No. 11-____

IN THE

# Supreme Court of the United States

ERWIN LUTZER,
*Petitioner,*

v.

RICHARD A. DUNCAN,
*Respondent.*

**On Petition for a Writ of Certiorari to the Appellate Court of the State of Illinois, Second District**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

This Court has stated that the First Amendment shields churches from civil-court scrutiny "over the selection of those who will personify [their] beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012). Moreover, consistent with its settled precedent, the Court removed from the reach of civil litigation any inquiry into whether the religious motivation for such personnel decision "was pretextual," *id.* at 709, or whether the discipline "compl[ied] with church laws and regulations," *id.* at 705. In this case, by contrast, the court below sustained a jury verdict against the senior pastor of a church when the trial included extensive questioning of the findings made during the church-discipline process, the sincerity and validity of the religious grounds for the revocation of a minister's ordination, and whether the church had adhered to its own internal procedures.

The question presented is whether the First Amendment permits imposing liability on a church pastor for revoking the ordination of a minister and communicating the reasons for that revocation to those who had initiated the internal disciplinary process: leaders of the church where that minister was then serving.

## PARTIES TO THE PROCEEDINGS BELOW

Erwin Lutzer was a defendant in the circuit court, an appellant in the state appellate court, and a petitioner in the state supreme court.

Richard A. Duncan was a plaintiff in the circuit court, an appellee in the state appellate court, and a respondent in the state supreme court.

Bervin Peterson was a defendant in the circuit court.

The Moody Church was a defendant in the circuit court.

Hope Church was a plaintiff in the circuit court.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Erwin Lutzer respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of the State of Illinois, Second District.

## OPINIONS BELOW

The opinion of the Appellate Court of the State of Illinois, Second District (App., *infra*, 1a-20a), is reported at 947 N.E.2d 305. The Appellate Court's denial of rehearing (App., *infra*, 60a), is unreported, and the Supreme Court of Illinois's denial of leave to appeal (*id.* at 61a), is reported at 955 N.E.2d 469. The Appellate Court's previous opinion (App., *infra*, 24a-47a), reversing in part the trial court's grant of summary judgment to the defendants (*id.* at 48a-59a), is reported at 835 N.E.2d 411.

## STATEMENT OF JURISDICTION

The judgment of the Appellate Court was filed on December 30, 2010 (App., *infra*, 1a), and rehearing was denied on May 10, 2011 (*id.* at 60a). The Supreme Court of Illinois denied leave to appeal on September 28, 2011 (*id.* at 61a). On December 16, 2011, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 25, 2012. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * *.

## PRELIMINARY STATEMENT

This case lies at the core of religious self-governance. It centers on the revocation of a minister's ordination and the related communications among the leaders of two churches—The Moody Church (hereinafter Moody or Moody Church), which had ordained the minister, and Hope Church (Hope), which employed him as senior pastor. The minister—respondent Richard A. Duncan—argued that these communications about his fitness for the religious credential of ordination constituted "false light invasion of privacy" under Illinois common law. His theory of damages was that this religious decision, communicated only to those involved in the two churches, led Hope's members to stop attending it, therefore depriving him of the money he otherwise could have earned. Perhaps most problematic, the verdict was against petitioner Erwin Lutzer, Moody's senior pastor, and his offense was to communicate the revocation, including the statement of charges against Duncan, in a letter to the same Hope

Church leaders who had brought those charges in the first place.[1]

It would be difficult to devise a fact pattern more pervasively ecclesiastical or less susceptible to adjudication by the civil courts. And indeed the trial court dismissed the case on First Amendment grounds—but the Appellate Court reversed, sending the case back for trial. It subsequently affirmed the resulting verdict. Its actions constitute an extraordinary civil-court encroachment on church governance.

Ordinations of ministers, revocations of ordinations, and explanations of those decisions to the involved religious leaders, are central to a church's practice of religious discipline and its "control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012). Church discipline—much less the question about whether someone is qualified for ordination to the clergy—has always been off-limits in the civil courts.

Worse, the lower courts predicated liability on communications between the senior pastor of a church that had *ordained* Duncan with leaders of a church that *employed* him. This result imperils the First Amendment rights of *both* churches.

The judgment below should be summarily reversed in light of this Court's unbroken chain of cases directing the

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[1] The three men referred to as "Hope Church leaders" throughout this litigation and in this petition were prominent members of, and had all served on the board of, Hope Church. Tr. 567, 608-609, 999. Their leadership role was recognized by Moody Church and the lower courts. App., *infra*, 19a, 32a, 52a, 53a; Tr. 664, 671. As described below, see *infra* pp. 6-7, Duncan had removed every remaining Board member from formal membership on the Board by the time of the events giving rise to this litigation. See Tr. 610, 999-1001.

civil courts to stand down in circumstances like these. At the very least, it should be vacated and remanded for reconsideration in light of this Court's recent opinion in *Hosanna-Tabor*. Alternatively, the Court should consider granting plenary review.

## STATEMENT

### I. BACKGROUND

This case arises from the exercise of church discipline. Leaders from Hope, where respondent Richard A. Duncan was then the senior pastor, sought assistance from Moody, which had ordained Duncan as a minister. The communication between leaders of the two churches about revoking that ordination led Duncan to bring suit against Moody and its leaders.

#### A. Duncan's ordination and career

Duncan had long attended Moody and was involved in lay ministries as he completed his seminary education. Tr. 841. When he graduated, he sought ordination as a minister by Moody Church. Tr. 841-842, 844-846.

Ordination is a religious credential given by a religious body to authorize someone to function as a minister pursuant to that church's teaching. It is an expression of a religious opinion that the newly ordained individual satisfies the necessary requirements for ministry. See 15 CR 3294, 3298; DX11, at 7-9; Tr. 1200 (expert testimony). In turn, churches revoke ordinations of those found unfit to retain the "imprimatur" of the church, because of changes in their theology or because of moral transgressions. 15 CR 3298-3299; DX11, at 10. "In the Christian community, every independent denominational church jealously guards its ordination procedures." Tr. 673-674.

Duncan himself testified that the ordination process was intense and involved, turning not only on study but

on the candidate's theological beliefs. Tr. 844-845. It required writing, examinations, and approval by various levels, culminating in a ceremony in which he was formally ordained as a minister. *Ibid.* The "significance * * * of being ordained" by Moody included "the acknowledgment of my talents, I suppose, and abilities and my dedication, it was a public credentialing of my life that you are fit for ministry and you are now an ordained minister and can function as a [*sic*] ordained minister * * * ." Tr. 846-847.

Duncan completed the process and was ordained by Moody in 1989. App., *infra*, 2a. He worked there as pastor for evangelism and outreach until 1992. *Ibid.*; Tr. 842. Petitioner Erwin Lutzer was the senior pastor at Moody during that time and remains the senior pastor now. Tr. 679.

In 1992, Duncan accepted an offer to become senior pastor of the Village Church at Lincolnshire. App., *infra*, 2a. Lutzer participated in the service installing Duncan in that role. Tr. 864-865. After several years, however, tensions developed with respect to Duncan's leadership, and the elders began considering terminating his position. Tr. 1179-1182. They invited Lutzer to provide counsel, in part because he would advocate for Duncan. Tr. 1181-1182. Lutzer advised caution and urged the elders at least to allow Duncan to speak to the congregation, and allow the congregation to vote. Tr. 1183. In February 1997, the elders gave Duncan the last word at a congregational meeting, and then took a vote. *Ibid.* The overwhelming majority voted to relieve him of his position. Tr. 1184.

Duncan then started Hope Church, along with some members of the Village Church who continued to support him. See, *e.g.*, Tr. 598, 870-872, 1098.

**B. The trouble at Hope Church**

1. By early 2000, Duncan and his wife, Diane (herself a member of the Hope Church Board, see Tr. 609, 999), began experiencing marital difficulties. Tr. 906. When the congregation expressed concern about Mrs. Duncan's frequent absences from church, Duncan told them that she, or one of the children, was sick, and denied any marital problems. See, *e.g.*, Tr. 1122-1124, 1150. In fact, Mrs. Duncan had grown estranged from Duncan, believing him to be unfaithful to her. Tr. 906-907. She presented e-mails to fellow Board members that persuaded them that Duncan was having an inappropriate relationship with a single woman and that Duncan's family life was in serious disarray. Tr. 536, 601, 612-613, 1100-1102, 1112.

The Hope Church leaders made an effort to investigate and resolve the issues presented by these developments. They separately talked with Duncan and his wife, and met with the woman who had ostensibly been having an inappropriate relationship with him. Tr. 602, 611-614, 618-619, 908, 1000, 1102-1104.

Duncan's response to his wife's accusations was to obtain an *ex parte* "protective order" barring her from the church. Tr. 916-917, 1002. Several days later, on Sunday, March 19, 2000, Duncan finally told the congregation that he and his wife were having marital problems. Tr. 997. During the week after that admission, Duncan appeared in court against his wife, and some members of the congregation testified in favor of Mrs. Duncan. Tr. 915-918, 1151.

2. Tensions boiled over at the church on the following Sunday, March 26, 2000 (called the "firestorm Sunday" throughout the record). Tr. 589, 621-623, 922-925. Dun-

can "fired" all remaining Board members,[2] canceled the worship service, and instead of leading worship, addressed those who remained. Tr. 610, 999-1001. He angrily denounced several of the Board members and members of the church, including some who had followed him from the Village Church. See Supp. Tr. 7-16. Duncan had called in the police, and as soon as someone started to question him, he stated: "Police are here. Police are here. * * * You folks agreed not to say anything. Folks, you agreed not to say anything until I dismissed the service. I'll ask him to come in and remove them." Supp. Tr. 12.

3. Not surprisingly, that "firestorm Sunday" affected the church. Tr. 801, 926. Many members quit because of how Duncan's personal life affected his ministry. See, *e.g.*, Tr. 1089, 1125, 1151.

### C. The Moody Church's revocation of Duncan's ordination

1. The Hope Church leaders initiated the process that led Moody to revoke Duncan's ordination. As the Hope Church leaders understood the Bible, a minister's personal life affects his fitness for the ministry; consequently, "church" and "personal" lives of clergy are not distinct. Tr. 618, 1111. Knowing that Moody was the church which had ordained Duncan, the Hope Church leaders turned there. Tr. 582, 1113. They discussed the various ecclesiastical charges that they were raising against Duncan with Moody's leadership, and also supplied the e-mails Mrs. Duncan had provided. Tr. 538-540, 571, 582, 684, 1113-1116, 1174.

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[2] Having drafted the rules of the church, Duncan left himself such unilateral power. See Tr. 929, 988-989; DX3.

2. The Moody Church's leadership, in turn, believed that ministers it had ordained were required to live according to biblical standards, which were inconsistent with the charges against Duncan. Tr. 664, 722. On April 23, 2000, Moody's Board of Elders sent Duncan a letter listing six charges brought by the Hope Church leaders. Each was accompanied by scriptural references as to why the alleged behavior is biblically inconsistent with ordination. See PX2. For instance, "1. You have had an improper relationship with a divorced single woman, violating the Biblical teaching that an elder be 'above reproach' (I Tim. 3:2)." PX2, at 1. The other charges related to Duncan's impending divorce, use of alcohol, misuse of funds, conduct within his family, and relation to ecclesiastical authority. *Id.* at 1-2. The elders then wrote,

> [a]ny one of the above charges, taken separately, is serious enough to warrant the withdrawing of the ordination credentials conferred upon you by us on March 19, 1989. Taken together, these six charges represent a grave breach of the high and holy conduct expected of a minister of the Gospel.

*Id.* at 2.

The elders stated that they "want[ed] to give [Duncan] an opportunity to reply to these charges. If you contact any one of us before Thursday, May 4, 2000, we will be glad to set up a meeting with you to which we will invite the former members of your church Board, and, if necessary, other witnesses." PX2, at 2.

Duncan did not accept the offer to schedule a meeting. Tr. 637. Rather, he called one of the elders, John Welch. Tr. 636-637, 932. Duncan stated that the charges were not true, asserted that he did not trust Lutzer, and told Welch that he would not appear. Tr. 932-933. Because

he had resigned his church membership at Moody, he said, Moody had no authority over him. Tr. 931.

Welch urged him to come due to the gravity of the charges, which touched not on church membership but the continuing validity of the ordination. Tr. 637. Moody Church then sent a second letter, dated May 5, 2000, beseeching Duncan to appear. PX3. They reiterated what was at stake and noted that they would proceed quickly "[g]iven the seriousness of this matter."

> Let us be very clear: if you are innocent of even one of the charges outlined, we are requesting you to come to our executive committee meeting this Monday evening and respond to these accusations. There, you will have an opportunity to meet your "accusers" and our committee will have the opportunity to judge the truth for themselves. *If you will accept our invitation*, we will have your former board members present, as well as other witnesses we deem necessary.

PX3 (emphasis added). Duncan did not "accept [their] invitation" or appear at the executive committee's meeting. Tr. 935. Consequently, the executive committee held no full hearing with "witnesses." Tr. 638, 715. It instead heard the charges from the elders, whose recommendation was motivated in part by the credibility of the Hope Church leaders whom they knew and esteemed, as well as by the distressing contents of the e-mails and by Duncan's failure to appear. Tr. 654-655, 715-717. The executive committee voted to revoke Duncan's ordination, and predicated its decision on scripture. PX4.

The following day, Bervin Peterson—the chairman of the board of elders—and Lutzer sent Duncan a final letter to inform him

> that last night, May 8, 2000, the Executive Committee of the Moody Church, upon the recommendation of the Elders, voted to rescind the licensing and ordination that this body conferred upon you in March, 1989. Since you did not respond to our request(s) that you meet with those who brought charges against you, we had little choice but to follow through with the action stated in our letters.

PX4. It also "request[ed]," "in light of our decision to revoke your licensing and ordination," that Duncan "no longer function in the role of a minister," that he "no longer accept the title 'Reverend' Duncan, or 'Pastor' Duncan, or any other such title that would imply that you have credentials for spiritual leadership and ministry," and finally that he "inform the leadership and membership of Hope Church of our action." *Ibid.*

That letter indicated that the Hope Church leaders who had initiated these proceedings were copied on this final letter. PX4. In forwarding the May 9 letter to all three men, along with the two prior letters that Moody Church had sent to Duncan, Lutzer included a cover letter thanking them for their "testimony" and telling them that "[w]e are sending you this information and it is up to you as to what is done with it." PX1; App., *infra*, 5a. Lutzer sent them this material because they had brought the allegations to Moody in the first place; this was Moody Church's communication of the outcome of the proceedings they had initiated. Tr. 671, 723. Neither Lutzer nor Peterson sent the correspondence to anyone other than Duncan and the Hope Church leaders. Tr. 671, 1174.

## II. PROCEEDINGS BELOW

### A. Summary judgment proceedings

1. *Proceedings in the circuit court*

Duncan and Hope Church[3] sued Peterson, Lutzer, and Moody Church in Illinois state court, alleging false-light-invasion-of-privacy and conspiracy claims. 1 CR 1; App., *infra*, 1a-2a. Defendants argued that the First Amendment to the U.S. Constitution precluded civil courts from adjudicating this dispute.

The trial court agreed and granted summary judgment for the defendants. App., *infra*, 48a. It began by describing this Court's decision in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), and it framed its analysis around the First Amendment principles articulated by this Court. App. *infra*, 49a-50a.

The actions of all parties in the case, the trial court concluded, were part of religious disciplinary proceedings: "[I]t is because Duncan still enjoyed the status of being ordained by the Moody Church that his complainants approached Moody. And it is because Duncan carried the name of the Moody Church with his ordination that the church apparently took disciplinary actions against him." App., *infra*, 51a. "Exercising jurisdiction would entangle the Court in the internal disciplinary functions of a church which may require that it pass judgment on matters of ecclesiastical import, a task which this Court lacks authority to do." *Id.* at 52a.

