No. 20-1158

IN THE
Supreme Court of the United States

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,
Petitioner,

v.

WILL MCRANEY,
Respondent.

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

BRIEF OF AGUDATH ISRAEL OF AMERICA AND TORAH UMESORAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM MILBURN
PAUL HASTINGS LLP
600 TRAVIS STREET
FIFTY-EIGHTH FLOOR
HOUSTON, TX 77002

IGOR V. TIMOFEYEV
Counsel of Record
MICHAEL S. WISE
JOANNE JOSEPH
TOR TARANTOLA
PAUL HASTINGS LLP
2050 M STREET, N.W.
WASHINGTON, D.C. 20036
(202) 551–1700
igortimofeyev@paulhastings.com
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Existing Disagreement Regarding First Amendment Protection from Employee Lawsuits Disproportionately Affects Certain Religions. 5

A. In Twelve States, a Religious Organization's Immunity from Suit May Depend on Its Institutional Structure. 5

B. In Some Jurisdictions, a Religious Organization's Immunity from Suit Can Depend on Whether the Lawsuit Is Adjudicated in a State or a Federal Court 8

II. The Question Presented Is Especially Important to Minority Religious Organizations. 10

A. Adjudication of "Valid Religious Reason[s]" Risks Impermissible Judicial Entanglement in Questions of Religious Doctrine. 10

B. Tort Principles Cannot Be Neutral When Applied to Ministerial Employment. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Banks v. St. Matthew Baptist Church,
750 S.E.2d 605 (S.C. 2013) 6, 9

Bell v. Presbyterian Church (U.S.A.),
126 F.3d 328 (4th Cir. 1997) 9

Drevlow v. Lutheran Church, Mo. Synod,
991 F.2d 468 (8th Cir. 1993) 6, 9

El-Farra v. Sayyed,
226 S.W.3d 792 (Ark. 2006) 9

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,
565 U.S. 171 (2012) 2, 5, 6, 11

Jones v. Wolf,
443 U.S. 595 (1979) 13

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,
344 U.S. 94 (1952) 11

Marshall v. Munro,
845 P.2d 424 (Alaska 1993)..... 6

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) .....*passim*

Vaden v. Discover Bank,
556 U.S. 49 (2009) 9

CONSTITUTIONS AND STATUTES

U.S. Const. amend I .....*passim*

28 U.S.C.
§ 1332 9
§ 1441 9
§ 1441(b)(2) 10

OTHER AUTHORITIES

Michael Broyde & Ira Bedzow, *The Codification of Jewish Law* (2014)..... 12

Restatement (Second) of Torts
(Am. L. Inst. 1975)
§ 559 ..... 4, 13
§ 766 ..... 4, 13
§ 767(e) 4, 13

Southern Baptist Conference,
Resolution: On Local Church Autonomy and Accountability,
SBC.net (June 1, 2019),
https://www.sbc.net/resource-library/resolutions/on-local-church-autonomy-and-accountability/ 7

Torah Umesorah, *About: Schools*,
https://www.torahumesorah.org/schools..... 8

INTERESTS OF THE *AMICI CURIAE*[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization with thousands of members and a large number of affiliated synagogues across the United States. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel also serves as an advocate for Jewish schools and Jewish education, which it regards as a personal religious obligation and a critical factor in ensuring Jewish religious identity and continuity. Agudath Israel regularly participates as an *amicus curiae* to advocate and protect the interests of the Orthodox Jewish community in the United States and the interests of religious liberty in general.

Torah Umesorah is an Orthodox Jewish educational organization that serves as the preeminent support system for Jewish day schools and yeshivas in the United States. Torah Umesorah's membership comprises more than 700 Jewish day schools and yeshivas in over 30 states. Torah Umesorah's mission is to ensure that students at its member schools receive high-quality Torah education, along with the skills to lead successful lives and become productive members of society. To that end, Torah Umesorah provides support

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for Petitioner provided blanket consent to the filing of *amici* briefs on February 26, 2021, and counsel for Respondent provided consent to this filing on March 15, 2021. Both parties received notice of the *amici*'s intention to file this brief at least 10 days prior to its due date.

for its members through staff training, curriculum development, and personnel placement, among other services.

