

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO: 49D01-1907-PL-027728
JOSHUA PAYNE-ELLIOTT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ROMAN CATHOLIC ARCHDIOCESE	)	
OF INDIANAPOLIS, INC.,	)	
	)	
Defendant.	)	

**PLAINTIFF JOSHUA PAYNE-ELLIOTT’S RESPONSE IN  
OPPOSITION TO DEFENDANT ROMAN CATHOLIC ARCHDIOCESE  
OF INDIANAPOLIS, INC.’S MOTION FOR PROTECTIVE ORDER**

Plaintiff, Joshua Payne-Elliott (“Payne-Elliott”), by counsel, respectfully files his response in opposition to Defendant Roman Catholic Archdiocese of Indianapolis, Inc.’s (“Archdiocese”) Motion for Protective Order.

The Archdiocese seeks to stay all discovery for an indefinite period of time while the parties brief and the Court decides its Motion to Dismiss. Defendants have failed to show good cause for variance from the standard application of the Indiana Rules of Trial Procedure. Given the fact sensitive nature of this dispute, discovery should be permitted to commence and continue in this matter without delay.

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action[.]” Ind. Tr. R. 26(A). Under Indiana Rule 26(C), “the burden is initially on the party seeking the protective order to show ‘good cause’ why such an order is required to protect it from ‘annoyance, embarrassment, oppression, or undue expense[.]’” *Estate of Lee v. Lee & Urbahns Co.*, 876 N.E.2d 361, 368 (Ind. Ct. App. 2007). “Once a showing of good cause has been made, the burden shifts to

the party seeking discovery of protected material to establish that the trial court's protective order constitutes an abuse of discretion." *Id.* "No general policy dictates a stay of discovery simply because a motion to dismiss has been filed." *Castrillon v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No. 1:11-cv-00430-WTL-DML, 2011 U.S. Dist. LEXIS 112177, \*4 (S.D. Ind. Sept. 29, 2011).

**I. The Archdiocese's Motion Fails to Comply with Rule 26(F).**

As a threshold matter, the Court should deny the Archdiocese's Motion because the Archdiocese made no effort to comply with the meet and confer requirements of Trial Rule 26(F).

Before any party files...any motion for protective order pursuant to discovery pursuant to Rule 26(C)...that party shall:

- (1) Make a reasonable effort to reach agreement with the opposing party concerning the matter which is the subject of the motion or request; and
- (2) Include in the motion or request a statement showing that the attorney...has made a reasonable effort to reach agreement with the opposing attorney(s) concerning the matter(s) set forth in the motion.... This statement shall recite...the date, time and place of this effort to reach agreement...and the names of all parties and attorneys participating therein.

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*The court may deny a discovery motion filed by a party who has failed to comply with the requirements of this subsection.*

Ind. Tr. R. 26(F) (emphasis added). Payne-Elliott served the Archdiocese with written discovery requests on August 5, 2019. The Archdiocese made no effort to confer with Payne-Elliott before filing the Motion for Protective Order on August 21, 2019. The Archdiocese makes no representations about any efforts by its counsel to reach agreement with Payne-Elliott's counsel because no such efforts have been undertaken. Payne-Elliott's counsel has not participated in any calls, meetings, or written communications with the

Archdiocese regarding this Motion. Payne-Elliott's counsel's first notice of the Motion came from the electronic filing notice. Therefore, the Archdiocese has failed to comply with Rule 26(F). As the Rule provides, the Court may deny the Motion for Protective Order for this reason alone.

## **II. Discovery Should Proceed without Delay.**

The Archdiocese's Motion for Protective Order should also be denied on the merits. The Archdiocese advances three arguments for staying discovery in this matter: (1) that the "church autonomy" doctrine bars all discovery; (2) that initial discovery should be limited to the ministerial exception defense; and (3) that the "freedom of expressive association" defense bars all discovery. None of these reasons establish good cause for staying discovery in this case.

