STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
) SS:	
COUNTY OF MARION)	

CAUSE NO. 49D01-1907-PL-27728

JOSHUA PAYNE-ELLIOTT	)
	)
Plaintiff,	)
	)
ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.	)
	)
Defendant.	)

MEMORADUM IN SUPPORT OF DEFENDANT ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.'S MOTION FOR PROTECTIVE ORDER

Trial Rule 26(C) of the Rules of Trial Procedure grants the trial court broad discretion in the oversight of the discovery process, including the discretion to limit the terms and conditions, timing, and scope of the discovery. In addition to Trial Rule 26(C), the U.S. Constitution independently limits discovery when it would impinge on freedoms guaranteed by the First Amendment.

Here, the First Amendment limits discovery in three distinct ways. First, the doctrine of church autonomy prohibits judicial interference into matters of church governance and thus requires a stay of discovery until the Court resolves the question of subject-matter jurisdiction. Second, even assuming the Court has jurisdiction, initial discovery would need to be limited to the merits of the ministerial exception defense, as numerous courts have recognized. Third, the freedom of expressive association limits discovery into internal religious communications between the Archdiocese and other Catholic ministries.

A. Discovery must be stayed until the Court resolves the church autonomy defense.

As elaborated in the accompanying Motion to Dismiss, the Supreme Court has long recognized that "civil courts exercise no jurisdiction" over matters of "church discipline" or

"ecclesiastical government." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). That principle is fully dispositive of this case. Not only does it deprive this Court of jurisdiction, it also serves as a defense to discovery.

The Supreme Court has often said that "the very process of inquiry" into internal church affairs and doctrines can "impinge on rights guaranteed by the religion clauses." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Thus, the First Amendment prohibits a "detailed review of the evidence" regarding internal church procedure and discipline. *Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 717–18 (1976) (a court's "detailed review of the evidence" regarding internal church procedures was itself "impermissible" under the First Amendment); *see Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (it is "well established" that state power should not be lightly employed to "troll[ ] through a person's or institution's religious beliefs").

In this respect, the church autonomy doctrine is "closely akin" to a type of "official immunity," because the immunity it provides is not simply immunity from an adverse judgment, but a more fundamental immunity from the "travails" of litigation and trial and intrusions by secular courts into religious affairs. *See McCarthy v. Fuller,* 714 F.3d 971, 975–76 (7th Cir. 2013). This immunity prohibits a "secular court [from] resolving a religious issue" as a threshold matter, an act recognized to work "irreparable" harm. *Id.* at 976; *see McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999) (courts may not make preliminary determinations about "canon law" or whether a religious authority "properly exercised his jurisdiction"). Thus, where courts allow claims that "fall within the scope of [a church's] immunity" to proceed "to discovery and trial," the "constitutional rights of the church to operate free of judicial scrutiny [are] irreparably violated." *United Methodist Church, Baltimore Annual*

Conference v. White, 571 A.2d 790, 792–93 (D.C. 1990) ("[t]he First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery . . . under certain circumstances in order to avoid subjecting religious institutions to defending their religious beliefs and practices in a court of law"); *see also Heard v. Johnson*, 810 A.2d 871, 876–77 (D.C. 2002) (same); *accord Harris v. Matthews*, 643 S.E.2d 566, 568–69 (N.C. 2007) (the "First Amendment prevents courts from becoming entangled in internal church governance concerning ecclesiastical matters," requiring final determination of a church-autonomy defense before "a civil court action can[] proceed").

Here, discovery is inappropriate at this early stage because the Court has not yet decided whether Plaintiff's claims are barred by the doctrine of church autonomy. When making discovery decisions in cases implicating church autonomy, courts "have consistently agreed that civil courts should not review the internal policies, internal procedures, or internal decisions of the church." *McRaney v. North Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 17-cv-080, 2018 WL 5839678 (N.D. Miss. Nov. 7, 2018) (quashing subpoena under both the ministerial exception and ecclesiastical abstention doctrines). The "kind of 'entanglement'" which "aris[es] out of the inquiry process" into "confidential communications among church officials" is precisely what the Religion Clauses forbid. *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 401–02 (1st Cir. 1985) (en banc) (Breyer, J., concurring); *accord Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) ("compelled disclosure" of internal church communications would "substantially infring[e]" church autonomy). Thus, for instance, the Fifth Circuit recently explained that discovery of religious organizations' "internal communications" can raise "inherent" conflicts with the Religion Clauses' "structural protection afforded religious organizations and practice." *See Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir.

