IN THE

Indiana Supreme Court

No. 20S-OR-520

STATE OF INDIANA *ex rel.* ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.,	)	Original Action from the Marion Superior Court
Relator,	)	Trial Court Case No.: 49D01-1907-PL-027728
v.	)	The Honorable Stephen R. Heimann, Special Judge
MARION SUPERIOR COURT and the HON. STEPHEN R. HEIMANN, as Special Judge thereof,	)	
Respondents.	)	

BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF RELATOR'S VERIFIED PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

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INTEREST OF *AMICUS CURIAE*

The State of Indiana files this brief as of right under Indiana Code section 34-33.1-1-2. The State has a significant interest in preventing entanglement of the Indiana judiciary in religious disputes. The trial court should have dismissed this case immediately under the church autonomy doctrine. Instead, the trial judge denied the Archdiocese's motion to dismiss, compelled responses to broad discovery requests, and attempted to force the Archdiocese into a settlement based on its own incorrect understanding of canon law. In the process, the judge has expressed his personal opinions regarding the Archdiocese's practices and policies and allowed those opinions to influence the course of the case. These actions violate the Archdiocese's constitutional rights and pose a grave risk to the State's judiciary by entangling it in a religious dispute, all without a sufficient appellate remedy. The Court should exercise its original jurisdiction to grant the writ of mandamus and dismiss this case or hold that the trial court's decision refusing to grant the Archdiocese immunity is immediately appealable.

STATEMENT

Plaintiff Joshua Payne-Elliott, a teacher fired by Cathedral High School when the Archdiocese of Indianapolis instructed the school adhere to Catholic marriage doctrine or no longer be recognized as Catholic, sued the Archdiocese for tortious interference with contract. The suit should have been dismissed immediately under the First Amendment's longstanding protections for church autonomy, reconfirmed just recently in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

Instead, Special Judge Stephen R. Heimann permitted the case to move forward, denied the Archdiocese leave to pursue an interlocutory appeal, opined on Catholic history during a settlement conference, questioned whether the Archdiocese is the "highest ecclesiastical authority" responsible for Cathedral High School, examined Church doctrine on homosexuality based on his personal knowledge of a gay priest, attempted to link resolution of this case to resolution of a canon-law appeal involving another Catholic school, and otherwise entangled the judiciary in a dispute over religious doctrine and governance.

Equally concerning, Payne-Elliott has served the Archdiocese with several broad discovery requests, seeking, among other things, the Archdiocese's internal records and communications concerning employees alleged to be in violation of church teachings. The trial court, however, has denied requests by the Archdiocese to protect it from such broad discovery into internal church matters and, instead, has ordered the church to produce the documents. R. 416–17, 531–35. It also denied the Archdiocese's motion to certify its dismissal order for immediate appeal under Indiana Rule of Appellate Procedure 14(B)(1). Having no other outlet to protect its well-established First Amendment immunity from this litigation, the Archdiocese filed this original action.

SUMMARY OF THE ARGUMENT

This Court long-ago recognized that "[n]o power save that of the church can rightfully declare who is a Catholic." *Dwenger v. Geary*, 14 N.E. 903, 908 (Ind. 1888). But this case would put that fundamental proposition to the test, as Judge Heimann

has proven all too willing not only to determine who is a Catholic, but what a proper Catholic must believe and do.

The United States has a long tradition of preventing judicial entanglement in religious disputes—entanglement that can only lead to interference with church autonomy. Here, the trial court's refusal to dismiss a direct challenge to the right of the Archdiocese to manage its religious school—and instead to permit in-depth discovery to determine who "really" is in charge and what that entity "really" thinks about marriage—violates the First Amendment by doing just that. Cases such as this questioning internal religious governance and doctrine must be dismissed outright.

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012), the Court held that the ministerial exception protects against judicial action that "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." And just this summer, the Supreme Court confirmed that "[j]udicial review of the way in which religious schools discharge th[eir] responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Accordingly, "civil courts exercise no jurisdiction" when the issue at hand is "strictly and purely ecclesiastical in its character." *Watson v. Jones*, 80 U.S. 679, 733 (1871). A civil court has a duty to "not allow itself to get dragged into a religious controversy." *Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036, 1042 (7th Cir. 2006).

