." *Catholic Bishop of Chi.*, 440 U.S. at 502; *Milivojevich*, 426 U.S. at 718 (a civil court's "detailed review of the evidence" regarding internal church procedures is "impermissible" under the First Amendment). Thus, lower courts have repeatedly recognized that the doctrine of church autonomy operates not only as a defense against "an adverse judgment," but also as an "immunity from the travails of a trial." *McCarthy*, 714 F.3d at 975 ("closely akin to a denial of official immunity"); *see also*, *e.g.*, *Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (church autonomy renders defendant "immune not only from liability, but also 'from the burdens of defending the action'"); *United Methodist Church, Balt. Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990) (church autonomy "grant[s] churches an immunity from civil discovery and trial").

As an immunity from suit, church autonomy "must be reviewed pretrial or it can never be reviewed at all." *White*, 571 A.2d at 793; *cf. Fort Wayne Cmty. Sch. v. Haney*, 94 N.E.3d 325, 331 (Ind. Ct. App. 2018) (immunity defenses must be reviewed at the threshold to protect defendants from "unnecessary and burdensome discovery or trial proceedings"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold

immunity question is resolved, discovery should not be allowed."). If the church-autonomy defense is denied, it must be "immediately appealable even in the absence of a final judgment." *Edwards*, 566 S.W.3d at 180. Otherwise, this immunity is "effectively lost." *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002). And if a claim falls within the scope of church autonomy, yet the court allows it to proceed "to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated." *White*, 571 A.2d at 793. The failure to protect this immunity "results in a substantial miscarriage of justice," *Edwards*, 566 S.W.3d at 179—which is the precise hardship standard for mandamus under Indiana law. *State ex rel. W.A.*, 704 N.E.2d at 478-79 (Ind. 1998) ("substantial injustice"); *accord Edwards*, 566 S.W.3d at 179 (granting mandamus review).

Here, the court not only refused to dismiss this suit on church-autonomy grounds when it was under a duty to do so, but also took the unusual step of denying certification—thus foreclosing any possibility of immediate appeal. *See Ind. Area Found. of United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174, 1177 (Ind. Ct. App. 2011) (church-autonomy defense certified for interlocutory appeal); *cf. Marceaux v. Lafayette City-Par. Consolidated Gov't*, 731 F.3d 488, 490 (5th Cir. 2013) (courts have "repeatedly" allowed interlocutory appeal when "pre-trial orders arguably infringe on First Amendment rights"). Thus, absent this Court's intervention, this First Amendment immunity will be "irreparably lost," *White*, 571 A.2d at 792, which is a "substantial miscarriage of justice" warranting mandamus. *Edwards*, 566 S.W.3d at 179.

2. Exposure of internal church communications. Beyond the loss of immunity, this Court's intervention is needed to halt the irreparable loss of the Archdiocese's First Amendment protections for internal church communications. As numerous courts have recognized, even when a religious defendant is not immune from suit—as the Archdiocese is here—the "structural protection afforded religious organizations" under the First Amendment limits discovery into the "internal

communications" of a church. *Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018), *cert denied sub nom. Whole Woman's Health v. Tex. Conference of Catholic Bishops*, 139 S. Ct. 1170 (2019); *see also*, *e.g.*, *Universidad Cent. De Bayamon v. NLRB*, 793 F.2d 383, 401-02 (1st Cir. 1985) (Breyer, J., concurring) (Religion Clauses forbid inquiry into "confidential communications among church officials"). Even in contexts less sensitive than those of church and state, the U.S. Supreme Court has "repeatedly" warned that governmentally "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). It is thus "well established" that state power should not be lightly employed to "troll[ ] through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

Whole Woman's Health is instructive. There, in a lawsuit challenging Texas's fetal-remains law, the abortion-rights plaintiff issued a subpoena seeking the Texas Catholic Conference of Bishops' "internal email communications" about the law. 896 F.3d at 373. The bishops resisted, invoking First Amendment protections for their internal communications. The Fifth Circuit held that the subpoena must be quashed, reasoning that subjecting the bishops to discovery "undermined" their "ability to conduct frank internal dialogue." 896 F.3d at 373.