Agudath Israel and Torah Umesorah are concerned that the Fifth Circuit's decision would undermine the First Amendment protections for the governance decisions made by religious organizations in the context of non-hierarchical, associational relationships. In particular, the kind of litigation permitted under the Fifth Circuit's ruling would undermine the ability of religious schools to work together with affiliated umbrella support organizations in designing their educational programming. Finally, as Jewish organizations, Agudath Israel and Torah Umesorah are concerned that the Fifth Circuit's decision may have disproportionate consequences for non-hierarchical minority faiths by subjecting their doctrines and practices to the scrutiny of secular courts.

SUMMARY OF THE ARGUMENT

The First Amendment protects a religious organization's autonomy with respect to internal management decisions that are essential to its mission. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). The Fifth Circuit's ruling, by permitting a terminated employee to sue an affiliated religious organization for allegedly having caused or contributed to his firing, would create a wide loophole in the protections afforded to religious organizations. These suits against affiliated religious organization seek to circumvent First Amendment interests underlying the ministerial exception, in contravention of this Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

Critically, these lawsuits threaten to chill organizations, such as Agudath Israel and Torah Umesorah, who advise affiliated religious schools on how to structure and supervise the teaching of their faiths. The Court should grant certiorari to close this dangerous loophole and to reaffirm the religious organizations' long-standing constitutional protections.

1. Under the Fifth Circuit's erroneous reasoning, a religious organization's right to choose its personnel without secular governmental interference can depend on its institutional structure or corporate formalities. If one faith tradition pursues its mission through interactions between legally separate entities—such as a religious school and its coreligionist advisors, or a locally governed church and its denomination's mission board—then the non-employing partner organization can become susceptible to employment-related tort suits from its' partners' ministerial employees. By contrast, a religion that depends less on such partnerships, or that is structured hierarchically, may be able to avoid such litigation exposure.

A particularly perverse consequence of allowing employee tort suits against affiliated religious organizations is that in states where the state's highest courts and the regional federal courts have adopted a different rule, a religious organization's susceptibility to suit may even depend on the diversity of the parties. The protection afforded by the Religion Clauses should not vary based on how a religious community chooses to structure itself or where an organization happens to be located.

2. The question presented is exceptionally important, particularly to minority faith communities.

The Fifth Circuit's test for First Amendment protection—whether an organization has "valid religious reason[s]" for the allegedly tortious conduct, Pet. App. 8a (internal quotation marks omitted) (alteration in original)—will result in exactly the kind of judicial entanglement in the operations of religious organizations that this Court sought to avoid when it articulated the ministerial-exception doctrine in *Our Lady of Guadalupe*. A religious organization's constitutional protections should not depend on whether it can adequately explain to a secular court the religious nature of the reasons for its governance decisions and the religious doctrines underpinning those reasons.

Even if a court could legitimately determine what religious reasons were "valid," applying tort law to questions of ministerial employment risks entangling judges and juries in questions of religious doctrine. Courts would invariably have to adjudicate what caused an employee's firing. And, depending on the claims, they might have to judge the "social interests" served by the organization's conduct, *see, e.g.*, Restatement (Second) of Torts §§ 766, 767(e) (Am. L. Inst. 1975) (tortious interference with third-party contract), or how much an alleged statement hurt a plaintiff's reputation in their religious community, *see id.* § 559 (defamation). These questions go beyond the scope of what the First Amendment authorizes a court to determine.

ARGUMENT

I. The Existing Disagreement Regarding First Amendment Protection from Employee Lawsuits Disproportionately Affects Certain Religions.

