IN THE SUPREME COURT OF IOWA

NO. 21-1275

Phyllis Konchar,

Plaintiff/Appellant

v.

Reverend Joseph Pins, St. Joseph's Church of Des Moines, and the Roman Catholic Diocese of Des Moines,

Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
CASE NUMBER: LACL141344

THE HONORABLE SARAH CRANE
THE HONORABLE COLEMAN MCALLISTER

APPELLEE'S FINAL BRIEF

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Statement of the Issues

I. With only her defamation claims left for the jury's determination, evidence of Konchar's reputation was probative of every fact at issue. The district court allowed the jury to hear evidence bearing on her reputation as Principal of St. Joseph's, subject to appropriate foundational showing. By admitting this highly relevant evidence, did the district court somehow err?

Cases

Andersen v. Khanna, 913 N.W.2d 526 (Iowa 2018)
Bandstra v. Covenant Reformed Church, 913 N.W.2d 19 (Iowa 2018)
Bauer v. Brinkman, 958 N.W.2d 194 (Iowa 2021)
Brown v. First Nat. Bank of Mason City, 193 N.W.2d 547 (Iowa 1972)
Buboltz v. Birusingh, 962 N.W.2d 747 (Iowa 2021)
Bustos v. A & E Television Networks, 646 F.3d 762 (10th Cir. 2011)
City of Des Moines v. Ogden, 909 N.W.2d 417 (Iowa 2018)
Delaney v. Int'l Union UAW Local No. 94 of John Deere Mfg. Co., 675 N.W.2d 832 (Iowa 2004)
Delavan Corp. v. Barry, No. 03-2105, 2005 WL 67578 (Iowa Ct. App. Jan. 13, 2005)
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Glatstein v. Grund, 51 N.W.2d 162 (Iowa 1952)
Gottschalk v. State, 881 P.2d 1139 (Alaska Ct. App. 1994)
Hearts with Haiti, Inc. v. Kendrick, No. 2:13-CV-00039-JAW, 2015 WL 4065193 (D. Me. July 2, 2015)
Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)
Koch Foods, Inc. v. Pate Dawson Co., Inc., No. 3:16-CV-355-DCB-MTP, 2018 WL 651371 (S.D. Miss. Jan. 31, 2018)
Matter of Application of O'Keeffe, 184 F. Supp. 3d 1362 (S.D. Fla.)
McGuire v. Kenefick, 82 N.W. 485 (Iowa 1900)
Medlin v. Carpenter, 329 S.E.2d 159 (Ga. App. 1985)
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Mohammed v. Otoadese, 738 N.W.2d 628 (Iowa 2007)
Montgomery v. Risen, 197 F. Supp. 3d 219 (D.D.C. 2016)
Mowry v. Reinking, 213 N.W. 274 (Iowa 1927)
Nepple v. Weifenbach, 274 N.W.2d 728 (Iowa 1979)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Olsen v. Harlan Nat. Bank, 162 N.W.2d 755 (Iowa 1968)

Ott v. Murphy, 141 N.W. 463 (Iowa 1913)
Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)
Pierson, Pierson v. Robert Griffin Investigations, Inc., 555 P.2d 843, 844 (Nev. 1976)
Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393 (Iowa 2017)
Poulston v. Rock, 467 S.E.2d 479 (Va. 1996)
Rice v. Rose & Atkinson, 176 F. Supp. 2d 585 (S.D. W. Va. 2001)
Schlegel v. Ottumwa Courier, a Div. of Lee Enterprises, Inc., 585 N.W.2d 217 (Iowa 1998)
State v. Buckner, 214 N.W.2d 164 (Iowa 1974)
State v. Buelow, 951 N.W.2d 879 (Iowa 2020)
State v. Martinez, 679 N.W.2d 620 (Iowa 2004)
State v. Thoren, 970 N.W.2d 611 (Iowa 2022)
Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981)
Twyford v. Weber, 220 N.W.2d 919 (Iowa 1974)
Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968)
Wailes v. Hy-Vee, Inc., 861 N.W.2d 262 (Iowa Ct. App. 2014)
Woods v. Charles Gabus Ford, Inc., 962 N.W.2d 1 (Iowa 2021)
World Wide Association v. Pure, Inc., 450 F.3d 1132 (10th Cir. 2006)

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Meiring de Villiers, Substantial Truth in Defamation Law, 32 Am. J. Trial Advoc. 91 (2008)

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Fed. R. Evid. 405
Iowa R. Evid. 5.103
Iowa R. Evid. 5.106
Iowa R. Evid. 5.401
Iowa R. Evid. 5.404
Iowa R. Evid. 5.405
Iowa R. Evid. 5.609

II. The First Amendment prohibits civil courts from becoming excessively entangled with a religious organization's internal affairs. In granting summary judgment on Konchar's defamation claim premised on the statement that "two prior pastors were consulted" about the non-renewal decision, the district court properly recognized that the claim would require a jury to interpret and decide questions of religious doctrine. Was the district court's deference to this longstanding doctrine of constitutional law appropriate?

Cases

Bandstra v. Covenant Reformed Church, 913 N.W.2d 19 (Iowa 2018)
Brazauskas v. Fort Wayne–South Bend Diocese, Inc., 714 N.E.2d 253 (Ind. Ct. App. 1999)
Downs v. Roman Catholic Archbishop of Baltimore, 683 A.2d 808 (Md. Ct. Spec. App. 1996)
Iowa Ass'n Bus. & Indus. v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)
Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732 (D.N.J. 1999)
Koster v. Harvest Bible Chapel-Quad Cities, 959 N.W.2d 680 (Iowa 2021)
Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S.Ct. 2049 (2020)
Patton v. Jones, 212 S.W.3d 541 (Tex. App. 2006)
State of Mo. ex rel. Gaydos v. Blaeuer, 81 S.W.3d 186 (Mo. Ct. App. 2002)
Watson v. Jones, 80 U.S. 679 (1871)
Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am., 860 F. Supp. 1194 (W.D. Ky. 1994)

Other Authorities

Iowa Const. Art I, § 3
U.S. Const. Amend I

III. An enforceable contract requires mutual assent as to the contract's terms. Konchar and Father Pins underwent religious mediation, in which they in which they memorialized their shared aspirational goals. The district court found that these goals were not sufficiently definite or certain to be enforceable and granted summary judgment on Konchar's breach-of-contract claim. Did the district court err in refusing to enforce these vague, aspirational goals?

Cases

Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995)
Audus v. Sabre Communications Corp., 554 N.W.2d 868 (Iowa 1996)
Das v. Rio Tinto PLC, 332 F. Supp. 3d 786 (S.D.N.Y. 2018)
Estate of Cox v. Dunakey & Klatt, P.C., 893 N.W.2d 295 (Iowa 2017)
Iowa Ass'n Bus. & Indus. v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)
Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325 (Iowa 1986)
Schiro v. Cemex, S.A.B. de C.V., 396 F. Supp. 3d 283 (S.D.N.Y. 2019)

IV. To warrant in-camera inspection of privileged materials, the party seeking to pierce the attorney-client privilege must make a particularized factual showing to support a reasonable belief that a specific communication was made with the intent to further a crime or fraud. In support of her motion to compel, Konchar lodged only conclusory accusations about Defendants' privilege log as a whole. Did the district court correctly refuse to invade the attorney-client privilege based on nothing more than Konchar's say-so?

Cases

33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co., 939 N.W.2d 69 (Iowa 2020)
Bryce v. Episcopal Church in the Diocese of Colorado, 289 F. 3d 648 (10th Cir. 2002)
Dayner v. Archdiocese of Hartford, 23 A3d 1192 (Conn. 2011)
Frease v. Glazer, 4 P.3d 56 (Or. 2000)
Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978)
In re 650 Fifth Ave., No. 08 CIV. 10934 KBF, 2013 WL 3863866 (S.D.N.Y. July 25, 2013)
In re BankAmerica Corp. Sec. Litig., 270 F.3d 639 (8th Cir. 2001)

In re Gen. Motors Corp., 153 F.3d 714 (8th Cir. 1998)
In re Grand Jury Proc., 417 F.3d 18 (1st Cir. 2005)
In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007)
In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005)
In re Pub. Def. Serv., 831 A.2d 890 (D.C. 2003)
In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995)
In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982)
Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009)
Kilpatrick v. King, 499 F.3d 759 (8th Cir. 2007)
Koch v. Specialized Care Servs., Inc., 437 F. Supp. 2d 362 (D. Md. 2005)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
People v. Radojcic, 998 N.E.2d 1212 (Ill. 2013)
Pfizer Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972)
Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984)
Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264 (E.D. Va. 2004)
Riley Drive Ent. I, Inc. v. Reynolds, 970 N.W.2d 289 (Iowa 2022)
Safety Today, Inc. v. Roy, No. 2:12-CV-510, 2013 WL 5597065 (S.D. Ohio Oct. 11, 2013)
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Stauffer Chem. Co. v. Monsanto Co., 623 F. Supp. 148 (E.D. Mo. 1985)
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United States v. Arthur Andersen, L.L.P, 273 F. Supp. 2d 955 (N.D. Ill. 2003)
United States v. Christensen, 828 F.3d 763 (9th Cir. 2015)
United States v. Jacobs, 117 F.3d 82, 88 (2d Cir. 1997)
United States v. Martin, 278 F.3d 988 (9th Cir. 2002)
United States v. White, 887 F.2d 267 (D.C. Cir. 1989)
United States v. Zolin, 491 U.S. 554 (1989)

Statutes

Iowa Code § 622.10

Rules

Iowa R. Civ. P. 1.503

Other Authorities

Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post Hosanna-Tabor* 10 FIRST AMEND L. REV. 233 (2012).

V. The Court should apply the ministerial-exception doctrine as an immunity and affirm dismissal of Konchar's claims on alternate grounds.