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

those in same-sex unions. *See* (R.98, 113-14, 121) The judge has already compelled the Archdiocese to hand over *all* of these sensitive internal communications on doctrine, canon law, and church discipline for its *in camera* review—in violation of the Supreme Court's holding that a *court's* "detailed review of the evidence" regarding internal church procedures is "impermissible under the First [Amendment]." *Milivojevich*, 426 U.S. at 717-18; *see also Whole Woman's Health*, 896 F.3d at 373 (*in camera* review designed "to parse the internal communications" "seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause."). Beyond that, the judge set a discovery hearing for August 24, making clear that "this Court firmly believes that Payne-Elliott is entitled to discovery," and even suggesting a new line of discovery that "Payne-Elliott may not be aware of"—namely, "the treatment" of the "Associate Pastor at the Special Judge's parish," whom the judge knows "personally," "who is gay," and who (according to the judge) was not "remove[d]" by the Archdiocese. (R.691-93 & n.i). Absent this Court's intervention, the lower court is poised to order disclosure of a host of internal church documents in a clear and irreparable violation of the First Amendment.

3. Judicial entanglement in religious questions. Lastly, the harm here is not just the ongoing and irreparable harm to the Archdiocese from violation of its First Amendment rights; it is also the harm to the *judiciary* from unconstitutional entanglement in religious questions. A civil court has an independent duty "not [to] allow itself to get dragged into a religious controversy." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006); *see McCarthy* 714 F.3d at 976 (the mixing of "religious and secular justice would violate . . . the First Amendment, which forbids the government to make religious judgments"). This is because the Religion Clauses set "constitutional limits on judicial authority" requiring courts to avoid "entangle[ment] . . . in religious doctrine." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 116, 118 & n.4 (3d Cir. 2018). This "structural limitation" "categorically

prohibits" the judiciary "from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *see also Our Lady*, 140 S. Ct. at 2069 (courts must avoid inquiries that "would risk judicial entanglement in religious issues"). "[S]uch a governmental intrusion into religious affairs" causes "irreparable" harm. *McCarthy*, 714 F.3d at 976.

Here, the trial court has announced it will decide a core question of ecclesiastical governance—whether the Archdiocese has final ecclesiastical authority over Cathedral. (R.555) The court has attempted to pressure the Archdiocese into a settlement agreement that conditions liability in this civil proceeding on the outcome of a canon law proceeding in the Holy See. (R.819-21) And the court has intruded on a religious question by opining that the distinction between celibacy and sexual activity outside Catholic marriage "does not appear to be great," despite the opposite view of the Catechism of the Catholic Church. (R.692-93) Beyond that, Plaintiff has made clear that he intends to invite the court (or a jury) to decide whether the Catholic Church has treated different violations of Church teaching differently and, if so, whether such different treatment is justified. (R.185) These are precisely the sort of religious questions a civil court is forbidden to resolve. *See Curay-Cramer*, 450 F.3d at 139 (judicial weighing of "relative severity of offenses . . . would violate the First Amendment").

* * *

None of these harms—the irreparable loss of First Amendment immunity, the impermissible intrusion on internal church communications, and the entanglement of the court in religious questions—can be remedied by appeal, because the trial court cut off the only avenue for immediate appeal by denying certification. Nor is this a matter of compensating the Archdiocese for wasted time or financial injury; the harm is the Archdiocese being "irrevocably deprived" of its right to operate its purely ecclesiastical affairs without government intrusion and to protect its sensitive internal deliberations from ongoing disclosure to Respondents or Plaintiff. *See McCarthy*, 714

F.3d at 975. That bell cannot be unrung. To avoid extreme harm to both the Archdiocese and to the judiciary itself, the trial court must be ordered to dismiss this case.