The court found unremarkable Moody's having provided the results to those who had initiated the proceedings. Those men were "all board members of the Hope Church. Since [they] brought their concerns to the

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[3] Hope was eliminated from the suit on summary judgment, which was affirmed and not further appealed. App., *infra*, 5a-6a.

Moody Church regarding Pastor Duncan's conduct and possible revocation of his ordination, it is natural that Moody Church sent a final correspondence to these individuals once it had finished disciplinary proceedings." App., *infra*, 52a.

The court cited this Court's case law to explain its need to avoid deciding matters "entwined with theological issues," App., *infra*, 55a, and concluded that the charges raised by the Hope Church leaders against Duncan were so entwined. They are "replete with theological references," such that evaluating (as one example) the charge regarding alcohol would require the court "to determine what meaning the terms temperate and self-controlled have in a biblical sense." *Id.* at 56a. "Similar problems would exist in determining whether Pastor Duncan had an improper relationship *** according to biblical standards and whether his conduct was above reproach according to biblical citation." *Id.* at 56a-57a.

Nor was Duncan's non-membership argument a valid basis for circumventing the First Amendment's protection of church-discipline proceedings: "[F]or Pastor Duncan to fully escape the disciplinary authority of the church, it may well be that *he* would have had to have revoked his ordination." App., *infra*, 57a (emphasis added).

2. *Proceedings in the Appellate Court*

Duncan timely appealed, and the Appellate Court of Illinois, Second District, reversed in relevant part in September 2005. It acknowledged that the First and Fourteenth Amendments prohibit civil courts from reviewing a church "decision relating to government of the religious polity. Rather, civil courts must examine as a given whatever the religious entity decides." App., *infra*, 36a. Yet the Appellate Court embraced civil court scrutiny of a church's adherence to its own procedures: "Court in-

tervention is also not prohibited when a church fails to follow the procedures it has enacted." App., *infra*, 38a.

Turning to Duncan's claims, the court acknowledged that "both sides of this case focus on the religious theory underlying whether the Moody Church had the ability to revoke an ordination of a person who resigned his membership and pastoral position," App., *infra*, 40a. Yet it found no need "to look at religious doctrine or the biblical underpinnings of The Moody Church's right to revoke an ordination to determine whether defendants' conduct invaded Duncan's privacy by publishing false information." *Ibid.* Rather, the

> harm alleged * * * resulted from the alleged conduct of defendants in placing Duncan in a false light when revoking that ordination. Even if the reasoning behind defendants' decision to revoke the ordination bestowed upon Duncan by The Moody Church is not reviewable because it is "steeped in matters of theological import," *we may review defendants' conduct in carrying out the revocation.*

*Ibid.* (emphasis added).

Characterizing Duncan's claims as asserting "false light" invasion of privacy, App., *infra*, 42a, the court identified as "fact" issues "whether the [May 9] letter placed Duncan in a false light by portraying him as having been stripped of all right to be a minister" and whether the letter's promise of prayer for Duncan "'so that [he] may be restored to [his] wife and those whose trust that [he] betrayed'" falsely implied that he had betrayed his wife, *id.* at 43a.

The court also rejected Lutzer's argument that there was no evidence of actual malice. It relied for this proposition on the claim that Moody "did not follow [its] own

recently enacted procedures for revoking an ordination, by giving Duncan only two days' notice for the hearing and refusing to give Duncan information regarding the witnesses," and that Lutzer did not clarify the letter later (by restating that the ordination's revocation was limited to ordination by Moody). App., *infra*, 45a-46a.

Thus, it remanded the case for trial. The Supreme Court of Illinois denied review of the interlocutory decision reversing summary judgment. App., *infra*, 62a.

**B. The trial**

1. After several additional years of pre-trial proceedings following remand, the case went to trial in March 2009. Defendants maintained their federal constitutional arguments and raised affirmative defenses that the letter in question amounted to the expression of an ecclesiastical opinion regarding Duncan's fitness to be a minister that was protected by the Speech and Religion Clauses of the First Amendment. 10 CR 2079-2081.

2. *a.* At trial, Duncan followed the Appellate Court's lead. Counsel—both in examining witnesses and at closing argument—emphasized Moody's alleged unfairness in revoking Duncan's ordination.

Counsel attacked the procedures and evidence Moody used in revoking Duncan's ordination. In eliciting testimony, counsel focused on Moody's revocation procedures (adopted *after* this case was in progress) not being expressly followed here; this being the first example of Moody imposing discipline on a non-member; whether the investigation or proceedings were sufficiently robust; and the most minute details of the various religious correspondence in the case. See, *e.g.*, Tr. 629-633, 647, 651-655, 674-677, 687, 694-701, 704-712. At closing, counsel harshly attacked the perceived inadequacy of Moody's in-

ternal religious procedures in the revocation of Duncan's ordination. Tr. 1227-1229.

Counsel asserted that the jury could conclude that Moody had little legitimate reason to trouble itself with Duncan's ordination—he had not been a member of that church for a decade. Tr. 1234. Rather, the *true* motive for the revocation was the personal animosity between Lutzer and Duncan, although the revocation decision was made by the elders and executive committee, not Lutzer alone. Tr. 1234-1235.[4] Moody failed to "do any investigation" with respect to the charges, counsel argued, which proved that the religious basis for revoking the ordination was pretextual. Tr. 1236. The failure to afford Duncan more process (despite Duncan's refusal to appear when given two such opportunities, something counsel did *not* address) demonstrates, counsel argued, that Moody was after something other than truth. *Ibid.*

The argument that the revocation was merely pretext even led counsel to belittle the significance of Duncan's ordination from Moody Church. Dwight L. Moody, the nineteenth-century founder of the church, had not been ordained, so counsel asked the jury to conclude that there was no true religious basis for saying that the revocation of *Duncan's* ordination meant *he* could not "still be a minister." Tr. 1231. Indeed, counsel asked the jury to adjudge the religious foundation of the revocation letter to be merely "lies, deception, and deceit." Tr. 1231-1232.

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[4] The alleged personal animus argued by Duncan's counsel included Lutzer being upset with Duncan leaving Moody and Lutzer's involvement with the Village Church at the time of Duncan's firing there, see Tr. 856, 905; Lutzer speaking with Duncan's wife and apparently taking her side in the divorce dispute, App., *infra*, 31a; and Lutzer's alleged knowledge that Duncan was aware of Lutzer's alleged inappropriate conduct, see *id.* at 19a.

*b.* Duncan himself, by contrast, testified to the value he placed on his Moody Church ordination. Tr. 845-847. He also claimed to have had an ordination from Hope Church. Tr. 883. Duncan himself drafted Hope's "structure of ministry," DX3, and inserted a clause stating that whoever was the senior pastor was "inherently ordained." Duncan called that provision "unique." Tr. 883.

Moody's leaders, accordingly, knew of no ordination appertaining to Duncan other than its own, see, *e.g.*, Tr. 670, 724, and Duncan testified that he never told anyone at Moody about any other ordination, Tr. 1020-1021. Hope's own board members testified that Duncan's ordination was from Moody, not Hope. Tr. 588, 1099. Expert testimony established that multiple ordinations were unusual. 15 CR 3313-3314. Rather, in the common scenario in which a minister ordained by a church leaves to minister elsewhere, the ordaining church's "continuing role in the ordination * * * regardless of where that individual may be," is "not only important" but "imperative" to "most churches." 15 CR 3298; see also DX11, at 10-11. Moody got involved because ordination (unlike membership) goes with someone upon leaving a church, so Duncan still held Moody's credential. Tr. 654, 666-667, 670.

2. The jury returned a verdict in favor of Duncan, but only as against Lutzer. App., *infra*, 23a. Peterson (who had also signed the letter to Duncan announcing the revocation, PX4) and Moody Church were not held liable. App., *infra*, 23a. The jury awarded Duncan $276,305, *ibid.*, and the trial court entered judgment for that amount, *id.* at 22a.

Lutzer filed post-verdict motions for judgment notwithstanding the verdict or, in the alternative, a new trial, 15 CR 3359, which were denied, App., *infra*, 21a.

**C. Proceedings on appeal**

1. The Appellate Court affirmed. App., *infra*, 1a. It rejected Lutzer's First Amendment argument and again held "that the ecclesiastical abstention doctrine did not apply" to this case. *Id.* at 7a.

The Appellate Court did not dispute Moody's authority to revoke an ordination, App., *infra*, 7a, but held that "the subject matter of this dispute is grounded in false light invasion of privacy," *id.* at 9a. The allegedly tortious conduct, therefore, came from "disseminat[ing] to individuals who were not members of the Moody Church a bundle of letters regarding plaintiff's conduct." *Ibid.* Those individuals, of course, were not mere strangers, but were the same Hope Church leaders who had invoked Moody Church's process. *Id.* at 2a-3a, 5a; Tr. 601.

Nonetheless, the court returned over and over to those men's lack of formal membership at Moody, purporting to distinguish on that basis a series of cases disclaiming jurisdiction over the collateral consequences of church discipline. The leaders here "were not members of the Moody Church," App., *infra*, 9a, and were "outside of the Moody Church," *id.* at 10a. Of another case, it said that "none of alleged [*sic*] defamatory information was disseminated beyond the church that made the allegations, and, thus, the subject matter concerned church governance." *Ibid.* Thus, Moody's revocation of Duncan's ordination pursuant to proceedings initiated by leaders of Duncan's church "was not an internal procedure of the Moody Church," *id.* at 11a, and "the general subject matter of the dispute does not involve internal church matters." *Ibid.* Thus, it found there was no basis for ecclesiastical abstention. *Id.* at 11a-12a.

The court recognized that Lutzer had raised the Religion and Speech Clauses of the First Amendment, but as

with civil-court jurisdiction, it found no constitutional obstacle to the trial court's merits resolution. App., *infra*, 12a-13a. While the "religious opinions" in the letters relating to Duncan's fitness may be off-limits, the court found the "accusations" within the first letter to Duncan to be "stated * * * as fact, not as opinion." *Id.* at 12a. One such "fact" was incorrect—Duncan's wife (not Duncan) initiated divorce proceedings. *Id.* at 13a, 16a. Other charges were made (the court stated) "without any investigation," *ibid.*, although the court also acknowledged that the Hope Church leaders had brought the e-mails to Moody, had spoken with Moody's elders and senior pastor about the charges, and had given Duncan two opportunities to appear. *Id.* at 3a-4a.

The court rejected Lutzer's remaining arguments. App., *infra*, 13a-20a. It found sufficient evidence for the jury to find some of the biblically-based charges to be "false," without having to determine what the biblical standards required. *Id.* at 15a-16a. It found sufficient evidence of malice—including asserting that Lutzer had "testified" that he refused to "clarify that the Moody Church had no power to prevent plaintiff from acting as pastor Hope Church," *id.* at 16a (something that was, in fact, *not* in the trial record). It also held that liability for such "falsity" could be upheld even though Lutzer merely republished the *same charges* to the same Hope Church leaders who initially raised them. *Id.* at 13a, 16a-17a.

2. The Appellate Court denied Lutzer's petition for rehearing. App., *infra*, 60a. Lutzer then filed a petition for leave to appeal in the Supreme Court of Illinois, urging the same federal constitutional issues that he had raised before both lower courts. That court denied review on September 28, 2011. App., *infra*, 61a.

## REASONS FOR GRANTING THE PETITION

The Illinois Appellate Court ordered the circuit court to hold a trial that was deeply invasive of internal church governance and discipline; it then upheld the result of that trial. In violation of this Court's cases and the First Amendment, the Appellate Court subjected to factual and legal scrutiny the most quintessentially religious judgments that a church could make—*whom should we ordain into our ministry, and why?* It set up the trial court to, in effect, sit as a court of errors over the procedural regularity of Moody Church's decision-making and the substantive fairness of the consequences of its decisions. But no civil court has the authority for such review. See *Milivojevich*, 426 U.S. at 720.

### I. At The Least, The Judgment Should Be Vacated And The Case Remanded In Light Of *Hosanna-Tabor*

This Court's pre-*Hosanna-Tabor* cases more than suffice to justify summary reversal. See *infra* Part II. *Hosanna-Tabor* itself adds heft to the rules of those cases, and "confirm[s] that it is impermissible for the government to contradict a church's determination of who can act as its ministers." 132 S. Ct. at 704. As Lutzer argued below, the Illinois courts should have applied those cases to conclude that adjudicating this dispute was unconstitutional. They did not need *Hosanna-Tabor* for that. But it is also true that the Appellate Court did not have the benefit of this Court's clear and unanimous ruling in that case. Thus, the Court might conclude that the simplest path is to vacate the Appellate Court's judgment and remand the case for reconsideration in light of *Hosanna-Tabor*.

### A. There is no constitutionally material distinction between Duncan's claim and the one barred in *Hosanna-Tabor*

Juxtaposed against the Appellate Court's dismissive approach to the scope of the First Amendment, this Court emphasized in *Hosanna-Tabor* that "*[b]oth* Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." 132 S. Ct. at 702 (emphasis added). The revocation of an ordination is a kind of "firing"—indeed, a *purely religious* "firing."

That fact makes this case far easier than *Hosanna-Tabor*, because there is no question that Duncan was "fired" only as a religious figure, not as an employee. The analysis in *Hosanna-Tabor*, by contrast, had to go a step further, determining whether Perich—the plaintiff in that case—was even a minister at all. That problem is absent here. Duncan's ordination was, as he himself put it, for the sole purpose of being a *minister*. Tr. 847. Vis-à-vis Moody Church, Duncan lost only the spiritual credential of his ordination. The First Amendment's protection is not limited to formal ordination, *Hosanna-Tabor*, 132 S. Ct. at 707-708, but when there *is* an ordination that *purely* invests someone with ministerial credentials, no question remains.

*Hosanna-Tabor* also undermines the judgment below because the remedy sought here is even more attenuated from any secular injury. Perich's economic harm—her lost salary—was undisputedly traceable to her termination as an employee as well as a minister. Duncan seeks the same thing—lost salary following ministerial termination. But his damages necessarily flow from the religious behavior of third parties—the members of Hope

Church who discontinued attendance (and contribution), allegedly because of Moody's disapprobation of Duncan.

Also like Perich, Duncan disclaimed reinstatement of his ordination and only sought money for the economic consequences of the revocation. App., *infra*, 8a; Tr. 1301 (post-verdict argument that "we are not asking for the Court to order the Moody Church to do anything. We are merely asking the defendants to compensate the plaintiffs [*sic*] for the damages suffered as a result of their torts"). But that is just the end-run that *Hosanna-Tabor* rejected. This Court saw the gambit for what it was. Such a payment, no less than reinstatement, "would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination." 132 S. Ct. at 709.

This prohibition fully applies here. Duncan's "invasion of privacy" recovery is a precise substitute for the revocation of his ordination, upon which his theory of damages *depends*. The Appellate Court (having just declared that the case was *not* about religion) readily agreed that "'[t]he harm alleged * * * resulted from the alleged conduct of defendants in placing [plaintiff] in a false light *when revoking that ordination.* * * * [W]e may review *defendants' conduct in carrying out the revocation.*'" App. *infra*, 7a-8a (quoting *Duncan*, App., *infra*, 40a) (emphasis added). In other words, it has imposed "a penalty on the Church" for fulfilling its religious duty of choosing which ministers may bear Moody's ordination.

Thus, Duncan's false-light-invasion-of-privacy label cannot disguise that his injury and demand are functionally indistinct from Perich's: lost-salary compensation to a minister for the consequences of a church's decision to withdraw its credential and imprimatur. Accordingly,

Lutzer can stipulate that a church or its officials could be defendants in a civil suit for non-religious activities, or even in a suit by a minister for injuries traceable to non-religious conduct (for physical injuries caused by negligently maintained property, perhaps). Cf. *Hosanna-Tabor*, 132 S. Ct. at 710 (reserving those questions). This case does not implicate such a possibility. No constitutionally material distinction exists between Duncan's claim and the one rejected by this Court in *Hosanna-Tabor*. If Perich's civil claim is barred, that holding also bars any recovery by Duncan for a more purely religious injury.