### **A. The "Church Autonomy" Doctrine Does Not Apply and Does Not Bar Discovery.**

The Archdiocese has filed a Motion to Dismiss Payne-Elliott's Complaint, which seeks dismissal on multiple grounds, including what the Archdiocese has described as the "church autonomy doctrine." The Archdiocese similarly relies on this "doctrine" in its Motion for a Protective Order, arguing that the Court should not permit discovery unless and until the Court decides that Payne-Elliott's claims are not barred by this defense.

Indiana Courts have described the church autonomy doctrine as dealing with "a church's First Amendment right to autonomy in making decisions regarding its own internal affairs, including matters of faith, doctrine, and internal governance." *Brazauskas v. Fort Wayne –South Bend Diocese, Inc.*, 796 N.E.2d 286, 293 (Ind. 2003); *Ind. Area Found. of the United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174, 1178 (Ind. Ct. App. 2011);

*Calvary Temple Church, Inc. v. Paino*, 827 N.E.2d 125, 138 (Ind. Ct. App. 2005) *transfer granted and appeal dismissed*, 841 N.E.2d 1133 (Ind. 2006).

The Archdiocese posits that the church autonomy doctrine precludes subject matter jurisdiction under Trial Rule 12(B)(1). However, “courts with general authority to hear matters like employment disputes are not denied subject matter jurisdiction...because the defendant pleads a religious defense.” *Ind. Area Found.*, 953 N.E.2d at 1178 (citing *Brazauskas*, 796 N.E.2d at 290). “The First Amendment does not immunize every legal claim against a religious institution and its members.” *Id.* (quoting *Brazauskas*, 796 N.E.2d at 293-94). “The analysis in each case is fact-sensitive and claim specific, requiring an assessment of every issue raised in terms of doctrinal and administrative intrusion and entanglement.” *Id.* Therefore, the Archdiocese’s “church autonomy” defense is best addressed on a motion for summary judgment, rather than a Rule 12(B)(1) motion for lack of subject matter jurisdiction. *Calvary*, 827 N.E.2d at 137 (finding that the “appropriate procedure” was to treat the church’s 12(B)(1) motion to dismiss as a 12(B)(6) motion, and converting the motion to a motion for summary judgment under Rule 56) (citing *Brazauskas*, 796 N.E.2d at 290).

Since the analysis of the Archdiocese’s defense is “fact-sensitive and claim specific,” a ruling on the applicability of this defense would be premature until the parties have had an opportunity to conduct discovery. Among other things, Plaintiff needs discovery on the Archdiocese’s ministerial exception defense. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Discovery relating to the ministerial exception will be required, at a minimum, on the following factors considered when determining whether to apply the ministerial exception: (1) “the formal title given by

the Church,” (2) “the substance reflected in that title,” (3) the teacher’s “own use of that title,” and (4) “the important religious functions” he performed. *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018). Payne-Elliott was a world language and social studies teacher at Cathedral High School (“Cathedral”). Comp., ¶ 7. Therefore, the above factors will require discovery directed to Cathedral, in addition to the Archdiocese. Cathedral employed Plaintiff, gave him a title, assigned him job duties, and contracted with him. The Archdiocese’s views of Plaintiff’s job will not alone be dispositive.

The Archdiocese cites not a single case where discovery was stayed based on the “church autonomy” doctrine alone. For example, *McCarthy v. Fuller* did not involve a discovery dispute at all, but an argument about whether the district court erred in failing to take judicial notice of the Holy See’s ruling on a Catholic Nun’s status with the Church. 714 F.3d 971, 974-976 (7th Cir. 2013). *McCarthy* did not mention the church autonomy doctrine, but addressed whether an appeals court could hear an interlocutory order that involved a religious question under the collateral order doctrine. *Id.* at 975-976.<sup>1</sup>

The Archdiocese also relies on a series of cases from Federal courts in other jurisdictions involving motions to quash subpoenas. *McRaney v. North Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 17-cv-080, 2018 U.S. Dist. LEXIS 193316 (N.D. Miss. Nov. 7, 2018); *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979); *Whole Woman’s Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018). In *McRaney*, the Court quashed a subpoena to the Plaintiff’s employer (which was a non-party) for his personnel