III. In the alternative, the Court should order disqualification.

Although dismissal is required, should this Court decline to issue a writ ordering dismissal, it should nonetheless issue a writ disqualifying Special Judge Heimann for multiple violations of the Code of Judicial Conduct. (R.783-821) (recusal motion)

Disqualification is often raised on appeal rather than through original action. *See State ex rel. Robinson v. Grant Super. Ct. No. 1*, 471 N.E.2d 302, 303 (Ind. 1984). But this principle isn't without exceptions. To the contrary, this Court regularly issues writs to disqualify where a party's right to the judge's disqualification is established by reference to a mandatory, objective standard. *See, e.g.*, *State ex rel. Crawford,* 655 N.E.2d 499; *State ex rel. Gosnell v. Cass Cir. Ct.*, 577 N.E.2d 957 (Ind. 1991). In these situations—unlike when the decision to recuse is "within the trial court's discretion," *Robinson*, 471 N.E.2d at 303—the Court has determined that it is "more equitable to" act by timely writ "rather than to foment additional judicial work and litigation costs" by waiting for an appeal, *State ex rel. Hahn v. Howard Cir. Ct.*, 571 N.E.2d 540, 541 (Ind. 1991).

This extraordinary case warrants disqualification by writ. As described above and elaborated on in the Verified Motion for Recusal currently pending before the trial court (R.783-821), Judge Heimann's actions throughout this case have created ample "basis for doubting [his] impartiality." *L.G. v. S.L.*, 88 N.E.3d 1069, 1071 (Ind. 2018). Judge Heimann has pressured the Archdiocese—including through *ex parte* communications—to agree to a bizarre, religiously entangling settlement linking the outcome of this case to that of a separate ecclesiastical proceeding before the Vatican. *Cf.* Code of Judicial Conduct ("CJC") Rule 2.6, 2.9(A). He has repeatedly associated the Archdiocese's religious beliefs about marriage and sexuality with "slavery," "racism," and the controversy over "Galileo." (R.808, 819-21) *Cf.* CJC Rule 2.4(B); *Masterpiece*

Cakeshop v. Colo. Human Rights Comm'n, 138 S. Ct. 1719, 1729-30 (2018) ("compar[ing] . . . sincerely held religious beliefs" about same-sex marriage "to defenses of slavery" and other odious historical incidents is inconsistent with "fair and neutral enforcement" of civil rights law). And he rescued this case from dismissal only by "transform[ing]" it, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581-82 (2020), denying the Archdiocese's motion to dismiss based on a theory of the case entirely of his own devising and contrary to that of the Plaintiff. *Cf.* CJC Rule 2.2.

Beyond that, Judge Heimann has conducted independent research to support Plaintiff's claims, inspired by his undisclosed personal knowledge about facts potentially relevant to this case. *Cf.* CJC Rule 2.9(C). This ground for disqualification is mandatory and objective. *Matter of Adoption of Johnson*, 612 N.E.2d 569, 572 (Ind. Ct. App. 1993) ("a judge's personal knowledge acquired through extra judicial sources requires recusal" where knowledge is relevant to the case); *Stivers v. Knox Cty. Dep't of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. Ct. App. 1985) (use of such "extrajudicial sources" raises issues of "fundamental error" requiring recusal). And it's indisputably met here. In his Order Denying Certification, Judge Heimann revealed that he had a pastoral relationship with a priest in his own former parish who announced that he was gay and was affected by the Archdiocese's policies on human sexuality. (R.688-93) Judge Heimann acknowledged that this information had not come from the facts presented in this case, telling Plaintiff he "may not be aware of" it and that it "may well be relevant." (R.691-93) And he conceded that he "confirm[ed]" his personal recollection of the mater by conducting independent, online research (without revealing his sources).