### B. The judgment below contravenes *Hosanna-Tabor*'s admonitions against civil-court reexamination of religious disciplinary proceedings

Likewise, the Appellate Court's purported basis for maintaining jurisdiction and stripping the case of its constitutional magnitude cannot survive *Hosanna-Tabor*. That court believed that Moody's communication to a *different church* transformed a religious dispute into a secular matter: "[T]his case is about false-light-invasion-of-privacy, not religion." App., *infra*, 20a; see *id.* at 8a-12a.[5]

1. From *Hosanna-Tabor*'s perspective, the dispute in this case is not merely religious, but intensively so. It involves *two* churches, whose communication solely con-

[5] Discussing another of its own cases that is irreconcilable with this one, see *Bruss* v. *Przybylo*, 895 N.E.2d 1102 (App. Ct. Ill. 2008), the Appellate Court attempted a distinction as follows: "[T]he thrust of the dispute's subject matter concerned the fitness of the priest and the qualifications of certain voting members within the congregation. * * * The same cannot be said of the subject matter in the case before us." App., *infra*, 8a-9a. But that conclusion hardly follows. The *entire* dispute here concerns "the fitness of [Duncan]" to be a minister, and whether Moody's rationale was "false."

cerned the fact of and reasons for revoking the ordination of Duncan, who worked at one but was ordained by the other. Ordination is the *essence* of choosing "who will personify" a church's beliefs, morals, and standards. *Hosanna-Tabor*, 132 S. Ct. at 706. This Court affirmed that such "'quintessentially religious controversies'" are to be resolved through churches' internal disciplinary procedures, whatever they may be—and that those procedures are not subject to further review or scrutiny. *Id.* at 705 (citation omitted). Such resolutions allow religious groups to "shape [their] own faith and mission through [their] appointments." *Id.* at 706. Judicial supervision over who should hold ecclesiastical credentials is nothing less than "control over the selection of those who will personify [a church's] beliefs." *Ibid.*

*Neither* church can freely exercise the all-important right recognized by *Hosanna-Tabor* if courts may regard the communications undergirding ministerial selection as "secular." Moody Church's right to exclude Duncan from "personify[ing]" its theology is hollow if it cannot explain its action to churches which rely on the preexisting credential from Moody. Similarly, other churches' right to select only ministers who "personify" *their* standards is undermined if they cannot validate the credentials given by larger, trustworthy churches, as the Hope Church leaders did by invoking Moody's disciplinary process. If another court's disciplinary action against an attorney may be the predicate for discipline by this Court, see this Court's Rule 8.1, surely a church employing a minister may take into account the disciplinary action of the church that ordained him.

2. At the same time, the central premise of the Appellate Court's judgment—that the Hope Church leaders were aliens to Moody Church for purposes of internal

discipline, see App., *infra*, 8a-12a—is *itself* a prohibited constitutional conclusion. Certainly Moody did not treat them that way; it regarded them as crucial participants in the discipline of a Moody Church minister and fellow members of an ecclesiastical communion for that purpose. That theological judgment should have ended the matter in state court. *Hosanna-Tabor* reaffirms this Court's precedents that such questions of ecclesiastical procedure may not be second-guessed by the civil courts, 132 S. Ct. at 704-705, *particularly* in the uniquely important job of selecting clergy, *id.* at 705-707. The court below made the linchpin of its liability finding just the sort of "rigid formula for deciding" who was properly part of the disciplinary process against Duncan that this Court disclaimed for deciding who "qualifies as a minister." *Id.* at 707.

### C. *Hosanna-Tabor* bars civil-court scrutiny into a church's motives, pretext, or procedures, but the proceedings below were saturated with such matters

Finally, a remand is appropriate because the entire trial in this case was infected by "evidence" and argument barred by *Hosanna-Tabor*—civil-court attacks upon a religious tribunal's procedure or motivation. Under *Hosanna-Tabor*, civil courts simply may not "inquir[e] into whether the Church had followed its own procedures" when resolving religious disputes. 132 S. Ct. at 705 (internal citation omitted). And churches do not even *need* a religious pretext to make these decisions:

> 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.

*Id.* at 709 (quoting *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 119 (1952)). See also *id.* at 715-716 (Alito, J., concurring) (civil-court intrusion into motive or pretext violates the First Amendment by scrutinizing what constitutes true and legitimate doctrine or theology). Perich had argued that the religious explanation for her firing (Christians not suing each other) was merely pretext, with the *real* reasons being discrimination and retaliation. *Id.* at 701, 709 (maj. op.). This Court held any such litigation strategy to be invalid. *Id.* at 709.

The court below, however, encouraged just such a strategy here, despite Lutzer's emphatic assertion of First Amendment protection. It made much of Moody's alleged motives, exacerbated by its purported failure to "follo[w] its own procedures," *Hosanna-Tabor*, 132 S. Ct. at 705, with respect to revocation. It emphasized those alleged procedural irregularities, App., *infra*, 32a-34a, 42a, 45a-47a; *explicitly* stated that "a church fail[ing] to follow the procedures it has enacted" makes its decisions fair game for the civil courts, *id.* at 38a; and treated the allegation as sufficient basis for finding actual malice, *id.* at 45a-47a.

This gave Duncan a green light to ask the jury over and over to scrutinize the religious procedures and motives of the revocation. As noted above, in both examination and in argument, Duncan's counsel pounded away—Moody's handling of the revocation was unfair, inconsistent with allegedly applicable internal disciplinary procedures, and was not truly motivated by religious belief at all. See *supra* pp. 14-15. Amazingly, the jury was even asked to conclude whether the theological consequences

of ordination asserted by Moody were Moody's actual religious views. *Ibid.*

Similarly, the Appellate Court used the following "evidence" to sustain the actual-malice element after the jury verdict:

> [D]efendant testified that subsequent to the letters' dissemination, plaintiff requested that defendant clarify that the Moody Church had no power to prevent plaintiff from acting as pastor of Hope Church; defendant refused plaintiff's request.

App., *infra*, 16a. But such a "pretext" analysis is *doubly* constitutionally infirm under *Hosanna-Tabor:* (1) all "pretext" analysis surrounding the choice of ministers is flatly rejected, 132 S. Ct. at 709; and (2) it is premised upon a theological conclusion about any role Moody may have in "prevent[ing] plaintiff from acting as pastor of Hope Church."

The Appellate Court's conclusion, therefore, that the case is "not [about] religion," App., *infra*, 20a, is ironic at best. It is certainly inconsistent with *Hosanna-Tabor*. *Hosanna-Tabor* shattered the very foundations of this case by forbidding precisely the kind of "evidence" that saturated the trial proceedings here. That is sufficient reason alone for vacating and remanding it to the Illinois courts.

## II. THE COURT MAY SUMMARILY REVERSE IN LIGHT OF ITS UNBROKEN LINE OF CASES PROTECTING RELIGIOUS SELF-GOVERNANCE FROM JUDICIAL SCRUTINY

The material events giving rise to this litigation fit into five key steps:

1. Moody ordained Duncan;

2. Armed with this ordination and Moody's imprimatur, Duncan helped found and lead the new Hope Church;

3. Distressed by accusations about Duncan's fitness for the clergy, Hope Church leaders reached out to Moody, which they knew had ordained Duncan;

4. Moody proceeded to determine whether to revoke, and after Duncan refused to participate ultimately did revoke, Duncan's ordination; and finally,

5. Lutzer, as senior pastor of Moody Church and on behalf of that church's executive committee, reported these results to the very Hope Church leaders who had initiated the review at Moody in the first place.

Every step in this narrative is so intrinsically centered on religious governance that none can be subjected to civil-court review. The judgment below fundamentally contradicts over a century of this Court's precedents. Accordingly, this Court may summarily reverse.

### A. This Court has repeatedly emphasized that civil courts may not interfere in internal church governance

1. The religious liberty of individuals and churches motivates this Court's precedent: "All who unite themselves to such a [religious] body do so with an implied consent to this government, and are bound to submit to it." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 729 (1872). As a corollary, once a "church judicator[y]" has decided a matter, the civil courts "must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. "'[T]he First Amendment commits *exclusively* to the highest ecclesiastical tribunals' of the Church" decisions regarding the "'internal discipline and government'" of that church. *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Milivojevich*, 426 U.S. at 720, 724) (emphasis added).

Moody Church's authority over Duncan's ordination, therefore, springs from Duncan's having "unite[d]" himself to that extent with Moody. *Watson*, 80 U.S. at 729. The church did not impose the ordination on Duncan; he sought it out, recognized its benefits, and never acted to terminate it. Tr. 844-847.

Duncan refused to participate in the revocation proceedings, despite two invitations to do so. See Tr. 636-638, 932; PX2, at 2; PX3. He was told to appear "if even one of the charges" were false. PX3. His default therefore permits all charges to be deemed true in the church tribunal no less than in civil court. Cf. Fed. R. Civ. P. 36(a)(3) (deemed admissions). Religious-dispute defaults are not novel. In *Milivojevich* (another case from the Illinois state courts), this Court reversed improper civil-court scrutiny of a religious decision treated by the church "as a default case * * * because of [the accused bishop's] refusal to participate." 426 U.S. at 706.

Thus, once the "church judicator[y]" decided Duncan's case, see *Watson*, 80 U.S. at 727, the "actual" truth or falsity of the charges were rendered immaterial. Duncan may not now seek collateral review in the civil courts alleging their falsity, because Moody's finding is "binding on" those civil courts. *Ibid.*[6]

2. This non-interference principle recurs frequently in this Court's cases, particularly in the context of clerical

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[6] His request for collateral review was explicit. In closing, for instance, he argued that "*[m]ost importantly*, the defendant has not offered any evidence *in this trial* that the accusations that they made were true, not a single witness to any personal knowledge of an improper relationship, not a single witness to a drinking problem, not a single personal witness to a misuse of funds." Tr. 1230 (emphasis added). Literally retrying the factual predicate of a religious decision in civil court must not be tolerated.

selection. "[Q]uestions of church discipline and composition of church hierarchy are at the core of ecclesiastical concern," *Milivojevich*, 426 U.S. at 717. The Constitution gives religious organizations 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. Ordaining only those who will faithfully spread its message is a key way for churches to "advance religion, which is their very purpose." *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987).[7] "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.***.'" *Id.* at 341 (Brennan, J., concurring in judgment) (quoting Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1389 (1981)).

Duncan persuaded the state courts to contravene this Court's settled precedent. The Appellate Court wrongly reversed a summary judgment favoring Lutzer, and it wrongly affirmed the subsequent verdict against Lutzer. This Court may summarily reverse such a blatant disregard of its case law.

### B. Civil courts cannot evaluate "facts" in religious-discipline cases

Civil courts may not and cannot evaluate the "falsity" of religious determinations like those Duncan challenged

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[7] Compare the ordination at issue here with the "temple recommend" in *Presiding Bishop*, a similar credential (but for lay members) "issued only to members who observe the Church's standards in" various aspects of their morals and personal life. See 483 U.S. at 330 n.4.

in this case. Religious tribunals are the "final" and "exclusive" forums for such questions. *Watson*, 80 U.S. at 727; *Milivojevich*, 426 U.S. at 720. Steering clear of disputes hinging on purely religious rights and conduct "avoids the kind of intrusive inquiry into religious belief that the [lower court] engaged in in this case." *Presiding Bishop*, 483 U.S. at 339. Similarly, the Court prohibits such scrutiny because "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id.* at 336.

And civil courts *cannot* evaluate facts in the religious-discipline context because there is no objective way to do so. For instance, Duncan's protestation that he did not have a sexual relationship with the woman in question may well be true. But the church is allowed, as the book of First Timothy and the charge against Duncan explain, to require that its ministers be "above reproach," not merely devoid of having committed adultery in a *sexual* sense. See, *e.g.*, Tr. 539, 1112, 1120. How could the Illinois courts decide whether such a charge was "true"? Indeed, it was for precisely this reason that the trial court originally granted summary judgment. App., *infra*, 56a-57a.

The only statement in the charges that the Appellate Court ever actually *said* was "false" concerned the divorce charge. The Appellate Court made much of the technical order of who filed first. App., *infra*, 13a (the charge said that Duncan filed for divorce, when in fact Mrs. Duncan was the first mover). But the Court did not quote the entire charge:

> Your decision to file a divorce petition against your wife violates the Biblical admonition that husbands are to love their wives "as Christ loves the church"

> (Eph. 5:25) and that an elder is to "be but the husband of one wife" (I Tim. 3:2), meaning that an elder is to be a "one wife" kind of man. Your decision to dissolve your marriage and your continuing relationship with the single woman referred to above, violates this mandate.

PX2, at 1. Far more complicated than merely the "order" of divorce filings is the minister's adherence to scriptural standards. Testimony at trial revealed that the point of the charge was not about the order of filing but the *fact of divorce*. *E.g.*, Tr. 676, 701, 717-718, 1136. Moreover, Duncan had actually obtained an *ex parte* protection order against his wife *before* she filed for divorce. Tr. 917. If church officials (and non-lawyers) regard a minister resorting to the civil courts to keep his own wife out of church as falling short of the cited biblical standards, or even tantamount to seeking divorce, civil courts may not reweigh such charges' metaphysical "truth." Religious tribunals can. And upon Duncan's default, Moody did.

### C. Incidental effects on civil rights are routine and irrelevant

The Appellate Court's assertion, therefore, that "this case is about false-light-invasion-of-privacy, not religion," App., *infra*, 20a, misses the point. Plaintiffs cannot pierce the religious-autonomy veil just by alleging collateral harms that affect civil rights. To the contrary, the Court has long recognized that church governance decisions routinely have such collateral consequences; all of them—like this case—could be characterized as "about [*fill-in-the-blank*], not religion." *Ibid.*

This Court has firmly rejected this pretense. Religious decisions, "although affecting civil rights," are nonetheless not reviewable "in litigation before the courts," *Gonzalez* v. *Archbishop*, 280 U.S. 1, 16 (1929).

Even when *property* rights flow from decisions about internal church governance—as when the control of real property turns on who the rightful ecclesiastical authority is—this Court mandates deference to the religious decision. See, *e.g.*, *Milivojevich*, 426 U.S. at 709-710, 720. That religious "resolution[s] * * * incidentally affect civil rights" is of no moment, because those connected with the church must accept its ecclesiastical judgments. *Id.* at 710 (citing *Watson*, 80 U.S. at 727). And, of course, the plaintiff in *Hosanna-Tabor* sought to protect the core civil right of being free from discrimination or retaliation in employment. 132 S. Ct. at 701.

Nor is this "unfair," least of all in cases like Duncan's. Members of Hope Church are *allowed* to consider Moody Church's disapprobation of Duncan in deciding whether they themselves wish to accept his ministry. The First Amendment protects religious expression and association without requiring a rational basis for joining or leaving a church. *Even if* Moody's revocation of Duncan's ordination and publication of that fact caused Hope's parishioners to stop attending and donating, the behavior on all sides is nothing more than the exercise of constitutionally protected religious liberty. As noted above, see *supra* Part I.B, the interaction between the two churches is not (as the Appellate Court believed) an excuse to impose liability, but indicates an even greater need for constitutional protection.

### D. No exception to the finality of ecclesiastical resolutions permits civil courts to evaluate the fairness of religious proceedings

The court below, and Duncan at trial, focused on perceived unfairnesses in Moody's internal procedure which led to his ordination's revocation. See *supra* pp. 14-15 (describing trial proceedings); Part I.C. The Appellate

Court even baldly stated that "[c]ourt intervention is also not prohibited when a church fails to follow the procedures it has enacted." App., *infra*, 38a. And it made clear that it could "review" precisely *how* the revocation was "carr[ied] out." *Id.* at 8a.

But this Court permits no "procedural" exception to the finality of ecclesiastical decision-making. Rather, "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow," this Court explained, "is exactly the inquiry that the First Amendment *prohibits*" civil courts from undertaking. *Milivojevich*, 426 U.S. at 713 (emphasis added).