Cases

Bryce v. Episcopal Church in the Diocese of Colorado, 289 F. 3d 648 (10th Cir. 2002)
Dayner v. Archdiocese of Hartford, 23 A3d 1192 (Conn. 2011)
Heard v. Johnson, 810 A.2d 871 (D.C. 2002)
Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012)
Kirby v. Lexington Theological Seminary, 426 S.W.3d 597 (Ky. 2014)
NLRB v. Catholic Bishop of Chi.,440 U.S. 490 (1979)
Petruska v. Gannon Univ., 462 F. 3d 294 (3d Cir. 2006)
Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010)

Other Sources

Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post Hosanna-Tabor* 10 FIRST AMEND L. REV. 233, 293 n.355 (2012)

Routing Statement

The Iowa Supreme Court should retain this appeal. Iowa R. App. P. 6.1101(2). The issues raised are fundamental, urgent issues of broad importance regarding the First Amendment ecclesiastical-abstention and ministerial-exception doctrines, requiring ultimate determination by this Court. Iowa R. App. P. 6.1101(2)(d). Additionally, this case presents substantial issues of first impression, which will require the Court's enunciation of legal principles. Iowa R. App. P. 6.1101(2)(c), (f).

Statement of the Case

I. Nature of the case.

Though she styled her claims as ones for fraud, breach-of-contract, and defamation, the allegations at the heart of this case stem from the end of Plaintiff Phyllis Konchar's employment as principal of St. Joseph's School. After an investigation revealed that she engaged in conduct irreconcilable with Catholic principles, Father Pins determined Konchar could not continue in her ministerial role at the parochial school the following year. Rather than retiring, Konchar publicized the details of her non-renewal and attempted to rally support. The Roman Catholic Diocese of Des Moines and Father Pins offered statements regarding the general circumstances surrounding her departure to rebut her one-sided narrative. Konchar responded by filing this lawsuit.

II. Procedural history.

A. The district court grants summary judgment on Konchar's breach-of-contract claim.

In February 2020, Judge McAllister granted summary judgment dismissing Konchar's breach-of-contract claim, which she premised on an aspirational document that she and Father Pins had signed as part of a Christian reconciliation process. (JA-V.I-0890-0937). Finding Konchar could not prove the existence of a contract, the court reasoned:

> [T]he undisputed evidence in the record is that the mediator, Tom Green, told both parties before they signed the document at issue that "the agreements in the document were not intended and did not function as a legally binding contract."
>
> Given this undisputed testimony, the Court concludes that Plaintiff cannot establish, as a matter of law, the existence of mutual assent necessary to form an enforceable contract. In addition, the Court also agrees with Defendant Pins that the term of the alleged agreement at issue, that Father Pins would help Plaintiff reach her retirement plans on her terms, is not sufficiently definite or certain as to be enforceable.
>
> It is undisputed that Plaintiff served as Principal of the School pursuant to the terms of a written administrator contract. Nothing in the administrator contract guaranteed Plaintiff the right to work for the School as Principal until any specific "retirement" date. Instead, Plaintiff worked under a one-year contract that terminated on July 31, 2018, unless earlier terminated. It defies credibility or common sense to suggest that there was a meeting of the minds between the parties that by executing the mediation document on February 22, 2018, the parties intended to amend the administrator contract to, in essence, guarantee Plaintiff employment until some unspecified retirement date.

(JA-V.I-0907-0908) (citation omitted).

Although Defendants moved for summary judgment on all claims based on the constitutional Religion Clauses, the court did not reach the issue as to Konchar's breach-of-contract claim, having granted summary judgment on the merits. (JA-V.I-0013-0015); (JA-V.I-0905-0908).

B. The district court rejects Konchar's attempts to invade the attorney-client privilege.

In discovery, Defendants produced privilege logs listing communications withheld or redacted on the basis of attorney-client privilege. *See* Iowa R. Civ. P. 1.503(1), (5)(a); (JA-V.II-0021-0041). Seeking to invoke the crime-fraud exception, Konchar moved to compel an *in-camera* inspection. (JA-V.I-0941). Finding her request rested on "mere speculations that something in the communication may be helpful to [her] fraud claim," which were "not sufficiently supported by any showing of particularized facts" suggesting that the crime-fraud exception could apply, the district court denied Konchar's motion to compel. (JA-V.I-1028).

C. The district court grants Defendants' motion for summary judgment on Konchar's defamation claim based on the "two prior pastors" statement.

In an email addressing the St. Joseph's community, Father Pins attempted to dissuade the apparent perception that the non-renewal decision was the product of animosity between himself and Konchar, saying: "Please be advised that the two prior pastors were consulted and Bishop Pates approved

the decision following the evaluation of past conduct." (JA-V.III-0113-0114). Konchar later claimed that this statement, among others, injured the reputation she'd earned for herself throughout her tenure. (JA-V.I-1372).

In July 2021, Judge Crane granted summary judgment on the defamation claim based the "two prior pastors" statement on religious entanglement grounds:

> [A]llowing a jury to determine whether or not the prior pastors approved the non-renewal decision would invite religious entanglement. As noted above, the decision of whether Konchar was suitable for the role of Principal at St. Joseph's is beyond the purview of a civil court. Likewise, the decision making process of the religious organization and the opinions of prior pastors as to her suitability cannot be examined by a jury. Whether or not prior pastors approved of Konchar's termination is not a secular matter. This claim would invite inquiry into the reason for Konchar's termination, the assessment of her suitability by the prior pastors, and Father Pins' understanding of those pastor's [sic] comments on Konchar's suitability. Unlike the allegations of employment misconduct that have a secular meaning, asking a jury to decide the prior pastors' opinions regarding Konchar's suitability would require an "impermissible inquiry into church doctrine and discipline." *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa 2003).

(JA-V.I-1571).

D. The jury reaches a verdict in Defendants' favor on Plaintiff's defamation claims.

On August 2, 2021, a jury trial commenced on Konchar's defamation claim, her only remaining cause of action. Two statements remained for the jury's consideration: a statement in Father Pins' email to the St. Joseph's

community, that an investigation revealed a "pattern of conduct that warranted choosing not to renew Ms. Konchar's contract," and the Diocese's statement that the "outcome of the investigation pointed to serious irregularities in the school administration under [Konchar's] direction." (JA-V.III-0515-0516); (JA-V.III-0113-0114). Judge Sarah Crane presided over the ten-day trial.

On August 13, 2021, the jury returned a verdict in Defendants' favor on both claims, and the district court entered judgment in favor of Defendants. (Verdict); (JA-V.I-2657).

Statement of the Facts

In the fall of 1999, Phyllis Konchar became the principal of St. Joseph's, a small parochial grade school on Des Moines' east side. (JA-V.I-1702[12:7-11]); (JA-V.III-0150-0179). St. Joseph's is a Catholic school operated by St. Joseph parish, a Catholic juridical entity in the Roman Catholic Diocese of Des Moines, and as Principal, Konchar was a minister of the Roman Catholic Church. (JA-V.III-0183); (JA-V.III-0145-0149); (JA-V.III-0014-0023); (JA-V.III-0023-0073); (JA-V.III-0373); (JA-V.I-0075-0106); (JA-V.I-0930-0931). A Catholic priest, appointed by and subordinated to the Bishop of the Diocese of Des Moines, administers St. Joseph's Church and School. (JA-V.I-2551-2553[13:23-15:4]); (JA-V.III-0133-0134). The Bishop of the Diocese is appointed by the Vicar of Christ, The Pope. (JA-V.III-0133).

Initially, Konchar seemed to be an outstanding principal. She was well-respected in the St. Joseph's community and became somewhat of a local celebrity in the Des Moines community at large. (JA-V.I-2166-2167[124:2-125:10]). She even received a national award as a distinguished Catholic principal. (JA-V.I-1719[29:2-8]).

Beneath the picturesque surface, however, Konchar's leadership was far from ideal. Over the course of nearly two decades, she earned a reputation as a tyrant. At trial, a dozen current and former St. Joseph's employees and community members testified that Konchar had a reputation for targeting and eliminating those who questioned her leadership decisions. (JA-V.I-2093[126:13-16]); (JA-V.I-2194[133:11-20]); (JA-V.I-2311-2312[58:24-59:4]); (JA-V.I-2575[84:18-25]); (JA-V.I-2252[14:9-14]).

Over the years, parish priests had consistently consulted with and apprised Bishop Pates of Konchar's shortcomings. (JA-V.I-2177-2181[11:11-20, 17:17-23:8]). Father Hurley and Father Parker, the priests who preceded Father Pins at St. Joseph's, shared their concerns about Konchar's leadership with Bishop Pates. (JA-V.I-2045-2049, 2053-2055, & 2063-2064[123:11-15, 124:21-126:12, 127:2-9, 132:15-134:14, 178:11-179:11]); (JA-V.III-0024-0073). Konchar avoided the consequences of her behavior by promising that she was close to retirement, leading them to believe the problem would sort itself out. (JA-V.I-2050-2051[128:11-129:2]); (JA-V.I-2181[22:8-17]).

In 2017, Bishop Pates appointed Father Joseph Pins as St. Joseph Parish Priest. Within months, three employees approached Father Pins to lodge complaints about Konchar. First, Jenny Gervais, the band teacher, reported that she had been bullied and harassed by Konchar. (JA-V.I-1935-1936 & 1939-1940[154:15-155:4, 159:7-12, 167:22-25]). Gervais ultimately resigned from her position because of Konchar's behavior, and when Gervais went to pick up her final paycheck, Konchar instructed the school secretary to withhold it illegally. (JA-V.III-0485-0486); (JA-V.III-0453); (JA-V.I-1998-1999[56:12-57:12]).