It's hard to imagine a clearer example of a judge "investigat[ing] facts in a matter independently" in violation of the Code of Judicial Conduct. CJC Rule 2.9(C). And mandatory recusal is particularly appropriate here where the online investigation was prompted by Judge Heimann's previously undisclosed, personal relationship

with his former "home parish" pastor arguably affected by the same Archdiocesan standards regarding sexual conduct and morality at issue in this case. (R.693 n.i) The potential conflicts arising from this relationship are obvious. *See Bloomington Magazine, Inc. v. Kiang*, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012) (recusal required where judge declined to disclose "relevant" relationship before trial). But at the outset of this case Judge Heimann chose to disclose only that he was a Roman Catholic churchgoer, declining to reveal this far more salient information until well after denial of the motion to dismiss. His decision to then research the issue further and offer the fruits to bolster Plaintiff's case makes the necessary result here clear: This case must be dismissed, but if it isn't, the trial judge must be ordered to recuse.[3]

CONCLUSION

The Archdiocese respectfully requests that this Court issue writs of mandamus and prohibition ordering the trial court to dismiss this case. In the alternative, the trial judge must be ordered to recuse.

[3] The day before this original action was to be filed, the trial judge issued an order stating that he "has given strong thought to recusing" and wants to "try to come to some agreement about some recusal issues" at a hearing on August 24. (R.834-35) If the trial judge recuses himself, the request for a writ mandating recusal may become moot. However, it remains to be seen whether the judge will recuse himself, and even if he does, a writ of mandamus and prohibition ordering the trial court to dismiss this case is still required.

Respectfully submitted,

FITZWATER MERCER

/s/ John S. (Jay) Mercer

By: John S. (Jay) Mercer
#11260-49
FITZWATER MERCER
One Indiana Square, Suite 1500
Indianapolis, IN 46204
(317) 636-3551
jsmercer@fitzwatermercer.com

Luke W. Goodrich (*pro hac vice* pending)
Daniel H. Blomberg (*pro hac vice* pending)
Christopher Pagliarella (*pro hac vice* pending)
The Becket Fund for Religious Liberty
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
(202) 955-0095
lgoodrich@becketlaw.org
dblomberg@becketlaw.org
cpagliarella@becketlaw.org

Attorneys for Relator

ORIGINAL ACTION RULE 3(B) APPENDIX

As contemplated by Original Action Rule 3(B), the Relator sets for the relevant parts of the following authorities that (as shown in the accompanying brief) support issuance of the Writ.

***Dwenger v. Geary*,**
14 N.E. 903 (Ind. 1888)

"No power save that of the church can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authorities. *White Lick Quarterly, etc., v. White Lick*, 89 Ind. 136. In discussing this subject, it was said by the court in *Smith v. Nelson*, 18 Vt. 511: 'The court, having no ecclesiastical jurisdiction, cannot review or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church.'"

***Brazauskas v. Fort Wayne-South Bend Diocese*,**
796 N.E.2d 286, 294 (Ind. 2003)

"Brazauskas would have us apply the blacklisting statute and tort law to penalize communication and coordination among church officials (all answerable to higher church authority that has directed them to work cooperatively) on a matter of internal church policy and administration that did not culminate in any illegal act. Such a holding would violate the church autonomy doctrine and run counter to the Court's declaration in *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1939): 'The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.'"

***McEnroy v. St. Meinrad Sch. of Theology*,**
713 N.E.2d 334, 337 (Ind. Ct. App. 1999)

"We observe, however, that the parties agreed before the trial court the Faculty Handbook, which includes among other things the Statement on Governance, was also incorporated into the contract at trial. In light of the Statement on Governance, resolution of Dr. McEnroy's claims would require the trial court

to interpret and apply religious doctrine and ecclesiastical law. At a minimum, the trial court would have to determine whether: (1) Archabbot Sweeney properly exercised his jurisdiction over Saint Meinrad, (2) Dr. McEnroy's conduct constituted public dissent or caused her to be 'seriously deficient,' and (3) canon law required Archabbot Sweeney to remove Dr. Sweeney from her teaching position. Because the trial court would be clearly and excessively entangled in religious affairs in violation of the First Amendment, we find no error."

***Stewart v. McCray*,**
135 N.E.3d 1012, 1029 (Ind. App. 2019)

"The instant matter arises from Rev. Stewart's suspension from his pastoral duties for his alleged failure to act in accordance with the Church's Bylaws. Regardless of whether the parties, at times, failed to adhere to the Church's Bylaws, at bottom, this is a dispute over the Church's leadership. As such, this matter, at its core, is purely ecclesiastical and one which the trial court lacked subject matter jurisdiction to adjudicate."