The church autonomy doctrine is, in essence, an immunity. Like sovereign, absolute, or qualified immunity, church autonomy entails immunity from suit, not just from liability. And just as with those other immunities, permitting this case to go forward would violate the rights of the Archdiocese in a way that appeal following final judgment cannot remedy. This Court should, therefore, exercise its original action jurisdiction to protect the Archdiocese.

In the alternative, the Court could establish a doctrine permitting immediate appeal of orders denying litigation immunity, similar to what federal courts permit and similar to that established by the Supreme Court of Kentucky in *Maggard v. Kinney*, 576 S.W.3d 559, 564 (Ky. 2019).

ARGUMENT

I. Entanglement in Religious Questions Harms the Judiciary

This case concerns whether the Archdiocese of Indianapolis can determine if a school under its direction is Catholic. First Amendment doctrine squarely secures the right of the Archdiocese to do so—without interference from civil courts. The trial court had an absolute duty to dismiss this case rather than launch into a series of inquiries over church governance and doctrine.

The First Amendment "protect[s] the[] autonomy [of religious institutions] with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—

unlike the English Crown—would have no role in filling ecclesiastical offices." *Hosanna-Tabor*, 565 U.S. 171, 184 (2012). Thus, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.*

By extension, civil courts lack authority to hear matters of religious governance: "[T]he First . . . Amendment[] permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government," and "the Constitution requires that civil courts accept their decisions as binding upon them." *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*, 426 U.S. 696, 724–25 (1976). Yet here, the trial judge not only refused to dismiss the case, but permitted discovery on the theory that, under canon law, the Archbishop may not be the "highest ecclesiastical authority" with the power to determine whether Cathedral qualifies as a Catholic school. R. 555 (Any such question would have been news to Cathedral High School, which readily acceded to the Archbishop's directive. R. 16–17.) Furthermore, the judge expressed his opinion that the Archdiocese had erred by treating Payne-Elliott differently than a celibate priest supposedly known by the judge to be gay. R. 691–93. The judge also bizarrely urged the parties to agree that legal liability would turn on the outcome of a canon law appeal concerning a different Catholic high school with a different ecclesiastical status. R. 808–09.

Judge Heimann's actions undoubtedly interfered with the Archdiocese's (and indeed, the Roman Catholic Church's) ability to govern its own affairs, R. 475–77, to

say nothing of its authority to select its Catholic school teachers. Such questions are "purely . . . of church government and discipline, and must be determined by the proper ecclesiastical authorities." *Dwenger v. Geary*, 14 N.E. 903, 908 (Ind. 1888) (citing *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136 (1883)).

They also demonstrate that Judge Heimann was prepared to use civil courts as an alternative forum respecting adjudication already being undertaken by canonical authorities in a separate case—as if the civil and canonical authorities were charged with carrying out the same body of law. Critically, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of [a religious body's] decisions could appeal to the secular courts and have them reversed." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 114–15 (1952).

Courts are secular agencies with "no jurisdiction" over matters of "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). Permitting litigation and investigation regarding church governance and doctrine, to say nothing of conditioning the outcome of a civil case on a canon law appeal, plainly qualifies as judicial "entanglement" with religion. It constitutes "intrusive government participation in, supervision of, or *inquiry* into religious affairs." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000) (emphasis added); *McEnroy v. St. Meinrad Sch. of Theology,* 713 N.E.2d 334, 337 (Ind.

Ct. App. 1999) (concluding that entertaining breach of contract and tortious interference claims against a Catholic seminary would make the trial court "clearly and excessively entangled in religious affairs in violation of the First Amendment"). When civil courts decide matters of church government, faith, or doctrine they "inhibit[] the free development of religious doctrine and [implicate] secular interests in matters of purely ecclesiastical concern." *Milivojevich*, 426 U.S. at 710.