Second, Brett Bender, the P.E. teacher, lodged a complaint against Konchar for harassment and creating a hostile work environment. (JA-V.III-0193-0197). He reported the work environment was "uncomfortable and one of anxiety for many teachers. Some staff have even called it 'toxic.'" (JA-V.III-0195). Bender also emphasized the high turnover at St. Joseph's, which he attributed "to harassment, constant bullying, and intimidation by Mrs. Konchar." (*Id.*).

Third, Konchar's administrative assistant and one-time confidant, Tonya Dunn, reported that Konchar had been paying her an extra $300 a month out of a "secret account" she maintained at the school. (JA-V.III-0192). This was especially troubling to Father Pins because he had denied Konchar's request to

increase Dunn's monthly salary by that very amount. (JA-V.I-2160-2161[53:17-54:14]); (JA-V.III-0505-0506).

Shortly after receiving these complaints, Father Pins learned of ongoing friction between Konchar and Paula Courter, the St. Joseph's Business Manager. (JA-V.I-2154-2156[43:18-45:14]). Concerned, Father Pins consulted with Tracey Bonday, the Catholic Schools Superintendent, and Eileen Valdez, Diocesan Human Resource Manager. With their guidance, and in consultation with the Bishop, Father Pins issued Konchar a Performance Improvement Plan ("PIP"), which laid out four main areas of concern: insubordination, differing treatment of employees, lack of collaboration with St. Joseph's staff, and fostering a "culture of fear and intimidation." (JA-V.III-0505-0506). Meanwhile, Valdez commenced an investigation into the charges leveled against Konchar. (JA-V.III-0443-0461).

After receiving the PIP, Konchar immediately began to undermine Father Pins by rallying support from her allies among the Board of Education and the Parish community. (JA-V.III-0204); (JA-V.I-1881-1887[49:16-55:2]). Using the school's electronic messaging system, Konchar exhorted her followers to confront Father Pins at the December 2017 School Board meeting. (JA-V.III-0204); (JA-V.III-0366-0371); (JA-V.III-0372); (JA-V.I-1888-1890[59:1-61:8]). Father Pins learned of the impending confrontation and alerted Bishop Pates, who attempted to defuse the conflict.

Bishop Pates summoned Father Pins and Konchar to discuss the ongoing situation. (JA-V.I-2183-2184[26:6-27:23]). Konchar read the Bishop a statement she had prepared and intended to read at the Board meeting, in which she acknowledged that she had a duty of obedience and understood the importance of a cohesive relationship between the Catholic school principal and the Parish Priest. (JA-V.III-0198-0201). Though Bishop Pates had considered terminating Konchar's employment, he decided to wait upon hearing these acknowledgments. (JA-V.I-2185-2186[28:10-29:9]). Instead, he directed Father Pins and Konchar to work with a Christian mediator, Tom Green, who the Diocese had used in the past for reconciliations when clerics had disagreements. (*Id.*); (JA-V.III-0463-0468).

Concurrent with these reconciliation efforts, Bishop Pates directed Valdez to continue her investigation of the serious allegations leveled against Konchar. (JA-V.III-0437-0438). She began interviewing the employees who had lodged complaints, as well as the former parish priests who'd worked alongside Konchar. (JA-V.III-0443-0461). As Bishop Pates explained, the mediation and investigation were on "parallel tracks." (JA-V.I-2183-2184[26:2-27:23]); (JA-V.III-0469-0470).

Meanwhile, during the mediation process, Konchar continued to undermine Father Pins. She shared confidential details of the process with Board members, teachers, and colleagues, and she sarcastically told her entire

staff that she had been forced to undergo "marriage counseling with a Catholic priest." (JA-V.I-1890-1896[61:15-67:12]); (JA-V.III-0205); (JA-V.III-0471-0476).

After concluding her investigation, Valdez determined that Konchar's conduct posed serious risks to St. Joseph's. (JA-V.III-0013, 0443-0461). As a result, the Church decided to exercise its absolute contractual right to decline renewing Konchar's annual contract. (JA-V.III-0523). On March 9, 2018, Father Pins met with Konchar to inform her of the decision. (JA-V.I-2164-2165[69:25-70:16]). He offered her the option of finishing out the school year and retiring, with the condition that she refrain from engaging in further subversive conduct. Konchar rejected this offer and took to social media. (*Id.*); (JA-V.I-1896-1897[67:22-68:22]). She also used the school's electronic communications system to publicize the details of her contract non-renewal and level accusations against Father Pins. (JA-V.III-0366-0371). In a school-wide message, Konchar acknowledged she had been warned against engaging in such behavior and stated, "As you can tell, I have made the decision to be terminated." (JA-V.III-0372).

As a result, Father Pins terminated Konchar's contract effective immediately. Konchar responded by using social media to accuse Father Pins of being a bad priest and a bad actor. (JA-V.III-0366-0371). She urged her supporters to publicize her termination, support her continued employment,

and call for have Father Pins' removal. Konchar also told her supporters to "contact the media," which they did. (JA-V.III-0374 & 0395-0396).

Consequently, the secular media echoed Konchar's version of events. (JA-V.III-0517-0522). This created what Bishop Pates described as an "imbroglio," sowing division in the St. Joseph's community and endangering the spiritual mission of the church. (JA-V.I-2187[33:5-19]). In an attempt to calm his congregation, Father Pins sent an email to the parish community, explaining:

> I regret having to send this message. As many of you may know, Ms. Konchar and I have philosophical differences of opinion regarding the church and school. We were working toward developing a cooperative relationship when I received complaints from a number of current and former staff. With the assistance of the diocese, these concerns were examined. We concluded there was a pattern of conduct that warranted choosing not to renew Ms. Konchar's contract. I informed Ms. Konchar of this decision and asked her to maintain the decision in confidence and in a professional manner. She shared with me that she had the right to tell the world – and she apparently has attempted to do so. In response she was let go.
>
> There's apparently a perception that this decision was the product of animosity between Ms. Konchar and me. Please be advised that the prior two pastors, were consulted and Bishop Pates approved the decision following the evaluation of the past conduct.
>
> You probably know that in situations like this the church and Ms. Konchar's employer have to maintain a level of discretion. The best action at this time is for prayer for Ms. Konchar, myself, and all associated with the Parish. We pray especially for St. Joseph School and its students who are the most important consideration at this time.

Sincerely,
Fr. Joe Pins

(JA-V.III-0113-0114).

During this time, Konchar continued to use social media and the school's messaging system to rally support. (JA-V.III-0366-0373) Particularly, she disseminated links to an online petition advocating for her reinstatement. (JA-V.III-0369); (JA-V.III-0374-0383); (JA-V.III-0384-0392); (JA-V.III-0393-0394).

Ultimately, Konchar's efforts to garner media attention were successful; the Des Moines Register published a newspaper article on March 12, 2018, entitled "Des Moines Catholic school principal fired; 'I'm not willing to be silent' about 'culture of fear.'" (JA-V.III-0517-0522). That same day, WHO news radio broadcasted a story about Konchar, which included excerpts from an interview with Konchar in which she blamed Father Pins for her termination. (P-16; JA-V.I-0464[267:21-268:7], JA-V.I-1350).

In the face of public criticism, the Diocese issued a statement about Konchar's departure, which stated in part:

> An investigation by the Diocese of Des Moines was conducted at St. Joseph School regarding the school administrator after a series of internal concerns were presented to the diocese.
>
> The outcome of the investigation pointed to serious irregularities in the school administration under her direction. The principal was advised of these and invited to remain in place for

> the remainder of the school year on the condition that the situation remain private. She chose otherwise.

(JA-V.III-0515-0516). Perhaps unsurprisingly, Konchar responded by bringing this action.

Argument

I. The district court properly found that Defendants' reputational evidence was relevant and admissible in this defamation action.

A. Error preservation.

Defendants contest error preservation. Konchar failed to preserve error on the admission of reputational testimony, with two narrow exceptions: (1) one answer in Rick Carpenter's testimony (JA-V.I-2364[29:7-25]); and (2) testimony from Natalie Bradley regarding Konchar's reputation for blackballing. (JA-V.I-2566-2567[75:22-76:33]). The remaining challenges were not preserved and should not be considered by this Court. *See Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017).

Though Konchar points to her motion in limine as error preservation, the "denial of a motion in limine does not preserve error for appellate review." *State v. Thoren*, 970 N.W.2d 611, 620–21 (Iowa 2022) (citation omitted). This is because error "arises when the evidence is introduced at trial, not from ruling on the motion in limine." *Id.* at 621. Therefore, the party seeking to exclude evidence "must object at the time the evidence is offered at trial to preserve a

challenge to the evidence on appeal." *Id.; see Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974).[1]

Konchar did not object on foundation grounds to nearly any of the reputation testimony she now challenges. The jury heard the testimony of three witnesses, Rick Carpenter, Autumn O'Connor, and Jill Dotson, through their perpetuation depositions, and the court ruled on any objections to the designated testimony prior to trial. (JA-V.I-1678-1682). Konchar objected to two designations of Carpenter's testimony on foundational grounds. (JA-V.I-1632-1633). The court sustained the first objection; Konchar can claim no error. (JA-V.I-1679). The court overruled her second foundation-related objection, allowing the jury to hear Carpenter's opinion that Konchar's reputation "was not good at all with the faculty," which he knew from his hiring of several former St. Joseph's employees, as well as through his involvement in the parish and school. (JA-V.I-2364[29:7-25]).[2]

Konchar preserved no error as to reputation testimony from O'Connor or Dotson. She lodged three foundation-related objections to O'Connor's

[1] There is an exception when the ruling is unequivocal, as such a decision "'has the effect of [an evidentiary] ruling' and thus preserves the issue for appellate review." *Wailes v. Hy-Vee, Inc.*, 861 N.W.2d 262, 264 (Iowa Ct. App. 2014) (citation omitted). That exception is inapplicable here because the district court's ruling specifically contemplated making witness-by-witness determinations and laying additional foundation outside of the presence of the jury, if necessary. (JA-V.I-1585, 1592-1593[11:18-22 & 18:15-19:2]).