A. In Twelve States, a Religious Organization's Immunity from Suit May Depend on Its Institutional Structure.

Currently, in twelve states (including the states within the Fifth Circuit), the protection offered by the First Amendment's ministerial exception potentially hinges on the religious organization's institutional structure or corporate formalities. Two scenarios help to illustrate this point:

- In one scenario, a religious school is owned and operated by a religious organization with a centralized structure. An advisor from the organization's headquarters offers advice to school officials, which causes the school to terminate a minister. The minister sues the organization for wrongful termination.
- In a second scenario, a religious school is incorporated separately but relies on the continuing advice and assistance of a religious organization of the same faith. An advisor from the organization offers advice to school officials, which causes the school to terminate a minister. The minister sues the organization for defamation and tortious interference.

In every jurisdiction, the suit in the first scenario will be dismissed under this Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*. In the Fifth and Eighth Circuits, however, as well as in the state

courts of Alaska and South Carolina, the suit in the second scenario would not. *See* Pet. App. 1a-8a (opinion below); *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993); *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993); *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605 (S.C. 2013). In those jurisdictions, the ministerial exception applies only to direct employers, not to affiliated organizations that may fulfill the same religious function. In other words, in those jurisdictions, the extent of a religious organization's First Amendment protection may depend on how the religion has chosen to organize its institutional structure.

The resulting loophole in the protections afforded to religious organizations contravenes the principles animating this Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*. The First Amendment protects against "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. That protection should not be made contingent on an organization's institutional structure. But in twelve states, corporate separateness can open the door to judicial scrutiny of a religious organization's decisions regarding who should serve as its employees performing religious functions. In these jurisdictions, religious leaders' deliberations and decisions regarding retention (or replacement) of a minister (or another employee) are open to a secular court's adjudication of whether there were "valid religious reason[s]" for that choice. Pet. App. 8a (internal quotation marks omitted) (alteration in original).

As a result, religious organizations with partners in jurisdictions that follow the Fifth Circuit's approach

can face extended litigation with respect to their partners' personnel decisions. Such lawsuits would not only impose a significant burden on these religious organizations, but also risk undermining the protection from employee suits that this Court has endorsed in *Our Lady of Guadalupe*. The constitutional protection that underpins the ministerial exception should not be easily evaded by suing a third-party organization under the guise of neutral tort-law principles.

Critically, the third-party tort lawsuit loophole could burden some faiths more than others. For example, the Orthodox Jewish community often relies on national organizations, such as Torah Umesorah, for the expert guidance required to teach Jewish law in its schools. Because of their reliance on a corporately separate organization, the staffing decisions made by many Orthodox schools, and the religious advice they rely on to make them, could be made open to potential judicial scrutiny under the Fifth Circuit's approach. By contrast, faith traditions that depend less on these kinds of partnerships, and that employ educational advisors directly, are less at risk because they would enjoy the full protection of the ministerial exception.

The Fifth Circuit's approach would particularly disadvantage decentralized religious organizations where each place of worship operates autonomously but often in coordination with a central religious organization. For instance, Petitioner's religious tradition believes in the autonomy of local churches. *See* Southern Baptist Conference, *Resolution: On Local Church Autonomy and Accountability* (June 1, 2019), https://www.sbc.net/resource-library/resolutions/on-local-church-autonomy-and-accountability/ ("The biblical doctrine of local church autonomy is based in the

local church's covenant with God in Christ . . . ."). In the Jewish faith, similarly, each synagogue—which is a *beit tefilah* (a house of prayer)—is an independent community organization, typically run by a lay board of directors that manages the synagogue's activities and hires a rabbi to provide leadership, guidance, and education to the community. In the United States, individual synagogues do not answer to any central authority. While they are often affiliated with a central organization for their Jewish denomination—as many Orthodox synagogues throughout the United States are affiliated with Agudath Israel—individual synagogues remain autonomous. Religions whose tenets of faith lead to autonomous operations of their local places of worship will now face limited First Amendment protection in the Fifth Circuit and jurisdictions that similarly allow a third-party loophole to employment-based suits.