Indeed, Duncan's fulmination against alleged procedural unfairnesses—too few witnesses, not enough time, and the like—is beside the point. "Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance." *Milivojevich*, *supra*, at 715. And while Duncan's counsel attempted to create an "inconsistency," and thereby prove pretext, about the religious significance of ordination itself, see Tr. 1231, this Court has rejected that trick before too: "[S]ources of [religious] law are sometimes ambiguous and seemingly inconsistent," but not therefore invalid bases for religious decision-making. *Milivojevich*, *supra*, at 699. After all, subjecting the motive, purpose, or legitimacy of ecclesiastical decisions to civil scrutiny necessarily invites secular authority to weigh whether religious doctrine truly requires the religious consequences—precisely what Duncan's counsel asked. "Plainly, the First Amendment *forbids* civil courts from playing such a role." *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (emphasis added).

An attempt to adjudicate cases turning on such matters means that the courts themselves violate the First Amendment rights of religious organizations, as this Court held in *Kreshik* v. *Saint. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*per curiam*) (citing *NAACP.* v. *Alabama*, 357 U.S. 449, 463 (1958)). Civil courts do not review the decision-making processes of ecclesiastical bodies as if they were administrative agencies. Because the judgment below turns on precisely this sort of constitutional violation, the Court may summarily reverse it.

## CONCLUSION

The petition for a writ of certiorari should be granted. The Court should summarily reverse the judgment below; at the least, the Court should vacate that judgment and remand for further proceedings in light of *Hosanna-Tabor*. Alternatively, in recognition of the grave constitutional issues presented, the Court may choose to set the case for plenary review.

Respectfully submitted.

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February 2012

# APPENDIX

**APPENDIX A**
**IN THE**
**APPELLATE COURT OF ILLINOIS**
**SECOND DISTRICT**

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NO. 2-09-1078

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RICHARD A. DUNCAN,
*Plaintiff-Appellee,*

v.

BERVIN PETERSON AND THE MOODY CHURCH,
*Defendants*

(HOPE CHURCH, *Plaintiff*; ERWIN LUTZER,
*Defendant-Appellant*).

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**(DECEMBER 30, 2010)**

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JUSTICE HUTCHINSON delivered the opinion of the court:

Defendant, Erwin Lutzer, appeals the trial court's judgment entered on a jury verdict in favor of plaintiff, Richard Duncan, on plaintiff's complaint alleging claims of false light invasion of privacy and conspiracy. Defendant contends that the trial court erred when it failed to grant his motion for judgment notwithstanding the verdict. In the alternative, defendant contends that the trial court erred when it failed to grant a new trial. We affirm.

This matter was initiated when plaintiff and Hope Church filed a complaint against plaintiff's former church

and its senior clergy after the senior pastor at the former church sent a bundle of letters to board members of Hope Church. The bundle of letters contained language accusing plaintiff of having an extramarital affair, filing a divorce petition against his wife, misusing church funds, and abusing alcohol. The bundle of letters also contained language purporting to strip plaintiff of his ordination as a minister and requesting that he no longer function in a ministerial capacity. The trial court initially determined that the ecclesiastical abstention doctrine applied and thus found that it lacked subject matter jurisdiction to hear plaintiffs' claims. It granted defendants' motion for summary judgment. This court reversed, holding that the ecclesiastical abstention doctrine did not apply. See *Duncan v. Peterson*, 359 Ill. App. 3d 1034 (2005). On remand, the jury found defendant, the senior pastor of the former church, liable and awarded plaintiff $276,306 in damages. Defendant appealed.

The evidence adduced at trial established the following. In 1989, plaintiff was ordained as a minister by the Moody Church. For the next several years, plaintiff worked in that capacity under defendant. In 1992, plaintiff resigned his position with the Moody Church in order to become the senior pastor for the Village Church of Lincolnshire. Subsequently, with the help of some fellow churchgoers, including Robert Dickman, Alvin Puccinelli, and Albert Nader, plaintiff founded Hope Church. Dickman, Puccinelli, and Nader became board members of Hope Church. In 2000, plaintiff's marriage experienced difficulties, and in March 2000 plaintiff's wife filed for divorce. Plaintiff sought and received an order of protection against his wife after she gave Puccinelli documents that she claimed were e-mails between plaintiff and another woman. Puccinelli gave the documents

to Nader. During the divorce proceedings, Nader testified on behalf of plaintiff's wife, and plaintiff's wife accused plaintiff of abusing alcohol.

In late March 2000, Nader called defendant and informed him that plaintiff's marriage was in trouble. Subsequently, Dickman and Nader met with defendant and the board of elders of the Moody Church to discuss plaintiff's marriage. In April 2000 plaintiff received a letter dated April 23, 2000, and signed by "The Elders of Moody Church," including defendant. The letter provided in part:

> "1. You have had an improper relationship with a divorced single woman, violating the Biblical teaching that an elder be 'above reproach.'
>
> 2. Your decision to file a divorce petition against your wife violates the Biblical admonition that husbands are to love their wives 'as Christ loved the church[.]'
>
> 3. Your misuse of alcohol violates the Biblical admonition that an elder be 'temperate, self-controlled.' * * *
>
> 4. Your misuse of personal funds as well as the deceitful means used to obtain the Hope Church Bank account violates the Biblical admonition that an elder should not be a 'lover of money.' * * *
>
> * * *
>
> We want to give you an opportunity to reply to these charges. If you contact any one of us before Thursday, May 4, 2000, we will be glad to set up a meeting with you to which we will invite the former members of your church Board, and if necessary, other witnesses. ***

> If you do not reply to us by the May 4 date, we will have no choice but to rescind your ordination to the Christian ministry that we granted you."

In response to the letter, plaintiff contacted John Welch, a signatory of the letter. Plaintiff denied the allegations and inquired as to why the Moody Church was getting involved in his personal affairs.

On May 5, 2000, plaintiff received a second letter from the Moody Church, requesting that plaintiff appear in person in front of its executive committee. The letter stated in part:

> "[Given] the seriousness of this matter, we have chosen this Monday evening, May 8, to make a final decision regarding your credentials for ministry that we conferred upon you. If you are unwilling to appear, with deep regret we will have to rescind your ordination and licensing."

Plaintiff did not attend the May 8, 2000, meeting of the Moody Church executive committee.

Plaintiff subsequently received a third letter from the Moody Church, dated May 9, 2000, and signed by defendant and another Moody Church elder, Bervin Peterson. The letter stated:

> "This letter is to inform you that last night, May 8, 2000, the Executive Committee of the Moody Church, upon the recommendation of the Elders, voted to rescind the licensing and ordination that this body conferred to you in March, 1989.
>
> ***
>
> Effective immediately, in light of our decision to revoke your licensing and ordination, we now request the following:

1. That you no longer function in the role of minister.

2. That you no longer accept the title 'Reverend' Duncan, or 'Pastor' Duncan, or any other such title that would imply that you have credentials for spiritual leadership and ministry.

3. That you inform the leadership and membership of Hope Church of our action."

Before plaintiff received his own copy of the May 9, 2000, letter, his children's guardian *ad litem* showed him a copy of the letter at a dissolution proceeding. This copy included a cover letter, signed by defendant. The cover letter was addressed to Puccinelli, Dickman, and Nader and noted three enclosures: the April 23, 2000, letter; the May 5, 2000, letter; and the May 9, 2000, letter. The cover letter stated, "We are sending you this information and it is up to you as to what is done with it."

On May 8, 2001, plaintiff and Hope Church filed their complaint against defendant, Peterson, and the Moody Church, based upon the letters. The trial court granted summary judgment in favor of defendants. Plaintiff and Hope Church appealed, and this court remanded the case after determining that genuine issues of material fact existed to preclude summary judgment on plaintiff's false-light-invasion-of-privacy and conspiracy claims. See *Duncan*, 359 Ill. App. 3d 1034. This court affirmed the judgment against Hope Church, because no injury was alleged against it. On remand, the trial court entertained defendant's motion to bar the testimony of a woman who alleged that defendant had touched her inappropriately, but it ultimately denied defendant's motion. The case proceeded to a jury trial. A verdict was subsequently entered against defendant and in favor of plaintiff in the amount of $276,306. Peterson and the Moody Church

were found not liable. Defendant timely appealed. Hope Church, Peterson, and the Moody Church are not parties to this appeal.

Defendant's initial contention is that the trial court erred when it failed to grant defendant's motion for judgment notwithstanding the verdict. We review *de novo* a trial court's decision to deny a motion for judgment notwithstanding the verdict. *Thornton v. Garcini*, 382 Ill. App. 3d 813, 817 (2008), citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). The trial court may enter judgment notwithstanding the verdict only when, viewing the evidence in the light most favorable to the nonmoving party, it so overwhelmingly favors the movant that a contrary verdict could not stand. *Williams v. City of Chicago*, 371 Ill. App. 3d 105, 106 (2007).

In support of his contention, defendant argues that (1) the undisputed facts established that the trial court did not have subject matter jurisdiction to decide the false-light-invasion-of-privacy claim; (2) the undisputed facts established that the false-light-invasion-of-privacy claim is defeated by the religion and speech clauses of the first amendment as read into the fourteenth amendment to the United States Constitution; (3) the undisputed facts established that the false-light-invasion-of-privacy claim is defeated by conditional privilege; and (4) plaintiff's failure to prove the necessary elements of his false-light-invasion-of-privacy claim precluded a judgment in his favor. We review each of defendant's arguments in turn.

Defendant argues that the trial court erred when it denied his motion for judgment notwithstanding the verdict, because the undisputed facts at trial established that the trial court did not have subject matter jurisdiction to decide the false-light-invasion-of-privacy claim. Specifi-

cally, defendant asserts that the ecclesiastical abstention doctrine precludes the judiciary from involving itself in matters within the church, including the Moody Church's decision to revoke plaintiff's ordination and its conduct of disseminating the letters regarding the revocation of plaintiff's ordination. The ecclesiastical abstention doctrine provides that civil courts may not determine the correctness of interpretations of canonical text or some decisions relating to government of the religious polity; rather, courts must accept as given whatever the religious entity decides. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709, 49 L. Ed. 2d 151, 163, 96 S. Ct. 2372, 2380 (1976). We review *de novo* whether the trial court had subject matter jurisdiction. *Blount v. Stroud*, 232 Ill. 2d 302, 308 (2009). We determine that the ecclesiastical abstention doctrine did not apply and that thus the trial court had subject matter jurisdiction.

The issue of whether the doctrine of ecclesiastical abstention deprived the trial court of subject matter jurisdiction was discussed by this court in its previous opinion. See *Duncan*, 359 Ill. App. 3d 1034. When we reversed the trial court's order granting summary judgment, we held:

> "We determine that we do not need to inquire into or interpret religious matters to decide whether the May 9, 2000, letter *** was a tortious invasion of privacy. We are not required to look at religious doctrine or biblical underpinnings of the Moody Church's right to revoke an ordination to determine whether defendants' conduct invaded [plaintiff's] privacy by publishing false information. *** The harm alleged in the complaint resulted from the alleged conduct of defendants in placing [plaintiff] in a false light when revoking that ordination. ***

> [W]e may review defendants' conduct in carrying out the revocation." *Duncan*, 359 Ill. App. 3d at 1046.

Defendant asserts that the ecclesiastical abstention doctrine was "not raised or addressed with respect to the publication of the ordination revocation in the first appeal." Defendant misconstrues our previous opinion. We determined that publication of the letter's contents and the tortious effects the publication had upon plaintiff were not beyond the reach of the trial court. Specifically, we stated, "Deciding whether defendants published a letter placing [plaintiff] in a false light, by appearing to revoke [plaintiff's] ability to be a minister and pastor at Hope Church, does not require extensive inquiry into religious law and polity." *Duncan*, 359 Ill. App. 3d at 1046.

Defendant further asserts that our opinion in *Bruss v. Przybylo*, 385 Ill. App. 3d 399 (2008), directly conflicts with our holding in *Duncan* regarding whether the ecclesiastical abstention doctrine precluded subject matter jurisdiction. We disagree. In *Bruss*, this court was asked to resolve whether the ecclesiastical abstention doctrine precluded a trial court from compelling the suspension and termination of a priest from a particular church and determining if the results of a church election should be invalidated. We answered the question in the affirmative, holding that "the more circumspect approach is to rest the abstention decision entirely on the subject matter of the dispute." *Bruss*, 385 Ill. App. 3d at 421. In that case, although the plaintiffs framed their claim as one based in property rights, the thrust of the dispute's subject matter concerned the fitness of the priest and the qualifications of certain voting members within the congregation; property rights were involved only incidentally. *Bruss*, 385 Ill. App. 3d at 415. The same cannot be

said of the subject matter in the case before us. In the present matter, the subject matter of the dispute is whether defendant invaded plaintiff's privacy by placing him in a false light when defendant disseminated to individuals who were not members of the Moody Church a bundle of letters regarding plaintiff's conduct. Because the subject matter of this dispute is grounded in false light invasion of privacy, *Duncan* does not conflict with our opinion in *Bruss*.

Moreover, although defendant cites six opinions from foreign jurisdictions in support of his argument that the ecclesiastical abstention doctrine precluded the trial court's subject matter jurisdiction, we determine that each is distinguishable. In *Ad Hoc Committee of Parishioners of Our Lady of the Sun Catholic Church, Inc. v. Reiss*, 223 Ariz. 505, 224 P.3d 1002 (App. 2010), the Arizona Court of Appeals determined that the ecclesiastical abstention doctrine applied to claims regarding a priest's fitness to be elected as director and president of a congregational church. Unlike the case currently before us, in *Reiss*, the court was asked to interpret the job rights and qualifications of clergy within a church. In declining to do so, the court determined that a "'minister's employment relationship with his church implicates internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'" *Reiss*, 223 Ariz. at 517, 224 P. 3d at 1014, quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). Again, in the current matter, the subject matter of the dispute is whether defendant invaded plaintiff's privacy by placing him in a false light when defendant disseminated a bundle of letters to individuals who were not members of the Moody Church. Because, here, the letters were not transmitted only within the Moody Church, the subject

matter of the dispute does not concern matters internal to the Moody Church.

In *Rentz v. Werner*, 156 Wash. App. 423, 232 P.3d 1169 (2010), the Washington Court of Appeals determined that the ecclesiastical abstention doctrine applied to claims regarding whether a minister at a church had exceeded her authority when she expelled several members. Again, *Rentz* is distinguishable from the present matter because the subject matter of the dispute in *Rentz* concerned internal matters of church governance, while the subject matter here concerns the dissemination of information about plaintiff to members outside of the Moody Church.

In *Ogle v. Church of God*, 153 Fed. Appx. 371 (6th Cir. 2005), the United States Court of Appeals for the Sixth Circuit determined that the ecclesiastical abstention doctrine precluded its subject matter jurisdiction to decide whether a church had invaded the privacy of and defamed a bishop whom it accused of sexual impropriety. The appeals court determined that, although the complaint founded its claims in defamation, the subject matter of the dispute was the church's internal disciplinary procedures. The *Ogle* case is distinguishable from the present matter because, in *Ogle*, none of alleged defamatory information was disseminated beyond the church that made the allegations, and, thus, the subject matter concerned church governance.

In *Higgins v. Maher*, 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757 (1989), a California appeals court held that the ecclesiastical abstention doctrine precluded it from determining whether a priest suffered defamation and invasion of privacy when, without his permission, a church disseminated to other dioceses within its organization information regarding certain medical treatment and diag-

noses he received. However, unlike in the present matter, in *Higgins*, the information was disseminated only to other dioceses within the same church organization. Thus, the dissemination of the information was categorized as an internal church procedure. Again, this is not the case in the present matter, as the Moody Church has no authority over Hope Church and, hence, the dissemination of the letters at issue was not an internal procedure of the Moody Church.