[2] As noted above, Defendants do not dispute that Konchar preserved error with respect to this one response from Carpenter.

testimony, but neither of the two that the court overruled relate to the issue she raises on appeal.[3] First, Konchar objected on the basis of lack of foundation as to whether O'Connor's reputational knowledge carried over to 2017. (JA-V.I-1631-1645). Second, Konchar objected on the basis of lack of personal knowledge, foundation, and speculation with respect to O'Connor's testimony regarding another teacher "who carried around a tape recorder when she would interact with Ms. Konchar because she was afraid…" (*Id.*) Neither objection was aimed at the purported lack of foundation challenged on appeal. *See Nepple v. Weifenbach*, 274 N.W.2d 728, 732 (Iowa 1979) (explaining the "reason for requiring a 'specific' objection is that in fairness to the trial court, it should know upon what ground the objector relies and should be given an opportunity to pass upon it"); *accord Thompson v. Bohlken*, 312 N.W.2d 501, 509 (Iowa 1981). Konchar did not lodge any foundational objections to Dotson's designated testimony. (JA-V.I-1631-1645).

It is "a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court" to be preserved for appeal. *Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 6 (Iowa 2021) (citation omitted). Because Konchar did not raise, and the district court did not rule on, any foundation-related objections to O'Connor's or Dotson's reputation

[3] Konchar's general foundational objection to a reputational question was sustained. (JA-V.I-1631-1645); (JA-V.I-1679).

testimony, the Court should decline to consider Konchar's arguments on this unpreserved issue. *See Buboltz v. Birusingh*, 962 N.W.2d 747, 754 (Iowa 2021).

Konchar also takes issue with the testimony of three other witnesses who testified in person at trial: Tanya Dunn, Jenny Gervais, and Natalie Bradley. Konchar called the first two witnesses herself and elicited the very testimony that she now complains of. (Appellant Br., 32-33). For example, Konchar points to Dunn's testimony "that there was 'a broad group of people who made comments about Ms. Konchar's reputation for putting Xs on people [sic] back.'" *Id.* at 33 (citing (JA-V.I-1993[49])). But it was on direct examination that Dunn first testified that she had heard from multiple people over the years that "once you get an 'X' on your back from Mrs. Konchar, [] there [i]s no going back." (JA-V.I-1988-1990[41:19-42:12 & 42:25-43:5]). Having opened the door to this line of questioning, Konchar cannot now complain about follow-up questions asked on cross-examination. (JA-V.I-1993-1994[49:5-50:3]). *See Delavan Corp. v. Barry*, No. 03-2105, 2005 WL 67578 at *3 (Iowa Ct. App. Jan. 13, 2005) ("[I]t is elementary a litigant cannot complain of error which he was invited or to which he has assented."); *see also* Iowa R. Evid. 5.106.

With respect to Gervais' testimony, the court sustained Konchar's foundation objection to reputation evidence, requiring additional foundation. (JA-V.I-1942-1943[171:8-172:10]). Defendants' counsel laid the additional

foundation requested, and Gervais was permitted to testify as to her knowledge of Konchar's reputation. (JA-V.I-1943-1944[172:12-173:5]). But the issue Konchar seems to raise came from testimony elicited by her own counsel, on redirect examination, specifically that Gervais heard about Konchar's reputation from "various people" over the years, providing the names of Bradley and O'Connor as two examples.[4] (JA-V.I-1947[176:5-25]). Konchar cannot complain of testimony that she introduced herself. *See, e.g, Brown v. First Nat. Bank of Mason City*, 193 N.W.2d 547, 555 (Iowa 1972) (finding no error in admitting evidence where party claiming error introduced the evidence); *Olsen v. Harlan Nat. Bank*, 162 N.W.2d 755, 761 (Iowa 1968); *Glatstein v. Grund*, 51 N.W.2d 162, 168 (Iowa 1952) ("Obviously [a party] cannot complain of testimony [his or her counsel] elicited."). Konchar's failure to preserve her arguments for appellate review is reason enough to allow the jury's verdict to stand.

B. Standard of review.

This Court reviews the admission of relevant evidence for an abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535–36 (Iowa 2018). "A district

[4] Defendants presume Konchar's contention that Gervais could "only name one person" and her reference to the challenged testimony as "question[ing] on cross examination" were mere oversights. (Appellant Br., 32). Regardless, the fact that a witness may not be able to recall the exact sources for her knowledge of reputation goes to the weight of the reputational testimony, not its admissibility. *See Gottschalk v. State*, 881 P.2d 1139, 1145 (Alaska Ct. App. 1994).

court abuses its discretion when it exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable, by issuing a decision that is not supported by substantial evidence or one that is based on an erroneous application of the law." *City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018) (internal quotation marks omitted). Even if erroneous, the admission of evidence "does not require reversal 'unless a substantial right of the party is affected.'" *Mohammed v. Otoadese*, 738 N.W.2d 628, 633 (Iowa 2007) (quoting Iowa R. Evid. 5.103(a)). "In other words, the admission of evidence must be prejudicial to the interest of the complaining party. This requires a finding that it is 'probable a different result would have been reached but for' the admission of the evidence or testimony." *Id.* at 633 (internal citations omitted).

C. Evidence of Konchar's reputation was relevant to determining the ultimate issues of her defamation claim.

At trial, only defamation claims remained for the jury's determination. Konchar concedes, as she must, that evidence of her reputation was relevant to the alleged defamation. (Appellant Br., 37). Under Iowa law, the "gravamen or gist of an action for defamation is damage to the plaintiff's reputation." *Schlegel v. Ottumwa Courier, a Div. of Lee Enterprises, Inc.*, 585 N.W.2d 217, 221 (Iowa 1998). "It is reputation which is defamed, reputation which is injured, and reputation which is protected by the law of defamation." *Id.* Put simply, Konchar placed her reputation and character squarely at issue in this case by

suing Father Pins, St. Joseph's, and the Diocese for defamation. *See id.*; *World Wide Association v. Pure, Inc.*, 450 F.3d 1132, 1138 (10th Cir. 2006) (referencing this "well-established" principle).[5]

The Rules of Evidence provide, when character is at issue, it may be proved "by testimony about the person's reputation or by testimony in the form of an opinion," as well as "by relevant specific instances of the person's conduct." Fed. R. Evid. 405; Iowa R. Evid. 5.405.[6] Like its federal counterpart, the Iowa rule allows a party to introduce evidence of specific acts of misconduct only in cases "in which character is, in the strict sense, in issue." Fed. R. Evid. 405, advisory committee's note. Character is in issue when it is "a material fact that under the substantive law determines rights and liabilities of the parties." *Perrin v. Anderson*, 784 F.2d 1040, 1045 (10th Cir. 1986) (citation omitted). The quintessential example of such a case is one for defamation, where the plaintiff's reputation and character are an essential element of the claim. *See Schlegel*, 585 N.W.2d at 221; *see also Koch Foods, Inc. v. Pate Dawson Co., Inc.*, No. 3:16-CV-355-DCB-MTP, 2018 WL 651371, *5 n.4 (S.D. Miss. Jan. 31,

[5] Though exact boundaries are difficult to delineate, this Court has explained that "[r]oughly stated, character is what a [person] actually is, while reputation is what [a person's] neighbors say [she] is." *State v. Buelow*, 951 N.W.2d 879, 887 (Iowa 2020) (citation omitted).

[6] Notably, unlike other rules, Rule 5.405 contains no prohibition on prior bad acts evidence based on temporal scope. *Compare* Iowa R. Evid. 5.405, *with* Iowa R. Evid. 5.609. Further, Rule 5.803(21) provides a specific hearsay exception for reputation evidence: "A reputation among a person's associates or in the community concerning the person's character."

2018) ("The classic example is a defamation suit to which truth is an affirmative defense." (citation omitted)).

The reputation a person has "is based upon all the years, few or many" that he or she has been a part of the community. *McGuire v. Kenefick*, 82 N.W. 485, 485 (Iowa 1900). Throughout this litigation, Konchar flouted her "remarkable career" as the principal of St. Joseph's. (JA-V.I-1370); (JA-V.I-1719-1721[29:2-31:6]); (JA-V.III-0074-0103). At trial, she asked the jury to find that Father Pins' statement about a "pattern of conduct" as Principal and the Diocese's reference to "serious irregularities in the school administration under her direction" impugned her supposedly outstanding reputation. (JA-V.I-1372).

Relevant evidence is evidence having "any tendency to make a [consequential] fact more or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Reputation evidence bears on nearly every consequential fact in defamation, and as such, is the most highly probative evidence in a defamation action. *See Matter of Application of O'Keeffe*, 184 F. Supp. 3d 1362, 1368–70 (S.D. Fla.), *aff'd sub nom. In re O'Keeffe*, 660 F. App'x 871 (11th Cir. 2016). The district court did not abuse its broad discretion by allowing the jury to hear relevant evidence bearing on Konchar's reputation.

1. Konchar's reputation was relevant to the issues of the falsity of the alleged defamatory statements and actual malice.

Defamation is the publication of a *false* statement that injures a person's reputation. *Bauer v. Brinkman,* 958 N.W.2d 194, 198 (Iowa 2021). Defamation law "is not about compensating for damage done to a false reputation by the publication of hidden facts," but rather, aims to protect "a good reputation honestly earned." *Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011). There can be no defamation without a false statement, as "a truthful defamatory statement merely deprives the plaintiff of a reputation that she was not entitled to in the first place." Meiring de Villiers, *Substantial Truth in Defamation Law*, 32 Am. J. Trial Advoc. 91, 98–99 (2008) (internal citation omitted).