Civil courts must assiduously avoid the temptation to engage in cases that call upon them to review questions of church doctrine and governance so that they remain "completely secular in operation." *Jones v. Wolf*, 443 U.S. 595, 603 (1979). Steering clear of such cases "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.*

Even attempting to determine independently a division of the secular and inherently religious matters amidst litigation violates church autonomy doctrine. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018) ("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."). As this Court has said, "civil courts, if they should be so unwise as to attempt to supervise the[] judgments [of ecclesiastical courts] on matters which come within their jurisdiction, would involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals." *Dwenger*, 14 N.E. at 909 (Ind. 1888).

To that, the Court might easily add, "which would do anything but improve respect for the Courts." "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." Ind. Code of Jud. Conduct, Preamble. For this reason, "judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." *Id.* The implication is that judges must—out of respect for courts as institutions, respect for private citizens and organizations, and respect for the public esteem which gives courts power—strictly avoid any course of action that lends the prestige of the judiciary to an illegitimate undertaking. *See* Ind. Code of Jud. Conduct, Canon 1, Rule 1.3 (forbidding judges from "abus[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others").

Courts are extraordinarily powerful, and the people bestow that power with the understanding that courts will apply it within strict limits and not in service of enterprises having no relation to proper adjudication. When the judiciary allows itself to become entangled in religious disputes, however, that is precisely what happens. Courts harm themselves when they go looking for churches to fix. The trial judge's actions here improperly interjected judicial power into ecclesiastical matters, and this Court should dismiss the case before the judiciary suffers further loss of esteem.

II. The Church Autonomy Doctrine Functions as an Absolute Immunity Requiring Immediate Dismissal

Writs of mandamus and prohibition are appropriate "where the trial court has an *absolute* duty to act or refrain from acting." *State ex rel. Harris v. Scott Circuit Court*, 437 N.E.2d 952, 954 (Ind. 1982) (emphasis added) (citing *State ex rel. Neese v. Montgomery Circuit Court*, 399 N.E.2d 375, 376 (Ind. 1980); *State ex rel. White v. Marion Superior Court*, 391 N.E.2d 596, 597 (Ind. 1979)). The trial court had an *absolute* duty to dismiss this case—it had "no ecclesiastical jurisdiction," *Dwenger*, 14 N.E. at 908—which makes writs of mandamus and prohibition proper here.

Religious organizations have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Above all, "[r]eligious questions are to be answered by religious bodies." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013). And where a lawsuit against an Archdiocese threatens church autonomy, the result must be judgment for the defendant, period. *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 288–89, 294 (Ind. 2003) (directing summary judgment for defendant where the Court concluded that applying 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"); *see also Hosanna-Tabor*, 565 U.S. at 194 (holding that "the First Amendment requires dismissal" of lawsuits falling within the ministerial exception).

The Archdiocese's religious guidance on the qualifications for Catholic schools was, "at its core," focused on matters that were "purely ecclesiastical," such that the case should have been dismissed because "the trial court lacked subject matter jurisdiction to adjudicate" it. *Stewart v. McCray*, 135 N.E.3d 1012, 1029 (Ind. Ct. App. 2019). The Indiana Court of Appeals has on multiple occasions held that church "personnel decisions are protected from civil court interference where review by the civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical law," and that cases concerning such decisions warrant dismissal. *Stewart v. Kingsley Terrace Church of Christ, Inc.*, 767 N.E.2d 542, 546 (Ind. Ct. App. 2002) (quoting *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999)). Civil courts should refrain from any form of "review" when the court would be "require[d] . . . to interpret and apply religious doctrine or ecclesiastical law," such as where claims would require assessment whether canon law required the church to take a particular action or whether ecclesiastic authorities "properly exercised . . . jurisdiction." *McEnroy*, 713 N.E.2d at 337 (citing *Milivojevich*, 426 U.S. at 696). This is precisely such a case.

What is more, the application of church autonomy doctrine must properly be understood as an absolute immunity from litigation, not merely a defense to liability. An immunity from litigation protects the beneficiary from even having to undergo the exposure and indignity of judicial proceedings. Here, for example, the Archdiocese has already suffered irreparable harm in the form of exposure of internal church documents and decisions (including those having no relation to this case), and the harm

will only grow if the trial court continues to exercise jurisdiction. "The very process of inquiry leading to findings and conclusions" presents the possibility of "imping[ing] on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also Whole Woman's Health v. Smith*, 896 F.3d at 373 (holding that allowing discovery of internal church documents not only interferes with a church's "decision-making processes" but may "expose[] those processes to an opponent and will induce similar ongoing intrusions against religious bodies' self-government.").