Defendant cites *Alford v. United States*, 116 F. 3d 334 (8th Cir. 1997), for the proposition that a church has the right to control its clergy, similar to a state bar association's right to control its lawyers and to publish its disciplinary determinations. Although this may be true, it does not bear directly on the issue presently before this court, whether defendant's dissemination of the letters to individual members of Hope Church constituted false light invasion of privacy. Furthermore, while a bar association does publish a decision to remove a name from its roll of attorneys, it does not publish a list of all allegations, let alone publish allegations without any inquiry.

Defendant cites *Kinder v. Webb*, 239 Ark. 1101, 396 S.W.2d 823 (1965), for the proposition that "[i]t is firmly settled that the civil courts will not assume jurisdiction of a dispute involving church doctrine or discipline unless property rights are involved." *Kinder*, 239 Ark. at 1102, 396 S.W.2d at 824. While we acknowledge that the present matter does not involve property rights and are mindful of *Kinder*'s persuasive authority, we instead follow the approach we proclaimed in *Bruss*, 385 Ill. App. 3d 399, and again determine that the ecclesiastical abstention doctrine is not applicable in the present matter because the general subject matter of the dispute does not involve internal church matters. Accordingly, we con-

clude that the trial court had subject matter jurisdiction to hear plaintiff's claim.

Defendant next argues that the undisputed facts established that the false-light-invasion-of-privacy claim is defeated by the religion and speech clauses of the first amendment as read into the fourteenth amendment to the United States Constitution. Specifically, defendant asserts that the May 9, 2000, letter serving as the basis for the claim constituted religious opinions and, thus, is protected speech under the first amendment to the United States Constitution. Put another way, defendant asserts that, because the contents of the letter are religious opinions and cannot be proved false, no false-light-invasion-of-privacy claim can be sustained, no matter how derogatory the contents of the letters might be.

We review *de novo* whether a statement qualifies as constitutionally protected speech under the first amendment. *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 760 (2002), citing *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 324 (1999). Where a published statement alleged to be a fact is actually an opinion, it is protected by the first amendment. *Owen v. Carr*, 113 Ill. 2d 273, 280 (1986). To determine if an allegedly defamatory statement is constitutionally protected under the first amendment, or if it can be reasonably interpreted as a statement of actual fact, the emphasis is on whether the statement contains an objectively verifiable assertion. *Schivarelli*, 333 Ill. App. 3d at 760.

In the present matter, the disseminated May 9, 2000, letter included the April 23, 2000, letter as an enclosure. The April 23, 2000, letter stated all accusations contained within it as fact, not as opinion. The letter stated, "You have had an improper relationship with a divorced single

woman," "Your decision to file a divorce petition against your wife," "Your misuse of alcohol," and "Your misuse of personal funds." Moreover, some of these factual allegations were falsehoods, such as that plaintiff filed a divorce petition against his wife, and the other allegations were stated without any investigation, such as that plaintiff misused alcohol and personal funds. As the April 23, 2000, letter was enclosed with the May 9, 2000, letter, it was part of the publication serving as the basis for the false-light-invasion-of-privacy claim. Because the April 23, 2000, enclosure contained false assertions of fact, this argument fails. See *Duncan*, 359 Ill. App. 3d at 1037-38 (May 9, 2000, letter included April 23, 2000, letter and May 5, 2000, letter as enclosures).

Defendant next argues that the undisputed facts established that the false-light-invasion-of-privacy claim is defeated by conditional privilege. Specifically, defendant asserts that, because he sent the letters to only the three men who brought the charges against plaintiff, each of whom had an interest in the matter, and because at that time the letters contained no knowingly false statements, conditional privilege defeats plaintiff's claim. We disagree.

Whether plaintiff's false-light-invasion-of-privacy claim is defeated by conditional privilege is a legal question; therefore, our review is *de novo*. *Blount*, 232 Ill. 2d at 308. Defendant cites *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 585 (2006), in support of his position. *Solaia Technology* specifically regards the fair report privilege and provides, "'[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete

or a fair abridgement of the occurrence reported.'" *Solaia Technology*, 221 Ill. 2d at 585, quoting Restatement (Second) of Torts §611 (1977). There are two requirements to establish the privilege: (1) the report must be of an official proceeding; and (2) the report must be complete and accurate or a fair abridgement of the official proceeding. *Solaia Technology*, 221 Ill. 2d at 588.

In the current matter, the statements contained in the letters are not a summary of an official proceeding or a summary of a meeting that was open to the public. The fair report privilege was designed to protect reporting of government proceedings. *Solaia Technology*, 221 Ill. 2d at 587. We determine that it does not extend to the statements here, because they are not a report or summary of an official proceeding, but are instead a series of accusations and requests by leaders of a church. See *Eubanks v. Northwest Herald Newspapers*, 397 Ill. App. 3d 746, 749 (2010); see also *Solaia Technology*, 221 Ill. 2d at 588.

Moreover, as plaintiff points out, even if a conditional privilege did exist, it is immaterial because it cannot survive the jury's findings at trial. According to *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993), which both parties cite, once a defendant establishes a conditional privilege, a plaintiff can overcome this privilege if he or she proves that the defendant either intentionally published the material while knowing the matter was false or displayed a reckless disregard as to the matter's falseness. *Kuwik*, 156 Ill. 2d at 24. To overcome a conditional privilege, the plaintiff must show either a "direct intention to injure" or a "reckless disregard" of the plaintiff's rights. *Kuwik*, 156 Ill. 2d at 30. "[A]n abuse of a [conditional] privilege may consist of any reckless act which shows a disregard for

the defamed party's rights." *Kuwik*, 156 Ill. 2d at 30. Here, the jury found that, when the letters were sent, defendant knew that they contained false statements or he acted in reckless disregard for whether any statements were false. Thus, defendant's claim of conditional privilege was overcome by the jury's findings at trial.

Defendant next argues that plaintiff's failure to prove the elements of a false-light-invasion-of-privacy claim precluded a judgment in his favor. Specifically, defendant asserts that (1) there was no evidence of a false statement in the May 9, 2000, letter; (2) there was no evidence of actual malice; and (3) the evidence adduced at trial did not support that plaintiff was placed in a false light before the public.

As noted, a judgment notwithstanding the verdict should be entered only when the evidence so overwhelmingly favors the movant that no contrary verdict is possible. *Williams*, 371 Ill. App. 3d at 106. To recover for a claim of false-light-invasion-of-privacy, a plaintiff must prove that the defendant's actions placed the plaintiff in a false light before the public, that the false light would be highly offensive to a reasonable person, and that the defendant acted with actual malice. *Schivarelli*, 333 Ill. App. 3d at 764.

Defendant first asserts that the evidence adduced at trial did not establish that the May 9, 2000, letter contained a false statement. There can be no claim for false-light-invasion-of-privacy without a false statement being made by the defendant; it is the essence of the claim. See *Kirchner v. Greene*, 294 Ill. App. 3d 672, 683 (1998). Here, the May 9, 2000, letter stated that plaintiff's ordination from the Moody Church was revoked. It then requested that plaintiff no longer function as a minister, that he no longer accept the title of "Reverend" or "Pas-

tor," and that he inform Hope Church of the Moody Church's action. However, defendant testified at trial that he sent the May 9, 2000, letter to Puccinelli, Dickman, and Nader with both the April 23, 2000, letter and the May 5, 2000, letter attached. The contents of those letters contained falsehoods, such as that plaintiff filed a divorce petition against his wife. Because the letters were disseminated together as one package, it is immaterial whether the May 9, 2000, letter, by itself, contained false statements. See *Duncan*, 359 Ill. App. 3d at 1037-38. Thus, we determine that the jury could have found that defendant published false statements.

Defendant next asserts that there was no evidence of actual malice. For a finding of malice, the jury needed to find that the statements were made with knowledge that they were false or with reckless disregard for whether they were true or false. See *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 419-23 (1989). Here, defendant testified that he did not investigate the charges in the letters; he did not check the public record regarding the circumstances surrounding plaintiff's dissolution proceedings; and he did not question those who accused plaintiff of the behaviors stated in the letters. Furthermore, defendant testified that subsequent to the letters' dissemination, plaintiff requested that defendant clarify that the Moody Church had no power to prevent plaintiff from acting as pastor of Hope Church; defendant refused plaintiff's request. Thus, we determine that the jury could have found that defendant acted with actual malice. See *Lovgren*, 126 Ill. 2d at 419-23.

Next, defendant asserts that the evidence did not support that plaintiff was placed in a false light before the public. To establish a false light invasion of privacy, a

plaintiff must prove that he was injured when he was placed in a false light before the public. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 17 (1992). While the publicity element will ordinarily be shown by a general publication, this court has recognized that limited publication to recipients who are in a special relationship with the plaintiff satisfies the publicity element. See *Duncan*, 359 Ill. App. 3d at 1049. Thus, because of Puccinelli's, Dickman's, and Nader's positions in Hope Church, dissemination of the letters to them was as harmful to plaintiff as dissemination to the public would have been. See *Duncan*, 359 Ill. App. 3d at 1049.

Defendant asserts that the May 9, 2000, letter was not a proximate cause of plaintiff's injury. We determine that the jury could have found that the May 9, 2000, letter and its enclosures caused plaintiff's injury. The implication that plaintiff had an extramarital affair, filed for divorce from his spouse, abused alcohol, and misused personal funds would be offensive to a reasonable person. See *Schivarelli*, 333 Ill. App. 3d at 764 ("To state a claim for a false light invasion of privacy, the plaintiff must [prove] *** that the false light would be highly offensive to the reasonable person"). The evidence supported that, as a result of defendant disseminating the bundle of letters, Hope Church's membership diminished and the church could no longer continue to employ plaintiff. Plaintiff testified that he was unable to get work as a minister in any other church. The evidence supported the finding that plaintiff suffered injury as a result of the letters' dissemination.

After reviewing each of defendant's arguments, we conclude that, when viewed in the light most favorable to plaintiff, the evidence adduced at trial does not overwhelmingly favor defendant. *Williams*, 371 Ill. App. 3d

at 106. The evidence was sufficient for a jury to have ruled in plaintiff's favor. Thus, we determine that the trial court did not err when it denied defendant's motion for judgment notwithstanding the verdict. *Thornton*, 382 Ill. App. 3d at 817, citing *McClure*, 188 Ill. 2d at 132.

Defendant's next contention is that the trial court erred when it failed to grant defendant a new trial. Specifically, defendant argues that (1) the verdict was against the manifest weight of the evidence; (2) the admission of evidence of publication by people other than defendant was improper; (3) the admission of the testimony of a women who alleged that defendant inappropriately touched her was an abuse of the trial court's discretion; and (4) the trial court erred when it restricted *voir dire* related to religious matters. We address each argument in turn.

Defendant first argues that the verdict was against the manifest weight of the evidence. Manifest weight is defined as that weight which is clearly evident, plain, and indisputable. *Anderson v. Beers*, 74 Ill. App. 3d 619, 623 (1979). A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, or not based on the evidence. *Anderson*, 74 Ill. App. 3d at 623. As we discussed above, the evidence adduced at trial was sufficient for a jury to have ruled in plaintiff's favor. Accordingly, we determine that the verdict was not against the manifest weight of the evidence.

Defendant next argues that the admission of evidence of publication by people other than defendant was improper. Specifically, defendant asserts that plaintiff was not entitled to recover damages based upon publication of the letters by those other than defendant. We disagree. Here, defendant's cover letter stated, "We are

sending you this information and it is up to you as to what is done with it." Defendant's publication began the spread of false information throughout the community, ultimately causing plaintiff's injury. As we stated in *Duncan*, "publicity to these three men, who within a short period of time had been leaders in the Hope Church, would have been just as devastating as publication to the general public because of their close ties to the congregation." *Duncan*, 359 Ill. App. 3d at 1049.

Defendant next argues that the admission of the testimony of a woman who alleged that defendant inappropriately touched her constituted an abuse of the trial court's discretion. We will not overturn an evidentiary ruling of the trial court, absent an abuse of discretion. *Gunn v. Sobucki*, 216 Ill. 2d 602, 608-09 (2005). Defendant asserts that the evidence was irrelevant and prejudicial. We disagree. At trial, plaintiff testified that his knowledge of defendant's alleged inappropriate conduct with the woman was a source of contention between him and defendant. Therefore, the evidence was relevant to show motive as to why defendant might have wished to harm plaintiff's reputation. See *Thompson v. Petit*, 294 Ill. App. 3d 1029, 1035 (1998) (In a civil trial, evidence of prior acts of misconduct are relevant to show motive). Because it was reasonable that plaintiff's knowledge of defendant's alleged conduct with the woman could have affected how defendant viewed plaintiff, it was within the trial court's discretion to allow the testimony. See *Thompson*, 294 Ill. App. 3d at 1035.

Defendant next argues that the trial court erred when it restricted *voir dire* related to religious matters. The purpose of *voir dire* during jury selection is to impanel an impartial jury. *Limer v. Casassa*, 273 Ill. App. 3d 300, 302 (1995). The trial court has the primary responsibility

for initiating and conducting voir dire, and the scope and extent of *voir dire* are within its sound discretion. *Rub v. Consolidated Rail Corp.*, 331 Ill. App. 3d 692, 696 (2002), citing *Dixson v. University of Chicago Hospitals & Clinics,* 190 Ill. App. 3d 369, 376 (1989). Upon review, an abuse of discretion will be found only if the trial court's conduct prevented the selection of an impartial jury. *Rub*, 331 Ill. App. 3d at 696, citing *Dixson*, 190 Ill. App. 3d at 376. Generally, when religious affiliation is relevant to potential prejudice, subjects related to religious affiliation are proper subjects of inquiry during *voir dire*. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 167 (1994).

Here, however, both plaintiff and defendant were Christian ministers; thus questions regarding religious beliefs would be unlikely to reveal bias in favor of one side or the other. Moreover, this case is about false-light-invasion-of-privacy, not religion. There is no evidence that the trial court's conduct prevented the selection of an impartial jury. Therefore, we determine that the trial court did not abuse its discretion when it restricted *voir dire* with regard to religious matters. Having determined that all of defendant's arguments fail, we conclude that the trial court did not err when it denied defendant's motion for a new trial.

For the forgoing reasons, we affirm the judgment of the circuit court of Lake County.

Affirmed.

JORGENSEN, P.J., and McLAREN, J., concur.

**APPENDIX B**
**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS**

---

No. 01 L 374

---

DUNCAN
vs.
LUTZER

---

**(SEPTEMBER 23, 2009)**

---

**ORDER**

[This cause coming on for hearing on the motion of defendant Lutzer for judgment notwithstanding the verdict or, in the alternative, for a new trial, the court being fully advised in the premises,

It is hereby ordered that the motions are denied. This order is final and appealable.][*]

Dated at Waukegan, Illinois this [23d] day of [Sept], 20[09].

Enter:

[Signature]_____

Judge

---

[*] Material in brackets is handwritten in the original.

**APPENDIX C**
**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS**

---

No. 01 L 374

---

DUNCAN

vs.

PETERSON

---

**(MARCH 26, 2009)**

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**JUDGMENT ORDER-PLAINTIFF, JURY**

After hearing the evidence, the jury found for Plaintiff [Richard Duncan] and against defendant [Erwin Lutzer] and assessed damages of [$276,305.00].

It is ordered that plaintiff may recover from defendant [$276,305.00] and costs of suit. Execution may issue.

Enter:

[Signature]_____

Judge

[March 26], 20[09].

## APPENDIX D

**(IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS)**

---

(No. 01 L 374)

---

**(MARCH 26, 2009)**

---

VERDICT FORM A

On the issue of false light invasion of privacy, we, the jury, find for Richard Duncan and against the following defendants:

| | | |
|---|---|---|
| Erwin Lutzer | Yes [X] | No_____ |
| Bervin Peterson | Yes_____ | No [X] |
| The Moody Church | Yes_____ | No [X] |

If you find for all Defendants on the false light invasion of privacy claim there is no need to deliberate further and you should use Verdict Form B.

If you find against any of the Defendants on the false light, you may consider the issue of conspiracy.