Konchar argues the district court should have excluded evidence of her misdeeds, if her actions were unknown to Father Pins or the Diocese at the time of publication, but her argument conflates "the distinct inquiries for actual malice and falsity." *Montgomery v. Risen*, 197 F. Supp. 3d 219, 239 (D.D.C.

2016), *aff'd,* 875 F.3d 709 (D.C. Cir. 2017).[7] Even information unknown at the time of publication was relevant to establishing the statements were true (and therefore non-actionable). *See id.*; *Delaney v. Int'l Union UAW Local No. 94 of John Deere Mfg. Co.,* 675 N.W.2d 832, 843 (Iowa 2004) ("Truth is a complete defense to defamation"). Because truth is an absolute defense to defamation, the date on which Father Pins or the Diocese learned of Konchar's misdeeds is of no consequence. *Medlin v. Carpenter*, 329 S.E.2d 159, 165 (Ga. App. 1985).[8] Defendants' subjective knowledge only comes into play only when determining whether the statements were made with "reckless disregard" for truth or falsity required for actual malice. *Montgomery*, 197 F. Supp. 3d at 239.[9] Any testimony

[7] Relatedly, Konchar contends that Defendants should not have been "allowed to present every single negative complaint or incident about Konchar throughout her nineteen-year tenure as principal at St. Joseph's school." (Appellee Br., 37). This is clearly hyperbole. A review of the litany of complaints about Konchar confirms that the evidence presented at trial was a small sampling of the misdeeds for which she became notorious in the St. Joseph's community. *E.g.*, (JA-V.III-0206-0365, 0397-0436, 0437-0462, 0477-0506).

[8]As a limited public figure, Konchar bore the burden of proving falsity and actual malice by clear and convincing evidence. *See New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 149 (Iowa 2013). *See also* (JA-V.I-2584-2585[5:21-6:4]). On appeal, she does not contest the district court's determination that she was a limited public figure for purposes of her defamation claim.

[9] *Accord Gilmore v. Jones*, No. 3:18-CV-00017, 2021 WL 2709669, at *8 n.10 (W.D. Va. July 1, 2021) (agreeing that information unknown at publication "cannot be relevant to the actual malice inquiry," but holding "evidence tending to show that [Defendant's] allegedly defamatory statements were true would be relevant to [the] defense that his statements are not 'actionable' because they were not false").

or evidence establishing that Konchar engaged in "a pattern of conduct that warranted choosing not to renew [her] contract" or that there were indeed "serious irregularities in the school administration under her direction" were therefore admissible to establish that the statements were true, regardless of when that information became known. *See id.* The district court appropriately recognized these distinctions. (JA-V.I-1582-1583[8:18-9:5]).

2. Defendants were entitled to rebut Konchar's evidence of her "good reputation" through testimony concerning her bad reputation.

To prevail on her claim, Konchar was required to establish that the alleged defamatory statements injured her reputation. *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 46 (Iowa 2018). To do so, she needed to convince the jury she had a "good" reputation for Defendants to injure. *Schlegel*, 585 N.W.2d at 224. *See* (JA-V.I-1719-1721[29:2-31:6]). Defendants were entitled to present competing evidence of Konchar's bad reputation prior to the alleged defamation. *Rice v. Rose & Atkinson*, 176 F. Supp. 2d 585, 594 (S.D.W. Va. 2001), *aff'd,* 36 F. App'x 97 (4th Cir. 2002) (noting defamation plaintiff would need to prove actual injury to reputation, which would "open the door to character evidence").

This Court has long held that defamation defendants are entitled to "show that reputation was already tarnished before the [alleged defamation] in order to minimize the harm suffered by plaintiff." *Vojak v. Jensen*, 161 N.W.2d

100, 111 (Iowa 1968), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004); *accord Mowry v. Reinking*, 213 N.W. 274 (Iowa 1927); *Ott v. Murphy*, 141 N.W. 463 (Iowa 1913). As such, the district court appropriately allowed Defendants to present testimony to show the jury that Konchar's reputation was "tarnished" before the statements at issue. *See Vojak*, 161 N.W.2d at 111; *accord Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 871 (7th Cir. 2018) (agreeing "evidence regarding the extent of the harm to [plaintiff's] professional reputation as a result of the statements was critical for minimizing damages").

The court also properly rejected Konchar's attempts to exclude evidence of her reputation prior to 2017. From the outset, Konchar premised her claim on the reputation she earned during her nearly twenty-year tenure, placing her reputation as St. Joseph's principal "at the heart of this case." *Hearts with Haiti, Inc. v. Kendrick*, No. 2:13-CV-00039-JAW, 2015 WL 4065193 at *3 (D. Me. July 2, 2015). *See* (JA-V.I-1719-1721[29:2-31:6]). Witnesses for both sides testified about Konchar's reputation as the principal of St. Joseph's through their involvement with the school and parish, at various times throughout her tenure. Given that her reputation is necessarily "based upon all the years" she served in that role, this testimony was relevant in order to show Konchar's true reputation. *McGuire*, 82 N.W. at 485; *see Pierson*, *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843, 844 (Nev. 1976) (finding no error in admitting

evidence of criminal acts committed ten years earlier to prove defamation plaintiff's reputation).[10]

3. Konchar's reputation was relevant to the propriety and measure of damages.

Konchar's reputation was also highly relevant to whether an award of damages was appropriate, and if so, the amount of damages. *See Schlegel*, 585 N.W.2d at 224. To show that she suffered reputational harm, Konchar had to establish a baseline of her purportedly good reputation before the statements. *Id.* And the jury needed to consider evidence of Konchar's reputation—both good and bad—prior to Defendants' statements to calculate any award of damages. *Id.*; *see also Poulston v. Rock*, 467 S.E.2d 479, 483 (Va. 1996) (explaining one whose reputation is "little hurt" is entitled to little damages).[11] As such, the district court acted well within its broad discretion by admitting evidence of Konchar's reputation.

D. Proper foundation supported the testimony about Konchar's reputation.

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[10] Konchar relied on her tenure in its entirety, beginning in 1998. *See* (JA-V.I-1704, 1726, & 1807-1808[14:22-24, 36:18-37:2, 117:15-16, 118:4-6]). Defendants offered testimony from witnesses who worked at or whose children attended St. Joseph's in 2007 at the earliest, based on Konchar's own calculations. (JA-V.I-1497).

[11] Without evidence of her good reputation prior to the alleged defamation, any award of damages would have been "lacking in evidentiary support." *Schlegal*, 585 N.W.2d at 224. Konchar also needed to prove actual damage to her reputation before she could recover any "parasitic damages," such as damages for emotional distress. *Id.*

Konchar also insists that the testimony of certain reputation witnesses lacked adequate foundation, but she points only to criminal cases in support of this contention. *E.g.*, Appellant Brief, 35 ("When introducing reputation evidence as a means of proving *defendant's* character…" (emphasis added) (citing *State v. Hobbs*, 172 N.W.2d 268, 276 (Iowa 1969)). In criminal trials, strict foundation requirements must be met before a witness may testify about the defendant's reputation. *E.g., State v. Buckner*, 214 N.W.2d 164, 167 (Iowa 1974). This is because the Constitution provides the criminally accused with heightened protections; the prosecution cannot inject the defendant's reputation as a substitute for proving guilt beyond a reasonable doubt. *E.g.,* Iowa R. Evid. 5.404; *State v. Martinez*, 679 N.W.2d 620, 624 (Iowa 2004). But Konchar was not a criminal defendant; she was a defamation plaintiff. Unlike the accused in a criminal trial—combating grave accusations by the prosecution with life and liberty at stake—Konchar herself initiated this action, seeking an award of damages for harm to her supposedly good name. As such, criminal cases are not the proper yardstick on the testimony admitted to rebut Konchar's defamation claim.

Regardless, proper foundation supported the testimony of each witness. Konchar moved in limine to exclude evidence of her own conduct and testimony about her reputation prior to 2017. (JA-V.I-1499-1500). Finding the testimony was relevant to both falsity and reputation, the court denied the

motion, and in so ruling made clear that reputational testimony would be subject to an appropriate foundational showing of each witness's "role inside the community" and his or her "knowledge of the reputation." (JA-V.I-1686-1687[4:25-5:11]).[12] That foundation was laid with respect to each of the witnesses Konchar challenges on appeal.[13]

Each witness was and is a member of the St. Joseph's community. Autumn O'Connor and her family have long attended St. Joseph's Church, her parents both work at the school, and she previously worked at the school teaching second grade.[14] Jill Dotson formerly worked as the St. Joseph's preschool teacher and has stayed in touch with other teachers since leaving.[15] A St. Joseph's parishioner, Natalie Bradley sent her children to the school and

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[12] The district court properly adhered to its ruling throughout trial, sustaining objections from Plaintiff's counsel and requiring additional foundation when appropriate. *E.g.*, (JA-V.I-1942-1944[171:3-173:5]).

[13] Bradley (JA-V.I-2563-2567[72:11-76:18]); Carpenter (JA-V.I-2360-2365[25:6-30:20]); Dotson (JA-V.I-2202-2213[6:22-17:5]); Dunn (JA-V.I-1986-1987 & 1992-1994[39:25-40:2, 48:24-50:3]); Gervais (JA-V.I-1942-1946[171:3-175:4]); O'Connor (JA-V.I-2249-2259[11:4-21:21]). *See* (JA-V.I-1688[6:10-13]); (JA-V.I-1678-1682).

[14] (JA-V.I-2243-2248[5:13-24, 6:7-7:8, 7:19-8:25, 8:3-4, 9:1-13, 10:3-5]).