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<sup>1</sup> In *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, which involved a Catholic school teacher who was fired for undergoing in vitro fertilization, a fertility treatment banned by Catholic Church teachings, the Seventh Circuit declined to follow *McCarthy*, and dismissed the Diocese’s interlocutory appeal under the collateral order doctrine, stating “[t]he circumstances here are not comparable.” 772 F.3d 1085, 1091 (7th Cir. 2014).

file *after* the Court had already ruled that the Plaintiff was a ministerial employee under *Hosanna-Tabor*. 2018 U.S. Dist. LEXIS at \*2. In *Surinach*, the Court enjoined the Puerto Rican government from enforcing document subpoenas for financial data of private religious schools. 604 F.2d at 78. In *Whole Woman's Health*, the Court quashed a subpoena directed to the Texas Catholic Conference of Bishops, a non-party to the case. 896 F.3d at 366. None of these cases considered a request to stay all discovery or ordered such a stay. Instead, they addressed the specific discovery disputes before them. If the Archdiocese has specific concerns about Payne-Elliott's discovery requests, it should have engaged Payne-Elliott in an attempt to resolve them as provided under Trial Rule 26(F), rather than seek to stay discovery entirely.

**B. Discovery Should Not Be Limited.**

The Archdiocese argues that, if discovery is not stayed, then discovery should be "limited to the question of whether the ministerial exception applies." This would not be feasible or appropriate. Payne-Elliott should be permitted to conduct discovery that relates to any disputed elements of his claims, or any other affirmative defenses raised by the Archdiocese. Discovery related to the ministerial exception will be intertwined with general discovery, and there are no clear boundaries between the two. For example, the Archdiocese's attempts to get Cathedral to adopt and enforce a morals clause in teacher contracts is relevant to both whether the Archdiocese and/or Cathedral treated teachers as ministers, and whether the morals clause is being applied consistently (or inconsistently) to all teachers. In addition, discovery relating to the differences between Cathedral's morals clause and the Archdiocese's proposed morals clause would have relevance to both the

ministerial exception and any consistent or inconsistent applications of those clauses to specific teachers.

Discovery should proceed without limit because even if the Archdiocese could successfully assert the ministerial exception – which Payne-Elliott hotly disputes – his case would continue. This case differs from a typical case where the ministerial exception defense arises, because the Archdiocese did not directly employ Payne-Elliott. Cathedral, an independent Catholic school, separately incorporated, did. Payne-Elliott’s claims would survive even if the Court finds that the ministerial exception applies. *See McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 304 F. Supp.3d 514, 519-520 (N.D. Miss. 2018) (“Accordingly...because McRaney was indisputably not employed by NAMB, this is not a claim between employer and employee...and thus the ministerial exception does not apply to mandate dismissal of any of McRaney’s claims.”). It is not even clear that the ministerial exception bars any claims other than for employment discrimination. *See Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 621 (Ky. 2014) (holding that “Kirby’s status as a ministerial employee does not...bar the claims in contract from proceeding.”). Payne-Elliott has not yet asserted employment discrimination claims in this action. Thus, even if the Archdiocese successfully argues that Payne-Elliott is a minister, this issue alone would not be dispositive of his claims and differentiates his case from those cited by the Archdiocese. *See, e.g., Sterlinski v. Catholic Bishop of Chicago*, No. 16-C-00596, 2017 U.S. Dist. LEXIS 65613, \*\*11-12 (N.D. Ill. May 1, 2017) (involving employment discrimination claims brought by employee against former employer); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 672 (N.D. Ill. 2012) (same); *Rayburn v. General Conference*

*of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (gender and race discrimination claim based on failure to hire).

It is imperative that the parties commence discovery immediately with respect to all matters relating to Payne-Elliott's claims. It appears that the Archdiocese intends to defend Payne-Elliott's claims by arguing that its intervention into Payne-Elliott's employment with Cathedral was for the purpose of enforcing the Catholic Church's teachings on same-sex marriage. Such a defense would necessarily put at issue whether the Archdiocese has acted consistently in enforcing Church teachings against Catholic school teachers, not only with respect to same-sex marriage, but other personal activities that violate Church teachings as well. Discovery will also be needed to determine whether Cathedral considered Payne-Elliott to be in violation of its morals clause or Church teachings, or otherwise took any actions – beyond terminating Plaintiff – in response to the Archdiocese's demands. Inconsistent enforcement of morals clauses in teacher contracts, or selective enforcement against homosexuals in same-sex marriages, would support Payne-Elliott's claims that the Archdiocese's interference was not justified, or "fair and reasonable under the circumstances." *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994).