2018), *cert. denied sub nom Whole Woman's Health v. Texas Catholic Conference of Bishops*, 139 S. Ct. 1170 (2019) (quashing subpoena of internal communications under Fed. R. Civ. P. 45 in light of, *inter alia*, burden on church autonomy rights).

Plaintiff's initial discovery requests served August 5, 2019, dive right into (and even beyond) the merits of the case, targeting the very matters of church governance that the church autonomy defense is designed to protect. For example, the requests seek: (1) information on the extent of "influence or control" exercised by the Archdiocese over Cathedral; (2) any communications by Archbishop Thompson to Cathedral regarding use of "morals clauses in its teacher contracts in order to retain its recognition as a Catholic institution"; (3) the canonical decrees issued by the Archbishop to Brebeuf and Cathedral; and (4) other terminations by the Archdiocese of "any married teacher for any violation of Church teachings related to divorce, annulment, co-habitation, pre-marital sex, extra-marital sex, birth control, sterilization, adultery, or fornication." *See* First Request for Production of Documents, First Set of Interrogatories, and First Requests for Admission, attached as Exhibits 1, 2, and 3.

Further, Plaintiff's claims would require this Court to determine whether the Archdiocese had a "legitimate reason" for requiring Cathedral "to adopt and enforce morals clause language" used in all other Archdiocesan schools. Compl. ¶ 13; *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000). And, as explained in the parallel motion to dismiss, whether a legitimate reason exists is ultimately a religious question outside secular court jurisdiction—turning on whether violating the teachings of the Catholic Church renders a teacher "deficient" under "canon law," and whether the Archbishop "properly exercised his jurisdiction over [Cathedral]." *McEnroy*, 713 N.E.2d at 337. Accordingly, the Court must resolve the church autonomy defense before allowing discovery to proceed.

B. Even if discovery is not stayed, it must be limited to the question of whether the ministerial exception applies.

Even apart from the church autonomy defense, the ministerial exception imposes additional limits on discovery. The ministerial exception is a "structural" protection under the Religion Clauses "that categorically prohibits federal and state governments" from interfering in disputes over ministerial employment. *See, e.g., Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (citing *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015)). As elaborated in the Motion to Dismiss, the Supreme Court has held that the Constitution protects religious groups in "choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012) (barring employment discrimination suit by school teacher at Lutheran school); *see Ind. Area Found. of United Methodist Church v. Snyder*, 953 N.E.2d 1174, 1180 (Ind. Ct. App. 2011) ("The right of the Church to choose its ministers without court intervention is protected by the First Amendment."); *Grussgott v. Milwaukee Jewish Day School, Inc.* 882 F.3d 655, 659 (7th Cir. 2018) (Hebrew teacher served ministerial role, despite her view that her teaching was "historical, cultural, and secular").

To "minimize the possibility of constitutional injury," courts have repeatedly held that the ministerial exception is a "threshold matter" that must be decided before merits-related discovery or trial and is "subject to prompt appellate review" when denied. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608–09 & n.45 (Ky. 2014) (citations omitted). As the Seventh Circuit recently explained, "it is precisely to avoid [ ] judicial entanglement" like "subjecting religious doctrine to discovery . . . that the Justices established the rule of *Hosanna-Tabor*." *Sterlinski v. Catholic Bishop of Chicago*, No. 18-2844, -- F.3d --, 2019 WL 3729495, at *2 (7th Cir. Aug. 8, 2019); *see Sterlinski v. Catholic Bishop of Chicago*, No. 16-C-00596, 2017 WL 1550186, at *5