[15] (JA-V.I-2201-2203; 2217-2218 & 2220-2221[5:24-6:3, 6:19-7:10, 21:25-22:22, 24:6-25]). St. Joseph's is a small community, and many former community members keep in touch long after leaving the school. *E.g.*, (JA-V.I-2051[129:3-11]); (JA-V.I-2074[94:11-15]); (JA-V.I-2190-2192); (T-8[33:14-16, 43:13-44:2, 144:24-145:2]; JA-V.I-2300, 2303-2304, & 2324-2325[121:10-123:14]); (JA-V.I-2577-2578[86:21-87:2]); (JA-V.I-225[13:22-24]1). Several heard the news of Konchar's non-renewal within days and reached out to Father Pins to express their support of the decision. (JA-V.I-2217, 2220, & 2228[21:2-13, 24:6-25, 32:4-23]); (JA-V.I-2296-2297 & 2323-2324[19:17-20:19, 143:13-144:5]); (JA-V.I-2569-2570[78:18-79:15]).

taught kindergarten there for five years.[16] Rick Carpenter was also a parishioner, and his daughter attended the school for a number of years, during which time he served as President of the School Board.[17] Jenny Geravis and Tanya Dunn both worked at St. Joseph's until the fall of 2017, when they resigned because of Konchar's actions.[18] All six of these witnesses knew Konchar in her capacity as principal of St. Joseph's and had the opportunity to observe her interactions with parish priests; school board members; and St. Joseph's students, teachers, and staff.[19] And each witness was all too familiar with Konchar's opprobrious reputation.[20]

As established by numerous witnesses, Konchar's notoriety persisted throughout her tenure as principal.[21] Testimony from priests, parents, teachers, and staff demonstrated consistent accounts of Konchar's continuous sullied reputation. Each witness had unique experiences and perspectives, representing a "cross-section" of the St. Joseph's community on any given year throughout

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[16] (JA-V.I-2563[72:14-21]).
[17] (JA-V.I-2346-2347[7:12-18, 11:6-25, 12:15-21]).
[18] (JA-V.I-1935-1935, & 1939-1941[154:15-155:4, 159:7-12, 167:22-25, 168:19-25]); (JA-V.I-1978, 1981-1983[31:15-32:9, 34:7-25, 35:18-36:6]); (JA-V.III-487).
[19] (JA-V.I-2347-2348 & 2351-2352[12:22-13:5 & 16:19-17:8]); (JA-V.I-2248-2250[10:18-12:5 & 11:20-12:5]); (JA-V.I-2203-2205[7:17-9:4]).
[20] *E.g.,* (JA-V.I-2362-2365[27:5-30:20]); (JA-V.I-2235-2236[42:19-43:4]).
[21] *E.g.,* (JA-V.I-2265[29:9-19]) (describing conduct over "many, many, many years"); (JA-V.I-2013-2016[91:7-10 & 93:20-94:3]); (JA-V.I-2192-2193[123:20-124:7]); (JA-V.I-2290-2291, 2301-2305, 2307-2310, 2316, 2323, & 2329-2330[9:24-10:24, 40:8-22, 47:3-6, 53:20-54:3, 55:19-56:6, 89:23-25, 143:13-24, & 157:21-158:8]).

Konchar's tenure.[22] *See Buckner*, 214 N.W.2d at 169 (explaining the "cross-section" requirement ensures the reliability of the reputational testimony and is satisfied if the comments "come from a cross-section of those persons among whom the individual lives and acts").[23] Thus, even assuming the heightened-criminal burden Konchar urges was applicable in this defamation action, proper foundation supported the testimony about her bad reputation. *Id.* at 167.

Additionally, Konchar's broad declaration that testimony from Gervais and Dunn "should have been excluded in [its] entirety" plainly ignores that these witnesses testified about matters that extended well beyond reputation. (Appellant Br., 39). They were two of the three employees who lodged complaints about Konchar in the fall of 2017—complaints which sparked the Diocese's investigation—and both resigned because of her behavior.[24] To that end, Gervais and Dunn also testified about their conversations with Valdez

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[22] *E.g.,* (JA-V.I-2292-2293, 2298-2299, 2302, 2317-2319, 2321-2323, 2326-2328, & 2330-2331[12:7-16, 13:18-15:7, 30:17-31:2, 41:2-16, 125:3-127:7, 141:8-13, 142:16-143:11, 150:18-152:5, 158:9-159:22]); (JA-V.I-2223-2224 & 2227[27:6-28:6, 31:5-8]); (JA-V.I-2557-2558, 2559-2560, & 2575[84:18-25, 47:1-48:20, 56:22-57:11]); (JA-V.I-2069-73[55:20-56:9, 61:14-25, 66:8-67:10]).

[23] Given the high rate of turnover (which many testified was attributable to Konchar), this evidence was all the more relevant to showing what her reputation was throughout the community. Despite Konchar's assertions otherwise, evidence of her already-soiled reputation did not somehow become less relevant based on witness' dates of employment or current residence.

[24] (JA-V.I-1920-1924, 1935-1936, & 1939[139:21-140:1, 141:25-142:2, 143:6-9, 154:15-155:4, 159:7-12, 167:22-25, 168:19-25]); (JA-V.I-1978-1979 & 1981-1983[31:15-32:9, 34:7-25, 35:18-36:6]); (JA-V.III-487).

during the investigation, which bore on Defendants' state of mind, the non-renewal decision, truth, and actual malice. *See Bandstra*, 913 N.W.2d at 46. In light of their firsthand knowledge of Konchar's reputation and conduct during the 2017-2018 school year, it is difficult to imagine on what basis the court should have precluded these witnesses from testifying altogether. Not to mention, Konchar called both Dunn and Gervais herself as part of her case-in-chief. (JA-V.I-1898[117:5-12]); (JA-V.I-1952[5:7-8]).

Moreover, Konchar cannot complain about testimony that her own counsel elicited. Again, it was on questioning from Plaintiff's counsel that Dunn first testified about Konchar blackballing teachers and students, as well as that Dunn understood "once you get an 'X' on your back from Mrs. Konchar, [] there is no going back."[25] It was also in response to questioning from Plaintiff's counsel that Bradley agreed there was a perception throughout the school that if "you didn't side with [Konchar], you got a target on your back." (JA-V.I-2575-2576[84:18-25 & 85:9-19]). Similarly, on redirect examination, Gervais testified about the various warnings she had heard, over the decades she worked at St. Joseph's, about getting on Konchar's "bad side." (JA-V.I-1947[176:5-25]).

[25] (JA-V.I-1979-1980, 1982-1985, & 1988-1990[32:4-9, 32:25-33:8, 35:18-36:6, 37:23-38:3, 41:19-42:12, 42:25-43:5]). *See* (JA-V.I-1993-1996[49:5-50:3, 50:25-52:5]).

In fact, nearly all the witnesses—including those whose testimony has not been challenged on appeal—recounted comparable experiences with Konchar and testified consistently about her reputation.[26] Throughout trial, the jury heard ample testimony about the culture of fear at St. Joseph's under her direction, earning Konchar a reputation as vindictive and retaliatory. Father Hurley testified that, during his years at St. Joseph's, the warning he consistently heard was: "Don't cross Phyllis; she'll get you." (JA-V.I-2007-2009[85:23-87:13]). Several witnesses described the behavior behind these repeated warnings, explaining that Konchar would single out teachers, slapping a "target" or "X" on her victim's back. The majority of witnesses agreed that Konchar's "leadership style" was to rule St. Joseph's though "intimidation and fear." (JA-V.I-2365[30:5-14]); *see also* (JA-V.I-2276[40:8-11]) (describing Konchar's leadership as one "of tyranny").

In sum, the jury heard and saw ample evidence and testimony establishing Konchar's true reputation over the course of a ten-day trial. Even

[26] Battani, Bender, Kramer, Godfredsen, Murphy, Keil, Valdez, Father Hurley, Father Pins, and Bishop Pates. (JA-V.I-1997, 2007-2010, 2012, 2022-2023, 2051-2052, & 2054-2059[53:2-6, 85:15-23, 86:11-87:1, 87:23-25, 88:6-23, 90:1-4, 100:21-101:5, 129:17-130:1, 133:14-134:3, 136:26-137:21, 142:13-25 & 143:6-12]); (JA-V.I-2093, 2097-2099, & 2122-2123[126:6-8, 130:6-14, 131:11-132:1, 165:6-14, 177:1-178:5]); (JA-V.I-2188-2189 & 2192-2193[39:24-40:10, 123:25-124:7]); (JA-V.I-2306-2307, 2313-2315, 2320, 2322-2323, &2332-2334[48:9-14, 53:4-6, 83:19-24, 87:6-9, 87:25-88:5, 130:8-10, 142:16-143:11, 162:7-16, 168:17-169:12]); (JA-V.I-2561-2562[64:13-65:20]); (JA-V.I-2255-2259 & 2274-2276[17:25-20:17, 21:3-21 & 38:24-40:11]); *see also* (JA-V.III-13, 24-73); (JA-V.III-507-514).

assuming the testimony of six witnesses lacked adequate foundation, any error in admitting that testimony was harmless and would not have changed the jury's ultimate decision. *See* Iowa R. Evid. 5.103(a)(1); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000). No appellate argument can overcome the reality that Konchar's reputation was one characterized by fear and marred by retaliation.

II. Analyzing Father Pins' "prior two pastors" statement would involve impermissible religious entanglement, as the district court properly recognized in granting summary judgment.

A. Error preservation.

Defendants agree that Konchar preserved error.

B. Standard of review.

This Court reviews a district court's ruling granting summary judgment to correct errors at law. *Iowa Ass'n Bus. & Indus. v. City of Waterloo*, 961 N.W.2d 465, 470 (Iowa 2021). Summary judgment is appropriate when the record shows "no genuine issues of material fact and the moving party is entitled to judgment as a matter of law . . . ." *Id.* (citation omitted).