On the issue of civil conspiracy, we, the jury find for Richard Duncan and against the following defendants:

| | | |
|---|---|---|
| Erwin Lutzer | Yes_____ | No [X] |
| Bervin Peterson | Yes_____ | No [X] |
| The Moody Church | Yes_____ | No [X] |

We find that the total amount of damages suffered by Richard Duncan as a proximate result of the occurrence in question is $[276,305.00].

[Signatures of Jurors]

**APPENDIX E**
**IN THE APPELLATE COURT OF ILLINOIS**
**SECOND DISTRICT**

---

No. 2-04-0911

---

RICHARD DUNCAN AND HOPE CHURCH,
*Plaintiffs-Appellants,*

v.

BERVIN PETERSON, ERWIN LUTZER,
AND THE MOODY CHURCH,
*Defendants-Appellees.*

---

**(SEPTEMBER 8, 2005)**

---

JUSTICE HUTCHINSON delivered the opinion of the court:

Plaintiffs Richard Duncan and Hope Church appeal from the order of the circuit court of Lake County granting the motion of defendants Bervin Peterson, Erwin Lutzer, and The Moody Church for summary judgment and denying plaintiffs' motion for partial summary judgment. See 735 ILCS 5/2--1005 (West 2004). Plaintiffs argue on appeal that the trial court erred in finding that the doctrine of ecclesiastical abstention barred their claims against defendants. We affirm in part, reverse in part, and remand the case for further proceedings.

Duncan, pastor and minister of Hope Church, and Hope Church filed a four-count complaint against Lutzer,

senior pastor of The Moody Church; Peterson, chairman of the board of elders of The Moody Church; and The Moody Church. Counts I, II, and III of plaintiffs' third amended complaint (hereinafter complaint) alleged that defendants invaded Duncan's privacy by sending false and misleading letters stating that Duncan could no longer act as a minister and could no longer accept the title of "Reverend," "Pastor," or any other title that would imply that Duncan had credentials for spiritual leadership and ministry. Count IV alleged that defendant Lutzer conspired with Diane Duncan to damage Duncan's reputation by disseminating false and misleading letters so that Duncan would lose his position at Hope Church and not gain custody of the couple's children.

The trial court granted defendants' motion for summary judgment and found that the doctrine of ecclesiastical abstention precluded it from exercising jurisdiction because a determination of the issues would require the court to become involved in interpreting religious doctrine. For the following reasons, we reverse that judgment as to Duncan and remand the case.

The following facts are taken from plaintiffs' complaint. In 1989 Duncan was a member of The Moody Church and was ordained a minister. In 1992 Duncan resigned his membership and his position as a minister of The Moody Church and became senior pastor and a member of an evangelical free church. In 1997 Duncan resigned from the evangelical free church and became senior pastor and chief executive officer of Hope Church, a nondenominational and independent church. Duncan was also ordained by Hope Church in 1997. On April 23, 2000, defendants sent a letter to Duncan, requesting that he respond to "disturbing reports" they received from Al

Nader about Duncan's conduct and informing him that if he did not respond they would rescind his ordination. The April 23, 2000, letter listed six charges against Duncan, including the following:

> "1. You have had an improper relationship with a divorced single woman, violating the Biblical teaching that an elder be 'above reproach.' ***
>
> 2. Your decision to file a divorce petition against your wife violates the Biblical admonition that husbands are to love their wives 'as Christ loves the church[.]' ***
>
> 3. Your misuse of alcohol violates the Biblical admonition that an elder be 'temperate, self-controlled.' ***
>
> 4. Your misuse of your personal funds as well as the deceitful means used to obtain the Hope Church Bank account, violates Biblical admonition that an elder should not be a 'lover of money.' "

Duncan called John Welch, a member of the board of elders of The Moody Church, and told Welch that the allegations contained in the April 23 letter were investigated by the Hope Church board and determined to be false. Duncan also told Welch that The Moody Church no longer had authority over him because he had resigned his membership and his ministry with The Moody Church in 1992.

On May 5, 2000, a letter signed by defendants Peterson and Lutzer was sent to Duncan, requesting him to appear before The Moody Church's executive committee on May 8, 2000, to respond to the charges set forth in their earlier letter. This later letter also informed Duncan that if he did not appear they would rescind his ordination. Duncan did not appear before the

committee. Duncan received a letter dated May 9, 2000, which stated that the licensing and ordination bestowed upon Duncan by The Moody Church was revoked. The letter also provided:

> "Effective immediately, in light of our decision to revoke your licensing and ordination, we now request the following:
>
> 1. That you no longer function in the role as minister.
>
> 2. That you no longer accept the title 'Reverend' Duncan, or 'Pastor' Duncan, or any other such title that would imply that you have credentials for spiritual leadership and ministry.
>
> 3. That you inform the leadership and membership of Hope Church of our action."
>
> The last paragraph of the letter provided:
>
> "You have not left our hearts Rick. We will continue to pray for you asking that God will graciously change your heart so that you may be restored to your wife and those whose trust you have betrayed. 'Seek the Lord while He may be found; Call upon Him while He is near. Let the wicked forsake his way; And the unrighteous man his thoughts; And let him return to the Lord, And He will have compassion on him; and to our God, For He will abundantly pardon.' (Isa. 55:6,7)."

The letter was printed on The Moody Church's letterhead and signed by Peterson as chairman of the board of elders and Lutzer as chairman of the executive committee. At the bottom of the letter it was noted that copies were sent to Robert Dickman, Al Nader, and Al Puccinelli.

Plaintiffs' complaint alleged that as a result of the May 9, 2000, letter over 200 people withdrew membership and attendance from Hope Church under the belief that Duncan could no longer be a minister. Plaintiffs' complaint alleged that Hope Church could no longer pay Duncan's salary or conduct services because of the diminished membership. The complaint further alleged that Duncan could not obtain employment elsewhere as a minister because the letters and/or their contents were disseminated and discussed widely in the evangelical protestant Christian community:

Defendants filed an affirmative defense and a motion for summary judgment. Both pleadings claimed that the letters were based upon their biblical authority over the ordination that The Moody Church bestowed upon Duncan in 1989 and that the first amendment to the United States Constitution prohibits a state court from examining the religious tenets underlying their authority. See *Serbian Eastern Orthodox Diocese v. Milivolevich*, 426 U.S. 696, 709, 49 L. Ed. 2d 151, 162, 96 S. Ct. 2372, 2380 (1976).

Plaintiffs filed a motion for partial summary judgment on defendants' affirmative defense, arguing that the first amendment prohibits a church from imposing religious authority over a person who has severed his membership. This motion concluded that a determination on the merits did not require an analysis of religious doctrine.

Numerous depositions were taken as part of discovery. At his deposition Duncan testified that he received a master's degree of divinity and a master's degree of theology from Trinity Seminary in the 1980s. Shortly thereafter he was hired as a pastor of evangelism at The Moody Church and ordained by The Moody Church. In 1992 Duncan left The Moody Church to

become senior pastor at the Village Church of Lincolnshire, which belonged to the evangelical free church denomination. The Village Church of Lincolnshire allowed Duncan to bypass its year-long ordination process mainly because he was educated at Trinity Seminary, which is the seminary for the Evangelical Free Church of America. Duncan was affirmed as the Village Church of Lincolnshire's ordained minister at a ceremony and Duncan understood it to mean that he was ordained by the Evangelical Free Church. Duncan testified that he received a certificate reflecting this ordination.

Duncan testified that in 1997 he was terminated from the Village Church of Lincolnshire by a vote at an unscheduled congregational meeting. Duncan was never told why he was terminated and was not given the opportunity to request the reasons for his removal. However, Duncan was given a document that stated that his termination was not, for reasons of immorality, impropriety, stealing money, or false teachings of sermon. Duncan testified that he subsequently learned that Lutzer had been present at the meeting terminating Duncan's employment and had assisted the Village Church of Lincolnshire with setting up the procedure for the termination.

Duncan testified that he and a small group of people started Hope Church in 1997. Hope Church is a an independent, nondenominational church. Duncan became pastor and he was ordained by Hope Church as required by its constitution. Al Nader, a former Moody Church board member, joined Hope Church early in its formation, as did Robert Dickman and Al Puccinelli. Hope Church continued to grow until 2000. Duncan testified that in 2000 his wife, Diane Duncan, filed for

dissolution of marriage. Duncan obtained an order of protection to keep her away from church services and from talking to church members. The Hope Church board investigated charges Diane had made against Duncan, and Duncan testified that he thought the board had cleared him of wrongdoing. In March a Hope Church Sunday service was disrupted by Nader, who threatened Duncan, and the police were called. Duncan subsequently removed Puccinelli from his position as Hope Church's treasurer because Puccinelli returned funds from the church account to members who had made contributions. Furthermore, Puccinelli's wife appeared on behalf of Diane Duncan at a court hearing, and Puccinelli threatened to stop issuing payroll checks to Duncan. As a result of Duncan's marital trouble many members left Hope Church.

Duncan testified that he received a letter dated April 23, 2000, from The Moody Church, in which it alleged it had received "disturbing reports" from Nader about Duncan's conduct. The letter listed six allegations and stated that the board of elders discussed the charges with three former board members of Hope Church. As stated above, the letter provided that if Duncan did not reply, The Moody Church would rescind the ordination it bestowed upon him in 1989. Duncan contacted John Welch, one of the elders who had signed the letter. Duncan requested the names of the former board members of Hope Church referred to in the letter. Duncan also told Welch that The Moody Church no longer had authority over him because he had resigned his membership and ministry with The Moody Church in 1992. On May 6, 2000, Duncan received a letter signed by Lutzer and Peterson that requested that Duncan come to an executive committee meeting on May 8, 2000, respond

to the charges against him, and meet his "accusers." Duncan did not attend the meeting, and he subsequently received the May 9, 2000, letter described above.

Duncan testified that before the May 9, 2000, letter, the Hope Church congregation had grown to about 70 members; however, the Sunday after the letter was disseminated, the congregation dropped down to 5 members. Duncan testified that the day after he received the letter his children's court-appointed guardian *ad litem* told him that she heard he was no longer a minister and questioned him regarding his means for supporting his children. Duncan testified that since the letter was disseminated he has had difficulty continuing his career as a minister. Duncan sent out about 15 resumes for senior pastor positions and received no calls. Duncan testified that the director of placement services at Trinity Seminary was reluctant to allow Duncan to use the Seminary's services to search for new employment, stating that he had heard bad things about Duncan. Duncan testified that Hope Church continues to hold services and that in November 2002 between 10 and 20 members were attending.

At his deposition, Lutzer testified that he spoke with Diane Duncan on several occasions in March and April 2000. Lutzer testified that Diane talked to him about difficulties in her marriage, including her belief that her husband was spending an inordinate amount of time with another woman. Lutzer knew that the Duncans were involved in a dissolution of marriage proceeding, and he was aware that the court had given custody of the couple's six children to Richard Duncan. However, he did not know when the custody proceedings took place. Also in March 2000, Nader contacted Lutzer and requested advice with reference to problems at Hope

Church. Lutzer spoke to Nader, Dickman, and Puccinelli regarding Richard Duncan's activities. Lutzer believed that all three men were members and leaders at Hope Church, though he did not know their positions. The three men told Lutzer that Duncan misused alcohol, spent too much time with a divorced woman, and had changed the signatory on Hope Church's bank account without approval from Hope Church's membership. Lutzer did not make an independent investigation of the allegations or read Hope Church's constitution.

Lutzer thought the allegations were serious because of Duncan's position as a pastor. Lutzer testified that The Moody Church does not have authority to discipline nonmembers; however, because Duncan had been ordained by The Moody Church, Duncan was obligated to abide by The Moody Church's standards for as long as he was ordained. Lutzer acknowledged that this obligation was not written anywhere. Lutzer stated that Duncan was not told that he remained subject to future authority of The Moody Church when he resigned his pastoral position and membership. Lutzer explained that The Moody Church's continuing authority over the ordinations it bestows comes from the Bible.

Lutzer testified that no hearing was held on the allegations against Duncan before the May 9, 2000, letter was sent because Duncan did not appear before the executive committee as requested. Lutzer testified that he did not inform the executive committee of his earlier presence at the Village Church of Lincolnshire's meeting in which the church's membership terminated Duncan's services as pastor. Lutzer testified that he sent all three letters, including the one dated May 9, 2000, to Dickman, Nader, and Puccinelli because he thought they had a

right to know the actions taken by The Moody Church and they might have needed to inform others.

Lutzer testified that there was no affiliation between The Moody Church and Hope Church. Lutzer testified that The Moody Church had no authority over Hope Church and it had no right to remove Duncan as pastor or minister of Hope Church. Lutzer testified that it was up to the leadership of Hope Church to decide whether Duncan should be called "Reverend" or "Pastor." Lutzer testified that The Moody Church had no authority to revoke an ordination given by Hope Church.

Lutzer also testified that prior to 2000 there was no mention of the revocation of an ordination in The Moody Church's constitution nor was there a procedure for relinquishing an ordination. The Moody Church amended its constitution effective April 30, 2000, to add a procedure for revoking an ordination. Lutzer testified that defendants did not follow the new procedure when they revoked Duncan's ordination because they had begun the process with Duncan before the constitution was amended. Lutzer confirmed that he was informed of Duncan's ordination by Hope Church after the May 9, 2000, letter was disseminated. Lutzer admitted that Duncan requested that he clarify the letter to specify that the revocation applied only to The Moody Church ordination and that he refused.

At his deposition, Peterson testified that there was no ecclesiastical relationship between Hope Church and The Moody Church. He admitted that The Moody Church had no authority to remove a pastor from Hope Church and that it was up to the leadership of Hope Church to decide who should be minister or pastor. Peterson testified that The Moody Church has no authority to discipline nonmembers; however, it had biblical authority

to revoke Duncan's ordination. Peterson testified that in his 30-year affiliation with The Moody Church he had never heard of another ordination being revoked. Peterson admitted that defendants did not comply with the recently amended constitution when it revoked Duncan's ordination. Peterson also testified that the May 9, 2000, letter applied only to Duncan's ordination by The Moody Church.

At his deposition, Puccinelli testified that he had been on the board of directors of Hope Church but stopped attending the church at the end of March 2000. Puccinelli testified that he interpreted the May 9, 2000, letter to mean that Duncan could no longer be the pastor of Hope Church. Nader testified similarly in his deposition that he believed the letter meant that Duncan could no longer preach. Nader also testified that he sent a letter to two members of Hope Church concerning the action of The Moody Church, along with The Moody Church letters. Nader testified that he believed "that they should take some consideration on attending a church whose pastor lost his ordination and could no longer preach from the pulpit or use the word reverend."

As noted above, the trial court granted defendants' motion for summary judgment, finding that a determination of the issues would necessitate a trier of fact to decide whether defendants followed proper biblical procedure and local church doctrine when it revoked Duncan's ordination and "because the issue of ordination is so heavily steeped in matters of theological import, the application of ecclesiastical abstention is warranted." The trial court further denied plaintiffs' motion for partial summary judgment. Plaintiffs timely appeal both orders.

Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2--1005(c) (West 2004); *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002). "The party opposing summary judgment does not have to prove his or her case, but must present some factual basis arguably entitling him or her to judgment." *Parker v. House O'Lite Corp.*; 324 Ill. App. 3d 1014, 1019 (2001). While summary judgment is encouraged as an aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt. *Parker*, 324 Ill. App. 3d at 1019. We review *de novo* the trial court's ruling on a motion for summary judgment. *Parker*, 324 Ill. App. 3d at 1020.

Initially we note that all four counts of the complaint allege causes of action in which plaintiff Duncan was injured. Counts I, II, and III, as described previously, allege that defendants invaded the privacy of Duncan, and count IV alleges that defendant Lutzer conspired to injure the reputation of Duncan. None of the counts allege injury against Hope Church, and no arguments on behalf of Hope Church are advanced upon appeal. Therefore the judgment granted against plaintiff Hope Church on all four counts of the complaint is affirmed.