B. In Some Jurisdictions, a Religious Organization's Immunity from Suit Can Depend on Whether the Lawsuit Is Adjudicated in a State or a Federal Court

A particularly perverse consequence of permitting employee tort suits against affiliated religious organizations is that in states where the state's highest courts and the regional federal courts have adopted a different approach to the issue a religions organization's exposure to such a lawsuit may depend on the diversity of the parties. For example, in Arkansas and South Carolina—two of the states where Torah Umesorah has member schools, *see* Torah Umesorah, *About: Schools*, https://www.torahumesorah.org/schools—the state's courts of last resort reached different conclusions than the federal courts

of appeals for the circuits encompassing those states. The applicable rule in those states may therefore depend on whether the suit could proceed in the state court or be removed to federal court because the parties are diverse. *See* 28 U.S.C. § 1332; *see also Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (reaffirming that a federal-law defense is not enough to confer federal jurisdiction).

Thus, in Arkansas, state courts would likely dismiss a lawsuit like the one at issue in this case, while the federal courts in the Eighth Circuit would likely allow it to proceed. *Compare El-Farra v. Sayyed*, 226 S.W.3d 792 (Ark. 2006), *with Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993). As a result, an out-of-state religious organization (such as Torah Umesorah, which is based in New York) could be subject to judicial scrutiny in an employment-related tort action, while a local Arkansas-based organization would not.

Conversely, the South Carolina state courts would likely let a similar suit move forward, while the federal courts in the Fourth Circuit would dismiss it. *Compare Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605 (S.C. 2013), *with Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997). A local organization sued in South Carolina state court would therefore face judicial scrutiny, while a diverse defendant could remove the suit to federal court and seek dismissal under the Fourth Circuit's precedent. *See* 28 U.S.C. § 1441 (providing for a defendant's removal to federal court). This dichotomy could have significant negative consequences for religious institutions' operations by discouraging out-of-state religious organizations from hiring employees in South Carolina, since a

local defendant could destroy complete diversity and prevent removal to federal court. *See* 28 U.S.C. § 1441(b)(2).

The extent of the First Amendment's protections should not depend on a religious organization's place of incorporation or the location of its headquarters. The Court should grant certiorari to ensure that all faiths and religious organizations enjoy the same constitutional protection from employee suits.

II. The Question Presented Is Especially Important to Minority Religious Organizations.

A. Adjudication of "Valid Religious Reason[s]" Risks Impermissible Judicial Entanglement in Questions of Religious Doctrine.

Under the Fifth Circuit's newly-minted rule, a religious organization must adduce evidence of the "valid religious reason[s]" for its conduct in order to shield it from judicial scrutiny. Pet. App. 8a (internal quotation marks omitted) (alteration in original). That includes conduct that directly implicates the employment of religious community leaders—actions that are otherwise subject to the ministerial exception. The Fifth Circuit's rule misconstrues this Court's precedent, and does so in a way that places minority faiths at particular disadvantage.

As the Fifth Circuit acknowledged, under the ecclesiastical abstention doctrine, courts are not permitted to adjudicate "'strictly and purely ecclesiastical' questions." Pet. App. 3a (quoting *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 713 (1976)). These questions include "matters of

church government, as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The panel, however, went on to rule that the alleged defamatory statements were "not ecclesiastical in nature," Pet. App. 5a-6a n.2, and that the religious organization would have to "present[] evidence" on remand that it had "valid religious reason[s]" for its alleged conduct, *id.* at 6a (alteration in original).

The panel's reasoning is misguided—and offensive to religious liberty. A purely ecclesiastical *question* is not the same as a purely ecclesiastical *reason*. The central *question* presented by the complaint in the case below—whether Petitioner wrongfully caused the termination of one of its faith leaders—is ultimately a question of church governance. The underlying *reasons* for these governance decisions, and the conduct that causes them, are therefore beyond the scope of secular judicial scrutiny. This Court's ministerial-exception cases affirm this principle. *See Hosanna-Tabor*, 565 U.S. at 194-95 ("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,'—is the church's alone.") (citation omitted).