***Watson v. Jones*,**
80 U.S. (13 Wall.) 679, 727, 733 (1872)

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. … But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, — a matter over which the civil courts exercise no jurisdiction, — a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, — becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction."

***Serbian E. Orthodox Diocese v. Milivojevich*,**
426 U.S. 696, 713 (1976)

"For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."

***Boy Scouts of Am. v. Dale*,**
530 U.S. 640, 648, 653 (2000)

"Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association … plainly presupposes a freedom not to associate.' *Ibid.* … As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."

***Our Lady's Inn v. City of St. Louis*,**
349 F. Supp. 3d 805, 821-22 (E.D. Mo. 2018)

"Turning to the second *Dale* factor, it is undisputed that the Archdiocesan Elementary Schools impose upon their teachers a code of religious moral conduct and expect them to follow, in their personal life and behavior, the recognized moral precepts of the Catholic Church. Under these circumstances, the forced inclusion of teachers or other staff who do not adhere to those values would significantly affect the Archdiocesan Elementary Schools' ability to advocate their viewpoints, through its teachers and staff, to their students."

***Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,**
565 U.S. 171, 195-96 (2012)

"The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to

the faithful—a matter 'strictly ecclesiastical,' *Kedroff*, 344 U.S., at 119—is the church's alone. … The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."

***Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,**
565 U.S. 171, 200-01 (2012) (Alito and Kagan, JJ., concurring)

"Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith. When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters."

***Our Lady of Guadalupe School v. Morrissey-Berru*,**
140 S. Ct. 2049, 2060, 2066 (2020)

"The independence of religious institutions in matters of 'faith and doctrine' is closely linked to independence in what we have termed '"matters of church government."' 565 U.S. at 186. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles. … When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility."

***McCarthy v. Fuller*,**
714 F.3d 971, 975-76 (7th Cir. 2013)

"If the defense of immunity is erroneously denied and the defendant has to undergo the trial before the error is corrected he has been irrevocably deprived

of one of the benefits — freedom from having to undergo a trial — that his immunity was intended to give him. … The conditions for collateral order review are satisfied with respect to appeal No. 12-2257, the district judge's ruling challenged by the plaintiffs being closely akin to a denial of official immunity. A secular court may not take sides on issues of religious doctrine. … Suppose the religious question on which the jury was (wrongly) allowed to rule turned out not to be germane to the appeal, or that there was no appeal. Then there would be a final judgment of a secular court resolving a religious issue. Such a judgment could cause confusion, consternation, and dismay in religious circles. … The harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of case in which the collateral order doctrine allows interlocutory appeals. That no religious institution is a party to this case is of no moment. McCarthy is asking us to reverse a district judge's ruling that if it stands will require a jury to answer a religious question. (He has standing to challenge the ruling because it bears directly on his claim.) Religious questions are to be answered by religious bodies."

***NLRB v. Catholic Bishop of Chi.*,**
440 U.S. 490, 501-02 (1979)

"In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), is true of the schools in this case: 'Religious authority necessarily pervades the school system.' … . The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."

***Presbyterian Church (U.S.A.) v. Edwards*,**
566 S.W.3d 175, 179 (Ky. 2018)

"Here, the trial court would have allowed broad discovery regarding the underlying merits of the case before making a ruling as to the church's immunity. However, '[i]mmunity from suit includes protection against the "cost of trial"

and the "burdens of broad-reaching discovery"....' *Lexington-Fayette Urban Cty. Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). A party entitled to immunity is immune not only from liability, but also 'from the burdens of defending the action.' *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). Because the church should not be subjected to the broad-reaching discovery allowed under the trial court's order prior to an immunity determination, we affirm the Court of Appeals' denial of discovery which does not pertain to the issue of the church's immunity. 'Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke [it] at the earliest stage of the proceeding.... [O]nce the defendant raises the immunity bar by motion, the court must proceed expeditiously.' *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009). To allow such broad discovery before the trial court rules on the church's immunity would result in 'a substantial miscarriage of justice ... if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration.' *Bender*, 343 S.W.2d at 801. This is simply not the manner in which an immunity case should proceed. If immune, the church should not be subject to the burdens of defending Hoey's defamation action."