The First Amendment declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. Similarly, the Iowa Constitution provides: "The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Iowa Const. Art. I, § 3. These Religion

Clauses "protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020) (citations omitted). "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* Put another way, the government cannot "lend its power to one or the other side in controversies over religious authority or dogma." *Bandstra*, 913 N.W.2d at 36 (citations omitted).

Pursuant to the Religion Clauses, courts have long recognized the right of religious organizations to control their internal affairs. *Watson v. Jones*, 80 U.S. 679, 727–29 (1871). The "general rule" is that "religious controversies are not the proper subject of civil court inquiry." *Koster v. Harvest Bible Chapel-Quad Cities*, 959 N.W.2d 680, 687 (Iowa 2021) (citation omitted). "The First Amendment plainly prohibits the state, through its courts, from resolving internal church disputes that would require interpreting or deciding questions of religious doctrine." *Bandstra*, 913 N.W.2d at 38 (collecting cases).

The ecclesiastical abstention doctrine reflects this fundamental principle, and courts apply it to refrain from deciding disputes that would require a secular factfinder to become excessively entangled in religion. *See, e.g.*, *id.* at 41. In determining whether the ecclesiastical abstention doctrine applies, the

central inquiry is whether deciding a particular claim would require the court to become impermissibly entangled with religion by "interpreting or deciding questions of religious doctrine." *See id.* at 41-42. The district court appropriately recognized that the ecclesiastical abstention doctrine prohibited secular inquiry into the "two prior pastors" statement in granting summary judgment on that claim.

C. Deciding whether Father Pins' "prior two pastors" statement was defamatory would result in impermissible secular interference and analysis of religious decision-making related to the fitness and suitability of a minister.

Shortly after he stepped into the role of St. Joseph's Parish Priest, three employees came to Father Pins to complain about Konchar. (JA-V.III-485-486, 501-502, 507-514); (JA-V.I-2157-2163[50:22-56:5]). He turned to two of his predecessors, Father Parker and Father Hurley, who had formerly worked with Konchar at St. Joseph's. (JA-V.I-1161[98:17–100:14] & 1214-1215[29:23–30:17]). Father Parker shared that certain teachers felt singled out by Konchar and that there was a lack of communication. (JA-V.I-1210[42:11-43:22]). Similarly, Father Hurley recalled that Konchar had issues with certain teachers and revealed that he had a "quandary about whether to retain her" while he was pastor. (JA-V.I-1214-1215[29:23–30:17]).

Father Pins was not the only one to speak with Father Parker and Father Hurley; Valdez interviewed both of them as part of the investigation. (JA-V.II-

247-253). During his interview, Father Parker explained that he'd observed employment issues with Konchar, which he believed would naturally resolve when she retired. (JA-V.II-252). Father Hurley told Valdez he felt there were issues that he couldn't seem to rectify, such as ongoing conflict between Konchar and the elementary-school teachers. (JA-V.II-253). He described Konchar having "buddies" amongst the staff who would monitor the happenings in the school until they fell out of her favor. (*Id.*). He also described significant staff turnover, and in light of her checkered past with staff, Father Hurley said that he hoped Konchar would retire soon. (*Id.*). These statements were consistent with accounts he had relayed to Valdez in July 2017, when he spoke with her about concerns that Konchar played favorites and targeted certain staff members. (JA-V.I-1177[34:12-37:6]).

With those same concerns present during Father Pins' tenure, he needed to decide what was best for St. Joseph's. As Parish Priest, he was responsible for "ensuring the Catholic identity of the School regarding the formative environment, the instruction, and the suitability of teachers and administrators." (JA-V.I-1471). With this sacred directive in mind, Father Pins turned to his predecessors and his religious superior, Bishop Pates, for guidance after receiving results of the Diocese's investigation. Ultimately, Father Pins determined Konchar's conduct was repugnant to Catholic principles and that she was unsuitable to continue serving in her ministerial role

beyond the 2017-2018 school year. (JA-V.I-1472-1479). Recognizing that she had served in that role for nearly two decades, he allowed her the option of a graceful exit, which she refused.

After Konchar publicly shared details of her non-renewal with the school and parish community, Father Pins chose to counsel and advise his parishioners, through an email addressing the circumstances surrounding her departure. (JA-V.I-1479 & 1482). Before sending the email to the St. Joseph's community, Father Pins sent his message to others within the Diocese, including Bishop Pates, Eileen Valdez, and Anne Marie Cox. (JA-V.I-1480-1482). After discussion and revisions, all approved the email that Father Pins ultimately sent, including the statement: "Please be advised the prior two pastors, were consulted and Bishops Pates approved the decision following the evaluation of the past conduct." (JA-V.I-1482) (quoted-in-full at Br. 26).

Had the "two prior pastors" defamation claim proceeded to trial, a civil jury would have been required to delve into canon law, Catholic doctrine, and the practices of the Diocese and St. Joseph's. Under the Religion Clauses, this inquiry is impermissible. As Principal, Konchar was a ministerial employee of St. Joseph's. (JA-V.III-0024-0073, 0145-0189, 0373); (JA-V.I-0075-106, 930-931). Courts across the nation have dismissed similar defamation claims brought by former ministerial employees as impermissibly intruding into forbidden First Amendment territory. *See, e.g.*, *Patton v. Jones*, 212 S.W.3d 541

(Tex. App. 2006) (finding "ample support" for the conclusion that statements related to the termination of a ministerial employee "are protected from secular review, even if the statements do not expressly involve religious doctrine or are not made prior to the church's decision…."); *State of Mo. ex rel. Gaydos v. Blaeuer*, 81 S.W.3d 186 (Mo. Ct. App. 2002) ("As a practical matter, it is impossible to separate the defamation from the non-renewal, not only as to the issue of the reasonableness of the statements made, but also as to damages."); *Brazauskas v. Fort Wayne–South Bend Diocese, Inc.*, 714 N.E.2d 253, 263 (Ind. Ct. App. 1999) (expounding, "to conclude otherwise would effectively thrust this Court into the forbidden role of arbiter of a strictly ecclesiastical dispute over the suitability of a pastoral employee to perform her designated responsibilities…."); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 812 (Md. Ct. Spec. App. 1996) ("Questions of truth, falsity, malice, and the various privileges that exist often take on a different hue when examined in the light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church.").

Konchar continues to argue the "prior two pastors" statement *implies* the two pastors approved her termination. (Appellant Br., 42). She claims the district court erroneously concluded there was no factual dispute that Fathers Parker and Hurley were consulted. But in so arguing, she concedes Father Pins had conversations with, and that Valdez interviewed, the two prior pastors

during the investigation. Relying on circular logic, Konchar assumes that she was correct that the statement implies the *approval* of two pastors. But the district court considered, without deciding, her "implication" argument and concluded that entertaining this claim would result in excessive entanglement: "Regardless of whether the statement was written in a way that inferred the two prior pastors approved the non-renewal decision, the Court finds that allowing a jury to determine whether or not the prior pastors approved the non-renewal decision would invite religious entanglement." (JA-V.I-0157).

Courts consider the *actual issues* the fact-finder will need to decide to determine whether ecclesiastical abstention is necessary. *See Bandstra*, 913 N.W.2d at 41. Considering Konchar's defamation claim and Defendants' defenses would have required a jury to impermissibly intrude into ecclesiastical matters in several respects. *See Downs*, 683 A.2d at 812. Analyzing issues such as truth or falsity, opinion, and actual malice would have all ultimately involved wading into Father Pins' decision-making process regarding Konchar's suitability and fitness to serve as principal of a Catholic school—which would require examination of that decision-making in view of canon law and Catholic doctrine and practices. (JA-V.I-1471-1472, 1475-1477, 1480-1481, & 1482). Determining whether the two prior pastors approved the decision also requires examining their assessment of Konchar's suitability for the ministerial position and the church's practices in consulting the prior two pastors regarding

Konchar's suitability. Such considerations would impermissibly infringe on Catholic doctrine, principles, and canon law. (JA-V.I-2546-2555[8:3-17:9]); (JA-V.III-0118-0144, 0187-0191). "Under canon law, the diocesan bishop and the pastor bear the ultimate responsibility in determining whether conduct by an administrator of or teacher in a parish school is in accord with Catholic principles."[27] (JA-V.I-1477). *See Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am.*, 860 F. Supp. 1194, 1199-1200 (W.D. Ky. 1994), *affirmed*, No. 94-5892, 1995 WL 499468, at *4 (6th Cir. Aug. 21, 1995) ("If truth were a defense to the defamation claim, we presumably could face inquiry into determination of the minister's effectiveness."); *Patton*, 212 S.W.3d at 554; *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 739 (D.N.J. 1999).

Although the *Koster* Court affirmed dismissal on other grounds, it alluded to constitutional concerns about the plaintiff's defamation claim:

> Moreover, if we were to second-guess whether the Small Group had a legitimate need to know about the child abuse allegedly committed by a fellow member of the discipleship group, we would be delving into the doctrine and practices of [Harvest Bible Chapel] and thus intruding into forbidden First Amendment territory.

Koster, 2021 WL 2021643 at *9. So too here, delving into Father Pins' statement to the parish and school community would require the jury to second-guess his

[27] (JA-V.I-2551-2556[13:11-18:2]).

decision-making and determine the validity of his reasoning for the communication. This would necessarily require analysis of canon law and Catholic doctrine and practices, which is impermissible under both the state and federal constitutions.