(N.D. Ill. May 1, 2017) ("potentially intrusive merits discovery" creates "the very type of intrusion that the ministerial exception seeks to avoid"). For this reason, courts avoid any unnecessary "legal process pitting church and state as adversaries" that would make church personnel and records "subject to subpoena, discovery, . . . [and] the full panoply of legal process designed to probe the mind of the church." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

Courts considering the applicability of the ministerial exception defense have therefore allowed, at most, "limited discovery to determine whether the ministerial exception applies." *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012). However, where "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense," it is appropriate to dismiss a case based on an affirmative defense even without limited discovery. *Demkovich v. St. Andrew the Apostle Parish*, No. 1:16-CV-11576, 2017 WL 4339817, at *4 n.4, 5 (N.D. Ill. Sept. 29, 2017) (granting motion to dismiss) (quoting *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005)). Allowing more discovery than strictly necessary to establish the affirmative defense would result in "impermissible entanglement with religion" via "intrusive discovery" into the reasoning behind religious belief and internal decision-making. *Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp. 3d 772, 786–87 (N.D. Ill. 2018).

Thus, even if the Court declines to dismiss this case for lack of jurisdiction under the doctrine of church autonomy, it must limit any initial discovery to the ministerial exception claim.

C. Discovery is further limited by the right of expressive association.

Finally, discovery is further limited in this case by the right of expressive association, particularly where the requested discovery could potentially chill protected association. "It is beyond debate that" the First Amendment protects not just the right of individuals to advocate their points of view in public but also the "freedom to engage in association" with others "for the

advancement of beliefs and ideas." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). This freedom traditionally bars enforcement of discovery requests requiring an expressive organization to disclose information where disclosure would have a "deterrent effect" on exercising associational liberties. *Id. at* 461–62 (noting expected "manifestations of public hostility" as such a deterrent).

Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010), is illustrative. There, in the course of challenging a state law prohibiting same-sex marriage, plaintiffs sought to have the proponents of the challenged law turn over their "internal communications relating to campaign strategy and advertising" *Id.* at 1152. The Ninth Circuit held that compelling these disclosures would violate the proponents' "First Amendment privilege." *Id.* at 1159–65. "Implicit in the right to associate with others to advance one's shared political beliefs" "is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Id.* at 1162. The proponents had made a "prima facie showing" that compelled disclosures would chill this component of their association rights, because they would be "less willing to engage in" internal communications about "political and moral" issues if they knew that those private deliberations would ultimately be subject to disclosure. *Id.* at 1163. The plaintiffs were unable to "demonstrate[ ] an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect" on the protected rights. *Id.* at 1164 (quoting *Patterson*, 357 U.S. at 463).

Similarly, in *Whole Women's Health*, the Fifth Circuit found that a subpoena of the "internal email communications" of the Texas Conference of Catholic Bishops in a challenge to a state fetal-remains law "undermined" the bishops' "ability to conduct frank internal dialogue" and should have been quashed. 896 F.3d at 373. Citing *Perry*, the Fifth Circuit emphasized that "a

seminal aspect of the freedom to associate" is "protecting [internal] deliberations" of expressive organizations so that those deliberations can be "broad, uninhibited, and fearless." *Id.* at 372.

Here, Plaintiff's discovery requests seek, among other things "any and all documents relating to, referring to, or evidencing the Archdiocese's directives to Catholic institutions" regarding the Catholic response to all forms of "conduct that does not conform to the doctrine and pastoral practice of the Catholic Church." *See* First Request for Production at 6; *see also, e.g.*, *id.* at 10 (requesting all documents relating to any employees "alleged to be in violation of Catholic Church teachings"); First Set of Interrogatories at 16 (requesting names of all such employees and details of how the alleged sin came to light); *id.* at 12 (requesting all directives to "schools or other institutions" regarding the employment of those in same sex unions), 15 (requesting the "reason(s) for" issuing a religious decree to Brebeuf). These are precisely the kind of internal deliberations that were protected from discovery in *Whole Women's Health*.

D. Conclusion

For the foregoing reasons, discovery must be stayed until the Court resolves the motion to dismiss on First Amendment grounds. Even if that motion is denied, discovery must be limited to the application of the ministerial exception and to requests that do not infringe the right of expressive association.

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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 ____ day of _______________ 2019:

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