***United Methodist Church v. White*,**
571 A.2d 790, 792-93 (D.C. 1990)

"The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain circumstances in order to avoid subjecting religious institutions to defending their religious beliefs and practices in a court of law. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). Obviously, if Rev. White's claims fall within the scope of UMC's immunity, once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated. In short, UMC's immunity claim can be exercised, if at all, only before trial, and must be reviewed pretrial or it can never be reviewed at all. *See Mitchell v. Forsyth*, *supra*, 472 U.S. at 526."

***Whole Woman's Health v. Smith*,**
896 F.3d 362, 373 (5th Cir. 2018)

"Both free exercise and establishment clause problems seem inherent in the court's discovery order. That internal communications are to be revealed not only interferes with TCCB's decision-making processes on a matter of intense doctrinal concern but also exposes those processes to an opponent and will

induce similar ongoing intrusions against religious bodies' self-government. Moreover, courts' involvement in attempting to parse the internal communications and discern which are 'facts' and which are 'religious' seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause."

***Matter of Adoption of Johnson*,**
612 N.E.2d 569, 572 (Ind. Ct. App. 1993)

"A judge's personal knowledge acquired through extra judicial sources requires recusal. *Stivers v. Knox County Department of Welfare* (1985), Ind. App., 482 N.E.2d 748. However, the type of personal knowledge which requires recusal is knowledge acquired from extrajudicial sources, not what the judge learned from his participation in the case. *Jones v. State* (1981), Ind. App., 416 N.E.2d 880."

***L.G. v. S.L.*,**
88 N.E.3d 1069, 1071 (Ind. 2018)

"However, comment 1 to Rule 2.11 provides that under the rule, 'a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions [of the rule] apply.' IN ST CJC Rule 2.11, cmt. 1. Our Court of Appeals has held that the mere appearance of bias and partiality may require recusal if an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality. *Bloomington Magazine, Inc. v. Kiang*, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012)."

U.S. Const., amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"

U.S. Const., amend. XIV

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law …"

CERTIFICATE OF SERVICE

Pursuant to Rule 6(B) of the Indiana Rule of Procedure for Original Actions, on August 17, 2020, personal service of the foregoing on the following parties (Respondent, parties opposing Relator in the Respondent Court, non-parties entering appearances in the Respondent Court, and the Attorney General) was made by in-person hand delivery at the following addresses, in addition to electronic service at the below emails:

Respondents
The Honorable Stephen R. Heimann
Special Judge
Marion Superior Court No.1
200 E. Washington St., #W-122
Indianapolis, IN 46204
stephen.heimann@trialjudges.in.gov

Counsel for Parties Opposing Relator in Respondent Court
Kathleen A. DeLaney, #18604-49
Christopher S. Stake, #27356-53
DeLaney & DeLaney LLC
3646 North Washington Blvd.
Indianapolis, IN 46205
kathleen@delaneylaw.net
cstake@delaneylaw.net

Counsel for United States
Josh J. Minkler
United States Attorney
United States Attorney's Office for the Southern District of Indiana
10 W. Market St., Suite 2100
Indianapolis, IN 46204
josh.minkler@usdoj.gov

Counsel for Cathedral Trustees
Thomas E. Wheeler
Stephanie V. McGowan
Frost Brown Todd LLC
201 N. Illinois Street, Suite 1900
Indianapolis, IN 46244
twheeler@fbtlaw.com
smcgowan@fbtlaw.com

Indiana Attorney General
Curtis Hill
Indiana Attorney General
Thomas Fisher
Solicitor General
Office of the Attorney General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.Fisher@atg.in.gov

/s/ John S. (Jay) Mercer
John S. (Jay) Mercer

John S. (Jay) Mercer, #11260-49
FITZWATER MERCER
One Indiana Square, Suite 1500
Indianapolis, IN 46204
(317) 636-3551
jsmercer@fitzwatermercer.com