We now turn to the arguments with respect to plaintiff Duncan. Duncan contends that the trial court erred in granting summary judgment based upon the ecclesiastical abstention doctrine because the doctrine does not bar his claim against defendants. "The first

amendment to the Constitution of the United States [citation] bars any secular court from involving itself in the ecclesiastical controversies that may arise in a religious body or organization." *Abrams v. Watchtower Bible & Tract Society of New York, Inc.*, 306 Ill. App. 3d 1006, 1011 (1999). Where resolution of ecclesiastical disputes cannot be made without extensive inquiry into religious law and polity, "'the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding.'" *Abrams*, 306 Ill. App. 3d at 1011, quoting *Serbian Eastern Orthodox Diocese*, 426 U.S. at 709, 49 L. Ed. 2d at 162, 96 S. Ct. at 2380. Ecclesiastical abstention provides that courts may not determine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity. Rather, civil courts must accept as a given whatever the religious entity decides. See *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, 49 L. Ed. 2d at 163, 96 S. Ct. at 2381. In *Abrams*, the plaintiff alleged that the church's body of elders conspired to prevent him from becoming an elder and to force him to leave the organization. The reviewing court found that the complaint was properly dismissed because review of such ecclesiastical and religious decisions, particularly those pertaining to the membership or hiring and firing of clergy, is an "extensive inquiry' into religious law and practice and, therefore, forbidden by the first amendment. *Abrams*, 306 Ill. App. 3d at 1013.

However, courts can resolve a dispute that arises within a church setting if the dispute does not require determination of any doctrinal issues. *Ervin v. Lilydale Progressive Missionary Baptist Church*, 35 Ill. App. 3d

41, 43 (2004). The primary objectives of the first amendment are to assure that the government would not interfere with freedom of worship, that the government would not adopt a state religion, and that the government would not in any way recognize one religion over another. *Bodewes v. Zuroweste*, 15 Ill. App. 3d 101, 103 (1973); see also *McCreary County v. American Civil Liberties Union*, No. 03--1693, slip op. at 10 (U.S. June 27, 2005). It is not the intent of the first amendment that civil and property rights should be unenforceable in civil courts simply because the parties involved are the church and members, officers, or the ministry of the church. *Bodewes*, 15 Ill. App. 3d at 103.

Both sides cite to *Guinn v: Church of Christ*, 775 P.2d 766 (Okla. 1989), in support of their positions. In *Guinn*, a former member of the church brought action against church elders for invasion of privacy and intentional infliction of emotional distress for disciplinary action they took against her before and after she withdrew her membership from the church. *Guinn*, 775 P.2d at 769.

The Oklahoma court found that this was not the sort of private ecclesiastical controversy that the United States Supreme Court has deemed immune from judicial scrutiny. *Guinn*, 775 P.2d at 772, citing *Serbian Orthodox Diocese*, 426 U.S. at 713, 49 L. Ed. 2d at 165, 96 S. Ct. at 2382. The Oklahoma court further opined that because the controversy concerned the allegedly tortious nature of religiously motivated acts and not their orthodoxy in relation to established church doctrine, the justification for judicial abstention was nonexistent and it did not apply to the case. *Guinn*, 775 P.2d at 773.

The supreme court of Massachusetts has similarly stated that "[t]he First Amendment religion provisions contain two concepts, 'freedom to believe and freedom to

act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" *Madsen v. Erwin*, 395 Mass. 715, 727, 481 N.E.2d 1160, 1167 (1985), quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 84 L. Ed. 1213, 1218, 60 S. Ct. 900, 903 (1940). "Under the banner of the First Amendment provisions ***; a clergyman may not with impunity defame a person, intentionally inflict serious emotional harm on a parishioner, or commit other torts." *Madsen*, 395 Mass. at 726-27, 481 N.E.2d at 1167.

Illinois courts have reviewed cases involving contract disputes with churches and found that an agreement for wages and benefits is governed by principles of civil contract law and can be enforced by the court. See *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill. App. 3d 504, 509 (2005); *Bodewes*, 15 Ill. App. 3d at 103-04. Court intervention is also not prohibited when a church fails to follow the procedures it has enacted. *Ervin*, 351 Ill. App. 3d. at 46. In *Ervin*, the reviewing court found that it did not need to interpret religious law to decide whether a church's board violated church bylaws when it terminated Ervin's service as pastor. *Ervin*, 351 Ill. App. 3d at 46. The court found that it could decide the issue by applying neutral legal principles to interpret the church's bylaws, handbook, and covenant. *Ervin*, 351 Ill. App. 3d at 46.

Similarly, Illinois courts may use neutral principles of negligence law in reviewing alleged tortious conduct by churches and their employees. *Biven v. Wright*, 275 Ill. App. 3d 899, 903 (1995). In *Biven*, the plaintiffs, husband and wife, alleged that during the course of marital counseling their minister initiated a sexual relationship with the wife. *Biven*, 275 Ill. App. 3d at 900. The plaintiffs filed a complaint alleging, *inter alia*, that the

church was negligent for failing to train and supervise the minister, for failing to warn the congregation of the minister's previous attachments, for creating an unreasonable risk of marital discord among members of the congregation, and for failing to dismiss the minister when it knew or should have known of his attraction to female members of the congregation. *Biven*, 275 Ill. App. 3d at 901-02. The trial court dismissed these allegations for failure to state a cause of action, based upon the constitutional guarantee of the right of free exercise of religion. *Biven*, 275 Ill. App. 3d at 902. The reviewing court found that inquiring into the church's failure to protect the plaintiffs from the sexual misconduct of its minister might not call into question the church's religious beliefs or practices because the minister's sexual misconduct was not rooted in the church's religious beliefs and was outside the boundaries of the church's practices. *Biven*, 275 Ill. App. 3d at 904. The court found, therefore, that resolving the dispute might not require the interpretation of church doctrine or any regulation of ecclesiastical activity and reversed the dismissal. *Biven*, 275 Ill. App. 3d at 904.

Thus, the threshold question in the case at hand is whether Duncan's claims can be resolved without inquiry into religious principles and doctrine. The gist of the first three counts of Duncan's complaint is that defendants invaded the privacy of Duncan by sending false and misleading letters. Defendants assert that the letters reflected that they revoked the ordination that The Moody Church had bestowed, upon Duncan and that they had "biblical" authority to revoke the ordination. Defendants reason that resolution of Duncan's claims would necessarily require the trial court to examine their doctrinal beliefs concerning The Moody Church's

authority to ordain and revoke an ordination. Duncan counters that the trial court would not have to inquire into religious doctrine to determine that: (1) defendants had no authority to revoke the ordination of Duncan, who was no longer a member of The Moody Church; (2) defendants did not follow the procedure set out in The Moody Church's amended constitution when they revoked Duncan's ordination; and (3) defendants' letters appear to revoke Duncan's ability to be a minister and pastor at any church, including Hope Church, which they have no authority to do.

We determine that we do not need to inquire into or interpret religious matters to decide whether the May 9, 2000, letter was false and misleading and was a tortious invasion of privacy. We are not required to look at religious doctrine or the biblical underpinnings of The Moody Church's right to revoke an ordination to determine whether defendants' conduct invaded Duncan's privacy by publishing false information. While both sides of this case focus on the religious theory underlying whether the Moody Church had the ability to revoke an ordination of a person who resigned his membership and pastoral position, that is not the harm alleged in the complaint. The harm alleged in the complaint resulted from the alleged conduct of defendants in placing Duncan in a false light when revoking that ordination. Even if the reasoning behind defendants' decision to revoke the ordination bestowed upon Duncan by The Moody Church is not reviewable because it is "steeped in matters of theological import," we may review defendants' conduct in carrying out the revocation. See *Biven*, 275 Ill. App. 3d at 904. Defendants have admitted that they do not have the authority to remove Duncan as a minister or pastor at

Hope Church. Deciding whether defendants published a letter placing Duncan in a false light, by appearing to revoke Duncan's ability to be a minister and pastor at Hope Church, does not require extensive inquiry into religious law and polity.

Similarly, a determination of the conspiracy alleged in count IV of the complaint can be accomplished by using neutral principles of law. A court need not interpret religious law or become involved in an ecclesiastical dispute to decide whether Lutzer conspired with others to injure the reputation of Duncan. Again, the conspiracy claim can be resolved without determining whether The Moody Church had biblical authority to revoke Duncan's ordination and without stepping on the religious liberties protected by the first amendment.

Defendants have also alleged that even if Duncan's claims are not barred by the first amendment, Duncan cannot prove the elements of the invasion of privacy and conspiracy torts alleged in the complaint and therefore the various counts should fail on the merits. Duncan counters that the sufficiency of the evidence was not considered in the ruling on the motion for summary judgment and should not be reviewed here. Although the scope of our review of a summary judgment is limited to the record as it existed at the time the trial court ruled, we are not restricted to the exact reasons the trial court stated or implied in entering its order. *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 338 (1998). We will therefore review whether there is a factual basis upon which Duncan could be entitled to recover.

There are four invasion of privacy torts: (1) intrusion upon seclusion of another; (2) appropriation of a name or likeness of another; (3) publication given to private life; and (4) publicity placing another person in false light.

*Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 416 (1989), citing Restatement (Second) of Torts §§652B, 652C, 652D, 652E (1977). Although not specified in the complaint, the alleged wrongdoing describes a cause of action for the tort of placing a person in a false light.

Defendants argue that the statements contained in the May 9, 2000, letter, upon which Duncan's allegations were premised, were not false and therefore Duncan's claims must fail. To state a case for the "false light" variety of invasion of privacy, the plaintiff must allege that: (1) the defendant's actions placed the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false. *Lovgren*, 126 Ill. 2d at 419-20. Duncan alleges in his complaint that the May 9, 2000, letter was false and misleading as it reflected that The Moody Church had determined that Duncan could no longer be a minister of the gospel and could no longer be the pastor of Hope Church.

Both Lutzer and Peterson acknowledged in their depositions that The Moody Church had no authority over Hope Church. They both agreed that defendants did not have the authority to decide who could minister for Hope Church and that only the leadership of Hope Church had the authority to decide who could be a minister or a pastor for their church. Defendants argue, however, that they took away from Duncan only what they had bestowed upon him. The May 9, 2000, letter does state that defendants rescinded the ordination that The Moody Church conferred upon Duncan.

Nevertheless, a later provision in the letter provides that, in light of their decision to revoke the ordination, they request "[t]hat you no longer function in the role of a minister" and "[t]hat you no longer accept the title 'Reverend' Duncan, or 'Pastor' Duncan, or any such other title that would imply that you have credentials for spiritual leadership and ministry." Both Nader and Puccinelli testified that the letter meant that Duncan could no longer be the pastor for Hope Church and that he could no longer use the title "Reverend." Based upon these conflicting positions, we determine that there is a question of fact as to whether the letter placed Duncan in a false light by portraying him as having been stripped of all right to be a minister.

The May 9, 2000, letter also provided that "[w]e will continue to pray for you asking that God will graciously change your heart so that you may be restored to your wife and those whose trust that you betrayed." Duncan testified that he never had a relationship with another woman and that he did not betray his wife's trust. He also testified that, contrary to the implications of the letter, his wife filed for the dissolution of their marriage. These statements constitute another question of fact.

Defendants also argue that the false light counts must fail because the publicity element of the tort cannot be established. They assert that defendants did not place Duncan "before the public" by sending the letter to Dickman, Nader, and Puccinelli. In *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739-40 (2000), the court noted that although it had never been determined what evidence was sufficient to establish the element of "before the public" for a false light action, the publicity element for a closely related action, public disclosure of private facts, had been previously defined.

The publicity element for public disclosure of private facts has been defined as "communication *** 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.'" *Poulos*, 312 Ill. App. 3d at 740, quoting Restatement (Second) of Torts §652D (1977); see also *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1192 (2003).

The *Poulos* court also noted that an exception to this publicity element has been recognized. *Poulos*, 312 Ill. App. 3d at 740. Publicity may be established by a showing that the disclosure was made to a person or persons with whom the plaintiff has a special relationship. *Poulos*, 312 Ill. App. 3d at 740. The court in *Miller v. Motorola*, 202 Ill. App. 3d 976, 980-81 (1990), which the *Poulos* court found instructive, provided that a special relationship is present in situations when the communication was made to a particular public such as employees, club members, church members, family, or neighbors. The reasoning for the special relationship exception is that disclosure to a limited number of persons may be just as devastating as disclosure to the general public. *Poulos*, 312 Ill. App. 3d at 740. The *Poulos* court found this reasoning persuasive, and it adopted the exception for false light actions, finding that the publicity element of an action for false light may be satisfied by establishing that the false and highly offensive information was disclosed to a person or persons with whom the plaintiff had a special relationship. *Poulos*, 312 Ill. App. 3d at 740.

The *Poulos* court then found that a special relationship existed between the plaintiff, a teacher, and the chairman of the board of trustees of the school board for which he worked. *Poulos*, 312 Ill. App. 3d at 740.

Here, the May 9, 2000, letter was sent by defendants to three former board members of Hope Church, *i.e.*, Dickman, Nader, and Puccinelli. The court in *Miller* specifically recognized church members as those who had a special relationship covered by the exception. *Miller*, 202 Ill. App. 3d at 980-81. Neither the evidence nor the complaint was clear as to what relationship Dickman, Nader, and Puccinelli had with Hope Church in May 2000. Nevertheless, publicity to these three men, who within a short period of time had been leaders in Hope Church, would have been just as devastating as publication to the general public because of their close ties to the congregation. We therefore find that there was a special relationship between the recipients of the letter and Duncan. Accordingly, the element of "before the public" is satisfied.

Defendants further argue that the false light counts must fail because there is no evidence that the communications were made with actual malice. In actions for false light, actual malice has been defined as knowledge that the statements made by the defendant were false or that such statements were made with a reckless disregard as to their truth. *Poulos*, 312 Ill. App. 3d at 741, citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 15, 17-18 (1992).

Lutzer admitted that several weeks after the May 9, 2000, letter was written, he was informed that Duncan had been ordained by Hope Church, and Lutzer was requested to clarify that The Moody Church's action applied only to its 1989 ordination. Lutzer, however, refused. There was also testimony that defendants did not follow their own recently enacted procedures for revoking an ordination, by giving Duncan only two days' notice for the hearing and refusing to give Duncan

information regarding the witnesses. The unwillingness of defendants to clarify the letter and their failure to follow their own procedures could support a finding of malice. We therefore determine that there is an issue of fact as to whether defendants acted with actual malice. See *Moriarty v. Greene*, 315 Ill. App. 3d 225, 237 (2000) (noting that whether defendants acted with actual malice is a question for the jury).

We also determine, and defendants do not argue otherwise, that a jury could find that the communication contained in the May 9, 2000, letter would be highly offensive to a reasonable person. Accordingly we find that the pleadings, depositions, and admissions, when viewed in the light most favorable to Duncan, reveal that there are genuine issues as to material facts for the invasion of privacy claims. Therefore, summary judgment on counts I, II and III as to plaintiff Duncan is reversed and the cause is remanded for further proceedings. See *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

Defendants also contend that Duncan is unable to provide evidence to support the conspiracy claim alleged in count IV. "Civil conspiracy is defined as 'a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means.'" [Citation.] *McClure v. Owens Corning Fiberglas Corporation*, 188 Ill. 2d 102, 133 (1999). In order to state a claim for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement. *Adcock v. Brakegate. Ltd.*, 164 Ill. 2d 54, 62-64 (1994). Civil conspiracy is an intentional tort and requires proof that a defendant knowingly and voluntarily participated in a common scheme to commit

an unlawful act. *Adcock*, 164 Ill. 2d at 64. A conspiracy is almost never susceptible to direct proof. *Walsh v. Fanslow*, 123 Ill, App. 3d 417, 422 (1984). Conspiracy is usually established from circumstantial evidence and inferences drawn from the evidence. *Adcock*, 164 Ill. 2d at 66.