And for good reason. When it comes to conduct that implicates ministerial employment, the reasons behind it may often be religious *and* secular. Does an employee who steals violate a secular norm or a religious one? An employee who is prideful and insubordinate? Who is dishonest with a coworker? Requiring a purely religious reason, with no secular overlap, sets

the First Amendment bar too high. As six judges of the Fifth Circuit have observed below, "secular courts are not competent to determine what constitutes a 'valid religious reason'—let alone whether a party has produced sufficient evidence of one." *See* Pet. App. 60a (Ho, J., dissenting from denial of rehearing en banc) (citations omitted); *see also* Pet. App. 77a (Oldham, J., dissenting from denial of rehearing en banc) (observing that "ecclesiastical jurisdiction at one time extended to certain torts, like defamation, that today seem purely secular").

Minority faiths are especially at risk under this standard, because their norms and traditions are more likely to be unfamiliar to a court. For example, suppose that a plaintiff in an employment-related defamation suit asserts that the religious organization's statements in question were motivated by purely secular considerations, while the organization maintains that they stemmed from its religious tenets. In order to adjudicate whether the organization's asserted reason was "valid" and predominant, the court would unavoidably have to wade into questions of religious doctrine that have been the subject of scholarly debate for centuries. *See, e.g.*, Michael Broyde & Ira Bedzow, *The Codification of Jewish Law* 1-17, 368-70 (2014) (describing the history of Jewish law and its interpretive methods). The risk of a mistaken ruling—and the chilling effect that comes with that risk—are especially pronounced for minority faith traditions in the United States.

B. Tort Principles Cannot Be Neutral When Applied to Ministerial Employment.

Even if courts could reliably distinguish valid from invalid religious reasons, applying employment-related torts to ministerial employment is unlikely to be truly "neutral." The Fifth Circuit panel likened the suit at issue to the property dispute in *Jones v. Wolf*, 443 U.S. 595 (1979). *See* Pet. App. 5a. But unlike disputes over title to property, many employment-related torts require judges and juries to assess defendants' conduct in expressly moral terms.

For instance, to adjudicate a claim for tortious interference with a third-party contract, a judge or jury must decide whether an act was "improper[]," *see* Restatement (Second) of Torts § 766, which can involve assessing "the social interests in protecting the freedom of action of the actor and the contractual interests of the other," *id.* § 767(e). Similarly, adjudicating a defamation claim requires deciding whether a statement "lower[s] [the victim] in the estimation of the community," *id.* § 559, which means deciding whether the plaintiff would be prejudiced in the eyes of a "substantial and respectable minority" of the relevant community. Moreover, judges and juries will be tasked with deciding whether the defendant's conduct was the legal cause of the plaintiff's termination.

"Deciding such questions would risk judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2069. So even if the reasons behind the defendants' conduct were secular, this entanglement would likely be unavoidable, given the nature of the torts at issue. *See* Pet. App. 57a (Ho, J., dissenting from denial of rehearing en banc). This is precisely the

kind of entanglement that the First Amendment prohibits.

CONCLUSION

This Court should grant certiorari and reverse the Fifth Circuit's decision.

Respectfully submitted,

IGOR V. TIMOFEYEV
Counsel of Record
MICHAEL S. WISE
JOANNE JOSEPH
TOR TARANTOLA
PAUL HASTINGS LLP
2050 M STREET, N.W.
WASHINGTON, D.C. 20036
(202) 551-1700
igortimofeyev@paulhastings.com

WILLIAM MILBURN
PAUL HASTINGS LLP
600 TRAVIS STREET
FIFTY-EIGHTH FLOOR
HOUSTON, TX 77002

April 2021