Other courts have recognized that church autonomy doctrine properly functions as litigation immunity. *See McCarthy v. Fuller*, 714 F.3d at 975 (equating the church's immunity to "official immunity" or "immunity from the travails of a trial and not just from an adverse judgment"); *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'" (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006)); *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" (citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. at 503)).

Yet, if the Archdiocese must litigate this case to final judgment before the judiciary will respect that immunity, it will, in effect, lose it. "[I]mmunity entitles its possessor to be free from the burdens of defending the action, not merely . . . from

liability." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009) (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d at 474). Consequently, "such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Id.*; *see also Daynor v. Archdiocese of Hartford*, 23 A.3d 1192, 1198–1200 (Conn. 2011) (explaining that "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and pre-trial process itself a First Amendment violation."), *overruling on other grounds recognized in Trinity Christian School v. Commission on Human Rights*, 189 A.3d 79, 89 (Conn. 2018); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) (ruling that additional discovery was impermissible since, once it became clear that resolving claims would cause entanglement, allowing discovery would only worsen entanglement).

The cost of litigation, the loss of institutional dignity, the exposure occasioned by discovery of communications and internal directives of the Archdiocese, are all harms that appeal after judgment cannot redress. And because the trial court cut off the only avenue of interlocutory appeal currently available, writs of mandamus and prohibition are the only existing devices by which the Archdiocese may vindicate its immunity. In view of the trial court's absolute duty to dismiss this case, this Court should exercise its original action jurisdiction and grant the petition.

III. If this Court Does Not Issue the Writs, It Should Establish a Collateral Order Appeal Doctrine for Litigation Immunity

If this Court does not exercise its original action jurisdiction to issue the writs requested by the Archiocese, it should use this case as an opportunity to create a doctrine permitting immediate appeal of orders denying immunity, akin to the collateral order doctrine available in federal courts and other States' courts.

In the federal system, "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 (1982)). Similarly, the Supreme Court of Kentucky has held that a non-final order can be appealed if it "address[es] substantial claims of right which would be rendered moot by litigation and thus are not subject to meaningful review in the ordinary course following a final judgment." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). In particular, denial of immunity falls within this rule. *Id.*; *see also Maggard v. Kinney*, 576 S.W.3d 559, 564 (Ky. 2019) (establishing parameters of the doctrine more broadly).

A doctrine permitting immediate appeal from denial of immunity would apply to protect religious organizations from improper, intrusive litigation, and would also apply more broadly to assertions by judges and other government officials and agencies that sovereign, legislative, absolute, or qualified immunity protects them from litigation. At present, the only way to appeal denial of immunity is by permission

under Appellate Rule 14(B). But obviously that avenue failed here, where the trial judge blocked appeal of his own ruling; moreover, last year the Court of Appeals accepted jurisdiction in over less than half of all interlocutory appeals certified by trial courts. R. 661. Appellate Rule 14(B) is thus hardly a reliable device for safeguarding the critical, absolute rights protected by immunity doctrine.

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Absent either original action jurisdiction or a new doctrine permitting immediate appeal of the denial of litigation immunity, the Archdiocese will lose the benefit of the immunity from suit over church doctrine and governance to which it is entitled under the First Amendment. That loss will effectively be unreviewable after final judgement. Accordingly, the State urges this Court to grant the writ of mandamus or, in the alternative, to state the denial of a substantial claim of litigation immunity is immediately appealable as of right.

CONCLUSION

The Court should exercise its original jurisdiction to grant the writ of mandamus and dismiss this case or hold that the trial court's decision refusing the grant the Archdiocese litigation immunity is immediately appealable.

Dated: September 8, 2020

Respectfully submitted,

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44(E), I verify that this Brief of Amicus Curiae in Support of Relator's Verified Petition for Writ of Mandamus and Writ of Prohibition contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

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