To the extent that the Archdiocese is willing to stipulate to any elements of Payne-Elliott's claims or withdraw any of its affirmative defenses, that would eliminate the need for discovery on those issues. Otherwise, Payne-Elliott should be permitted to proceed with discovery under the Rules of Trial Procedure.

**C. The "Freedom of Expressive Association" Does Not Bar Discovery.**

The Archdiocese's final argument is that certain discovery requests from Payne-Elliott allegedly violate its First Amendment rights. The Archdiocese identified 2 out of 21

Requests for Production and 3 out of 17 Interrogatories that allegedly infringe on the “freedom of expressive association.” The Archdiocese’s Motion for a Protective Order seeking a stay of all discovery overreaches even its own view of this “freedom.” If the Archdiocese refuses to answer specific discovery requests, the proper procedure is to object, and go through the 26(F) process with Payne-Elliott’s lawyers, after which the parties could file motions to compel and/or motions for a protective order. Ind. Tr. R. 26(C), (F); Ind. Tr. R. 37. At this time, the Archdiocese has not even responded to the discovery requests or made any specific objections to any of them. The Archdiocese jumped the gun by immediately moving to stay all discovery.

All of the cases cited by the Archdiocese are distinguishable. In *NAACP v. State of Ala. ex rel. Patterson*, the U.S. Supreme Court held that the State of Alabama’s attempt to obtain the NAACP’s membership list violated the constitutional rights of those members. 357 U.S. 449, 460-466 (1958). Payne-Elliott is a private citizen, not a state actor, and his discovery requests do not implicate the same concerns of freedom of association that were present in *NAACP*. See *Whole Woman’s Health*, 896 F.3d at 381 (Cost, J., dissenting) (“It is not, of course, the type of associational right at issue in the leading case...*NAACP v. Alabama ex rel. Patterson*...which involved disclosure of members of a group to the state with all its power to retaliate against those expressing unpopular views.”).

In *Perry v. Schwarzenegger*, the Court stated that “[w]here...discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights. 591 F.3d 1147, 1152 (9th Cir. 2010). Under this balancing test, the burden initially begins with the party opposing discovery to demonstrate a “*prima facie*

showing of first amendment infringement.” *Id.* at 1160. If it does so, the burden then shifts to the party seeking discovery. *Id.* at 1161. The Archdiocese has not explained why enforcement of Payne-Elliott’s discovery requests would result in “(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or chilling of, the members’ associational rights.” *Id.* at 1160 (internal citations omitted). The Archdiocese does not even attempt to make such a showing, despite its reliance on *Perry*. In any event, it is premature, at this stage, to engage in any balancing tests relating to Payne-Elliott’s discovery requests to the Archdiocese. To reiterate, the Archdiocese has not challenged specific requests, but asked for the Court to halt all discovery in this case.

*Whole Woman’s Health*, also relied upon by the Archdiocese, was decided at a later procedural stage. 896 F.3d at 366-367. There, a non-party religious entity received a subpoena, and partially complied with the subpoena by producing over 4,000 pages of documents, but withheld others based on its claims of privilege under the First Amendment. *Id.* In contrast, the Archdiocese has asked to stay all discovery, before responding to the discovery requests at issue, before conferring with opposing counsel on potential compromises, and before making any effort whatsoever to resolve this dispute informally under Rule 26(F).

For the above reasons, Plaintiff Joshua Payne-Elliott respectfully requests that the Court deny the Archdiocese’s Motion for Protective Order in all respects.

Respectfully submitted,

/s/ Kathleen A. DeLaney  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following by this court's electronic filing system this 4th day of September, 2019:

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*/s/ Kathleen A. DeLaney*  
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