Lutzer's meetings with Diane Duncan, the revocation-of-ordination hearing, the May 9, 2000, letter, and the divorce proceedings all took place within a 2½-month period. We determine that the close time line, coupled with Lutzer's failure to follow The Moody Church's newly instituted procedures for ordinance revocations and Lutzer's unwillingness to clarify the letter, provide sufficient evidence to leave the conspiracy question for the trier of fact.

For the foregoing reasons, we affirm the judgment of the circuit court of Lake County as to plaintiff Hope Church, we reverse the judgment as to plaintiff Richard Duncan, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part and reversed in part; cause remanded.

McLAREN and BYRNE, JJ., concur.

**APPENDIX F**
**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS**

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NO. 01 L 374

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RICHARD DUNCAN, AND HOPE CHURCH,
AN ILLINOIS NOT FOR PROFIT CORPORATION,
*Plaintiffs,*

v.

BERVIN PETERSON, ERWIN LUTZER, AND THE MOODY CHURCH, A RELIGIOUS CORPORATION,
*Defendants.*

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**(AUGUST 17, 2004)**

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**ORDER**

THIS CAUSE coming on for hearing on plaintiffs' motion to reconsider the court's ruling granting defendants summary judgment,

IT IS HEREBY ORDERED that plaintiffs' motion to reconsider the court's granting of summary judgment to all defendants on all counts is denied for the reasons stated in the report of proceedings on July 28, 2004, attached hereto and fully incorporated herein by reference.

IN ADDITION, plaintiffs' motion for leave to file additional counts is denied.

Entered:

[Signature]

Judge

Dated: [August 17, 2004]

* * *

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE STEPHEN E. WALTER, Judge of said court, on the 28th day of July, 15 A.D., 2004, a.m. proceedings.

APPEARANCES:

MR. RICHARD J. SMITH,

appeared on behalf of the plaintiffs;

MR. JAMES W. FORD,

appeared on behalf of the defendants.

THE COURT: Please state your names for the record.

MR. FORD: James W. Ford for the defendant.

MR. SMITH: Richard Smith for the plaintiff.

THE COURT: This cause comes on for the Court's decision on plaintiff's motion to reconsider ruling made on a motion for summary judgment. The record should reflect that the Court has considered those arguments, authorities cited, together with additional authorities.

As the U.S. Supreme Court said in the Serbian Eastern Orthodox Diocese versus Milivojevich, case at 426 U.S. 696, page 713, 1976, civil courts are bound to accept the decisions of the highest judicatories of a

religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. The facts of this case involve matters of theological dispute centered around disciplinary actions taken by a church.

Pastor Duncan asserts that the doctrine of ecclesiastic abstention should not apply in this instance for many reasons, and that instead jurisdiction be had and this Court apply neutral principles of law to settle the dispute. While the neutral principles of law approach is appropriate in limited instances, especially in deciding disputes over church property, it may not be validly applied in this case because there is no way for the Court to consider the legal questions without interpreting religious doctrine as well. This case presents a rather novel interpretation of the ecclesiastical abstention doctrine.

The difficult aspect of this case is that it goes beyond interpreting the disciplinary procedures a church employs against a member or current pastor. Instead, it involves the actions of a church taken against a former pastor and former member who enjoyed continuing ordination by the church. It appears clear that with regard to church members or pastors who at the time of the contested act maintain a connection with the church, that most disciplinary actions will not be the proper subject of judicial proceedings because of the rationale previously addressed -- consent and avoidance of entanglement in theological disputes.

This case presents the rather unique situation involving a pastor who had resigned his pastorate, revoked his membership, but left his ordination intact. The ordaining church, Moody, then responded to complaints by board members of Duncan's church

concerning his conduct and status as an individual ordained by the Moody Church.

There exists no case law that interprets or analyzes whether a continuing ordination is sufficient to establish a person's consent to the authority or discipline of the ordaining church. Plaintiff argues that his revocation of the pastorate and membership with the Moody Church are sufficient indicia of termination regarding consent. Yet, it is because Duncan still enjoyed the status of being ordained by the Moody Church that his complainants approached Moody. And it is because Duncan carried the name of the Moody Church with his ordination that the church apparently took disciplinary actions against him.

This case is not one where the issue is solely an internal disciplinary procedure. Rather, it concerns a pastor who left the Moody Church, retained his ordination and was later subject to its discipline.

Central to this dispute is this Court's determination as to whether Pastor Duncan maintained a passive connection with the Moody Church by retaining the ordination or whether he severed all ties when he revoked his pastorate and membership. If his retention of an ordination with Moody Church kept him passively connected to it and under their spiritual authority, then this Court would be without jurisdiction to entertain the claims. And the argument and logic here assumes a vicious circle format. This Court should avoid determining the religious significance of ordination. Whether Pastor Duncan consented to the continuing authority of the Moody Church depends upon the nature and character of an ordination, which clearly involves an interpretation of religious belief or doctrine. Because the Court is precluded from examining the religious implications of ordination, it becomes difficult to

understand whether continuing disciplinary authority is implicated. Exercising jurisdiction would entangle the Court in the internal disciplinary functions of a church which may require that it pass judgment on matters of ecclesiastical import, a task which this Court lacks authority to do.

Plaintiff's first theory is that since the letter of revocation was sent after Duncan's ordination was revoked, that it cannot be shielded by an act of discipline by the church due to its late timing. Pastor Duncan notes that his ordination was revoked on May 8, 2000, and that the Moody Church no longer had any religious authority over him after May 8th of 2000. Under plaintiff's reasoning, since the publication challenged was issued after the ordination was revoked, no religious issues could be raised. Plaintiff's argument misses the point of the May 9, 2000, letter and mischaracterizes the facts.

The revocation of Pastor Duncan's ordination and the start of his disciplinary proceedings were commenced by Alvin Puccinelli, Robert Dickman, and Al Nader, all board members of the Hope Church. Since these individuals brought their concerns to the Moody Church regarding Pastor Duncan's conduct and possible revocation of his ordination, it is natural that Moody Church sent a final correspondence to these individuals once it had finished disciplinary proceedings. The May 9th, 2000, letter was part and parcel of the ordination revocation process. It is true that the letter was sent one day after Pastor Duncan's ordination was officially revoked. However, the facts do not suggest that the May 9, 2000, letter was somehow disconnected from Pastor Duncan's ordination with the Moody Church.

It is true that several cases cited by plaintiff include instances where ecclesiastical abstention was denied

because various tort claims could be pursued against religious entities. See, for example, Paul versus Watchtower Bible and Tract Society of New York, Incorporated, a 9th Circuit Court of Appeals case at 819 F.3d 875. However, those cases involved instances where a dispute could be resolved without relying on the interpretation of religious doctrine or belief.

Plaintiff's string of collected cases stand united behind the principle that where a legal dispute involving a religious entity may be solved by reference to neutral laws, such as bylaws, and no entanglement in church doctrine is necessary, jurisdiction may be had. But ecclesiastical abstention still provides that where a court would be forced to entangle itself in religious doctrine or polity, jurisdiction may not be had.

In Kliebenstein, K-l-i-e-b-e-n-s-t-e-i-n, the Supreme Court of Iowa analyzed whether letters written by a Methodist superintendent to a church and others living in the community could be subject to defamation claims. It noted that jurisdiction could not be had if the case, quote, involved solely the discipline or excommunication, unquote, of individuals. At 663 N.W.2d, page 406. Because the case involved publication to members of the general community, the communication could not be deemed an internal disciplinary matter and would not be shielded under the ecclesiastical abstention doctrine.

In this case, plaintiff attempts to liken the facts at issue with those present in Kliebenstein since the Moody Church published its letter to nonmembers. While it's true that Moody published its letter to three men who are nonmembers, they were the board members of the Hope Church and they originated the disciplinary proceedings within the Moody Church. Again, it's natural that Moody Church sent them a copy of the final

disposition of the disciplinary proceedings relating to the revocation of Pastor Duncan's ordination. This is not a case like Kliebenstein where the letter was sent to members of the community at large who had no connection with the church. Instead, the letters here were sent to individuals who had approached the church about a church disciplinary matter and to whom the church responded once that disciplinary process was complete. These actions would appear to be quintessential matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

Plaintiff also argues this Court has already interpreted religious doctrine by discussing terms like ordination and membership. The plaintiff calls this Court to uphold the constitutional right of Pastor Duncan to receive the authority of a church and to note that plaintiff has not waived this right. The plaintiff asserts that the Court has denied him access to the legal system based on the failure to properly revoke his ordination. Plaintiff asserts that his right to leave Moody Church is hindered by this Court's understanding of the ordination revocation process.

It's not questioned that Pastor Duncan left the Moody Church, resigned his pastorate, and revoked his membership. He did, however, leave his ordination intact. That remaining ordination acted as a nexus connecting Pastor Duncan to the Moody Church. An ordination is, quote, the act of ordaining or the condition of being ordained, unquote. Citing Webster's Second New Riverside University Dictionary 828, 1984. It is also, quote, the ceremony of admission to the ministry of a church, unquote. Citing the same source. And the verb ordain means to, quote, invest with ministerial or priestly

authority, unquote, or to, quote, order by virtue of established authority, unquote.

The act of ordination in a secular understanding carries the imprimatur of the ordaining church. While it remains true that a person possesses a First Amendment right to join or leave a church, it is also true that churches may exercise their discipline over people associated with the church.

Plaintiff discusses a variety of discovery items, each detailing the scope of the authority the Moody Church may or may not have over people it has ordained. This type of question is the archetypical example of issues to be avoided under the ecclesiastical abstention doctrine. This Court does not have a mandate to venture into uncharted theological waters. Instead, it must avoid entangling itself in matters of religious doctrine and authority by deferring to the highest judicatories of a religious organization.

Plaintiff suggests that the Court apply neutral principles in an approach to deciding this controversy. The Supreme Court has applied the neutral principles approach to claims involving church property disputes. See, for example, Jones versus Wolf, 443 U.S. 595, a 1979 opinion. Yet this approach enjoys exceptions to its rule as well. In fact, a court must first, quote, defer to the resolution of issues of religious doctrine or polity, unquote, before it can apply neutral principles of law. Again citing Jones versus Wolf at page 602. If the legal issue in question is so entwined with theological issues, the court may not apply neutral principles of law to resolve the dispute. If a property dispute does not involve issues of doctrine or polity, the court may apply the neutral principles approach. As a result, as a threshold matter, it must be decided whether the dispute

in question involves inseparable issues of religious doctrine or polity.

Plaintiff asserts that the Court's reasoning concerning its abstention is based on religious teachings about the doctrine of ordination. Plaintiff goes on to discuss matters of theological import, including the doctrine of apostolic succession. Pastor Duncan contends that the Court has already involved itself in a religious dispute by using the ordination approach.

To the contrary, this Court employs the doctrine of ecclesiastical abstention precisely to avoid deciding theological issues, such as the one at the heart of this matter, the authority vested in a church to discipline people it has ordained. Since the dispute centers entirely on the letters published in May of 2000, jurisdiction might only be had if the Court could apply neutral principles and untangle the religious issues from its analysis and judgment. By allowing plaintiff's claims to go forward, the Court would entangle itself in the doctrine and polity of the Moody Church, again a task for which it lacks jurisdiction.

A review of the contested letter dated May 1st, 2000, suggests that any resolution of the claims in this case would include determinations about biblical standards. In fact, the May letter is replete with theological references. For every allegation of a wrong alleged to have been committed, there is a biblical reference as well. For example, the third charge reads, quote, his misuse of alcohol violates the biblical admonitions that an elder be temperate, self-controlled, with biblical reference cited. To evaluate the propriety of this claim, the Court would be required to determine what meaning the terms temperate and self-controlled have in a biblical sense. Similar problems would exist in determining whether

Pastor Duncan had an improper relationship, quote-unquote, according to biblical standards and whether his conduct was above reproach according to biblical citation. Obviously this would entangle the Court in the resolution of theological terms and religious doctrine.

The plaintiff also scrutinizes the legal reasoning behind the Court's earlier order. Pastor Duncan argues that under the Court's approach, quote, any church or cult could require a member to rescind, revoke, or terminate his or her baptism and the civil courts would have no jurisdiction to enforce the member's right to be free from authority and discipline, because the church has unfettered rights to create religious conditions for withdrawal superior to the United States Constitution, unquote. But case law has not addressed the issue of ordination, which seems from a secular stance to be another level of commitment and connection to a church beyond mere membership. The Moody Church acted under apparently genuine internal practice when it investigated Pastor Duncan, a minister the church had ordained. In order for Pastor Duncan to fully escape the disciplinary authority of the church, it may well be that he would have had to have revoked his ordination. By revoking the ordination, he may have terminated his consent to discipline and have invoked his right to bring a tort action for unwarranted discipline brought after such revocation.

Under the Court's ruling, plaintiffs do not lose the right to withdraw from churches and bring a tort action. Instead, they must insure that they fully terminate their relationship with the religious entity before bringing suit. Ordinarily this means a simple revocation of membership. For ministers, this may, and I underline

the word may, entail more, such as revoking one's ordained status within a particular church.

Plaintiff asserts that since the Court dismissed the action, it granted Moody Church the right to act with immunity to tort law and to deny relief to nonmembers who refused to submit to Moody's religious views. And this action entangles the courts in religious doctrine about ordination.

First, Pastor Duncan never waived his constitutional right to be free of the church's authority. He did resign his pastorate and revoke his membership. Yet, as a minister he appears to have retained his Moody Church ordination.

By keeping a passive connection to the Moody Church, he may have consented to its authority, however that is defined biblically or theologically. Again, that is an issue which would require the Court to be involved in religious doctrine and polity, and the answer to that issue would require the Court to do just what it is precluded from doing.

The Court is also mindful that it has entered a field of theological contemplation when it discusses the effects of an ordination with regard to church discipline. This only underscores the inappropriateness of exercising further jurisdiction over the matter because it is deeply entwined with theological considerations. Many courts nationwide have rejected claims against religious defendants for breach of fiduciary duty, negligent hiring, negligent supervision, tortious interference with contract, negligent infliction of emotional distress, and defamation or other tortious speech. See, for example, Tort Liability, Religious Entities, and the Decline of Constitutional Protection, by Scott C. Idleman, I-d-l-e-m-

a-n, at 75 Indiana Law Journal 219, pages 234 through 239, and appropriate notes with collected cases.

Most courts reject the idea that uniquely religious acts such as excommunications or shunning should be actionable at all in tort. The Moody Church's actions appear to fall squarely within such protected conduct and should not be adjudicated by this Court. The motion to reconsider is denied.

Thank you.

MR. SMITH: Judge --

THE COURT: That's all for the record. Thank you.

(Which were all the proceedings had at the above-entitled cause on said-date and time.)

**APPENDIX G**
**STATE OF ILLINOIS APPELLATE COURT**
**SECOND DISTRICT**

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NO. 2-09-1078

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DUNCAN, RICHARD

v.

LUTZER, ERWIN, ET AL.

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**MAY 10, 2011**

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THE COURT HAS THIS DAY, 05/10/11, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-09-1078

Duncan, Richard v. Lutzer, Erwin, et al.

Upon consideration of the petition for rehearing filed by appellant, the petition for rehearing is hereby denied.

(Hutchinson, Jorgensen, McLaren, JJ.)

**APPENDIX H**
**SUPREME COURT OF ILLINOIS**

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NO. 112573

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RICHARD A. DUNCAN,
*Respondent*,

v.

BERVIN PETERSON ET AL.
(ERWIN LUTZER, *Petitioner*).

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**SEPTEMBER 28, 2011**

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The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Thomas, J., took no part.

The mandate of this Court will issue to the Appellate Court on November 2, 2011.

**APPENDIX I**
**SUPREME COURT OF ILLINOIS**

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NO. 101432

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RICHARD A. DUNCAN

v.

BERVIN PETERSON

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**DEC. 1, 2005**

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ORDER

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Lower Court: 359 Ill. App. 3d 1034, 296 Ill. Dec. 377, 835 N.E.2d 411.

Disposition: Denied (Thomas, C. J., took no part.).