In *Bandstra*, this Court refused to decide plaintiffs' negligent response claims[28] because doing so would require the court to determine whether church elders breached their duty to plaintiffs, which in turn required analysis of "[t]he *means* by which they chose to counsel and advise the congregation," which is "outside the purview of the government." *Bandstra*, 913 N.W.2d at 41 (emphasis added). "Because plaintiffs' first two negligence claims go to the very heart of religious decision-making, they are barred by the First Amendment." *Id.*

Analyzing the truth, opinion, and qualified privilege issues as to Father Pins' "prior two pastors" statement here is akin to the determination regarding the negligent response claims in *Bandstra*; the focus of the inquiry regarding the "prior two pastors" statement would go to the *means* involved in Father Pins' decision-making and Konchar's suitability for the ministerial position of principal, such as who he consulted with and on what topics, as well as the extent to which the information bore on his decision that Konchar was

[28] The *Bandstra* decision did not analyze whether the plaintiffs' defamation claims would result in excessive entanglement, as the issue on appeal was the application of the qualified privilege. 913 N.W.2d at 35, 46-50.

unsuitable. Even worse, the jury would have been allowed to second-guess his decision as to whether Konchar was suitable to serve as a minister of the Catholic church. Such an inquiry is impermissible under the First Amendment. As such, this Court should affirm the entry of summary judgment and dismissal of this claim.

III. Because the parties lacked mutual assent, the "Building Agreements" document was not a contract, and the district court correctly granted summary judgment.

A. Error preservation.

Defendants agree that Konchar preserved error.

B. Standard of review.

This Court reviews the grant of summary judgment to correct errors at law. *City of Waterloo*, 961 N.W.2d at 470. Summary judgment is appropriate where, as here, the record shows "no genuine issues of material fact and the moving party is entitled to judgment as a matter of law…." *Id.* (citation omitted).

C. The district court should have granted summary judgment on First Amendment grounds to avoid unconstitutional interference with internal church governance.

As a Principal of a Roman Catholic School, Phyllis Konchar was clearly a minister of the Roman Catholic faith. (JA-V.I-2551[13:11-17:9]). As discussed above, the ministerial exception prevents this Court from interfering with the Catholic Church's internal self-governance and decisions regarding its

ministers. That non-interference principle extends to Konchar's contract claim. In fact, the trial court should have granted summary judgment on Konchar's contract claim to avoid unconstitutional interference in religious matters. In short, Konchar's contract claim was barred by the First Amendment.

The threshold analysis of Konchar's contract claim should have been whether Konchar was a minister. She was. Thus, her claim should have been dismissed because it is inextricably intertwined with canon law, church governance, and fundamentals of the Roman Catholic faith. By delving into Konchar's contract claim and evaluating the Catholic church's decision to terminate her employment, the court caused the government to effectively interfere with, or impermissibly oversee, church functions. The State of Iowa became the ultimate arbiter of who is properly executing a ministerial function, rather than leaving that decision to the church whose ministry is affected by the court's interference. The trial court should have dismissed Konchar's contract claim prior to trial, and this Court should therefore affirm the results below on this alternative ground.

D. The "Building Agreement" document was not intended to be, and did not function as, a legally binding contract.

The district court correctly held that Konchar could not establish the required "mutual assent" to support that a contract existed between her and Father Pins. (JA-V.I-0907-0908). "All contracts must contain mutual assent;

mode of assent is termed offer and acceptance." *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 285 (Iowa 1995). An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* (internal quotations and citation omitted). Whether an offer was made is an objective inquiry. *Id.* To be bound, contracting parties "must manifest their mutual assent to the terms sought to be enforced." *Estate of Cox v Dunakey & Klatt, P.C.*, 893 N.W.2d 295, 302 (Iowa 2017). An offer must also be certain as to its terms and requirements. *Audus v. Sabre Communications Corp.,* 554 N.W.2d 868, 871 (Iowa 1996). Because the Building Agreement lacked the mutual assent required to support an enforceable contract, the district court properly granted summary judgment on Konchar's breach-of-contract claim.

In December 2017, the Diocese retained Tom Green to assist Father Pins and Konchar with conflict resolution and reconciliation. (JA-V.I-0107-0108). Green described this process as bringing Father Pins and Konchar "together for a chance to have a better working relationship." (JA-V.I-0108). Green initially met with each of them "individually to learn their areas of concern, areas of improvement, and what would make things better." (*Id.*). Through those conversations, "they identified their priorities" and clarified issues "they desired to work on together." (*Id.*).

Green drafted the Building Agreements document based on Christian principles. (*Id.*). He explained, the "Building Agreements" begin with the parties creating "a shared 'Touchstone,' which acts as the parties' shared understanding, chosen focus, and guiding principles which the parties agree on initially and can always reference to remind them of their shared vision, values, alignment, and commitment." (*Id.*). He went onto elaborate:

> The agreements in the document were not intended and did not function as a legally binding contract. Rather the agreements are what they mutually decided to work toward. It was a document created to memorialize their shared goals and for each party to reference, remind, and realign in working towards those goals. I explained this to Fr. Pins and Ms. Konchar. Both acknowledged they understood the purpose and import of their mediation agreements.
>
> * * *
>
> The agreements process does not demand perfection in following the Agreements to the letter; only that the parties apply themselves to make progress towards their shared goals and visions. This aligns with Catholic principals, which acknowledge the imperfection of humanity, including our vulnerability to mistakes, including sin. Christian and Catholic teaching also professes the fulness of redemption, complete reconciliation, and new life through Jesus' saving death and resurrection.

(JA-V.I-0108-0110).

Konchar argues the district court improperly considered matters outside the document's four corners, but when analyzing mutual assent, context matters. "The standard is what a normally constituted person would have understood [the words] to mean, when used in their actual setting." *Anderson,*

540 N.W.2d at 286 (citation omitted). The objective standard does not hinge on the words of the document alone. *Id.* at 285 ("existence of contract determined from words and circumstances"); *Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986) (relying on parties' conduct in analyzing mutual assent).

The circumstances and setting here lead to the inevitable conclusion that neither Father Pins nor Konchar intended the "Building Agreements" document be a contract. The parties were undergoing reconciliation, as directed by the Diocesan Bishop; establishing goals; and working on conflict resolution. (JA-V.I-0107-0108); (JA-V.III-0115-0117). Konchar had a written employment agreement, which ended on July 31, 2018. (JA-V.II-0010-0011); (JA-V.III-0202-0203). Though she typically received her annual contract in January, as of February 22, 2018, Konchar had not yet received her contract for the 2018–2019 school year. (JA-V.I-400 & 402[14:20–15:3 & 23:17–24:2]). She even asked Father Pins about the status of her contract on March 6, 2018, after they'd signed the Building Agreements document. (MSJ Appendix, p. 161 (filed Nov. 23, 2020). Considering Konchar's separate written employment agreement, the conciliation process, Green's statements about the purposes of the Building Agreements, and the language in the document itself, the district court properly decided there was no mutual assent, which would be necessary to form a contract, a sound decision that this Court should affirm.

E. The Agreements were aspirational.

The district court also found "the term of the alleged agreement at issue, that Father Pins would help Plaintiff reach her retirement plans on her terms, is not sufficiently definite or certain as to be enforceable." (JA-V.I-0907). In determining whether a purported contract contains sufficiently definite terms, courts "look for terms with precise meaning that provide certainty of performance." *Anderson*, 540 N.W.2d at 286. The entire document should be analyzed to reveal the objective intent and context. *See id.* 286-287 (analyzing the language of the "handbook in general" and the provision at issue "specifically" to determine definiteness).

The Building Agreements document in its entirety reflects the aspirational nature of the "Agreements" section. (JA-V.III-0115-0117). Even the title of the document, "Building Agreements," suggested the "Agreements" between Father Pins and Konchar were fluid. Green drafted the Building Agreements document "as an entry point for the two parties to act and work together." (JA-V.I-0344[43:1-6]).

The document opened with Konchar's and Father Pins' "Touchstone," and its stated purpose:

> - Our Touchstone is a declaration of our truths and core principles, of what really matters to us, that we identify as our guide and focal point for times when we must work together, including deal with disagreement

- Influence us and inform our decisions and interactions and shape our relationship
- Continually remind and realign us with our foundational intentions, giving us a tool for assessing situations, making decisions, solving problems, instead of responding with silence, resistance, hostility, defensiveness
- Set the stage for Success!

(JA-V.I-0763). The document continued to identify "Our Shared Vision" and "Our Shared Goals." (JA-V.III-0116-0117). The "Suggested Agreement" section includes a series of aspirational and indefinite goals to move "away from hearts at war" and towards "hearts at peace." (*Id.*).

The Building Agreements document contains no contingencies, conditions, or consequences—because their inclusion would defeat the purposes of the reconciliation process, which is for the parties implement their vision and values through open discussion and as taught in practice. (JA-V.I-0763-0765); (JA-V.III-0115-0117). Instead, the "Agreements" were imprecise: "communicate openly," "collaborate," "support each other's successes," and "get back on track and move forward." (JA-V.III-0765). Rather than words of firm commitment (such as "I guarantee" or "I will"), Father Pins used aspirational words: "I *want* to offer you my support, celebrate your success and help you reach your leadership goals; help you reach your retirement plans on your terms." (JA-V.III-0765) (emphasis added). Courts have recognized that using the words "I want" in a promise reflects an aspirational goal rather than a

guarantee or firm commitment. *See Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 806 (S.D.N.Y. 2018) ("[P]uffery is frequently comprised of 'statements [that] are explicitly aspirational, with qualifiers such as 'aims to' 'wants to,' and 'should'"); *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 297–98 (S.D.N.Y. 2019) (same).

The aspirational, indefinite language replete throughout makes clear the "Building Agreements" document was not intended to be a contract and therefore lacks the mutual assent required to form one. This Court should affirm the grant of summary judgment on Konchar's breach-of-contract claim.

IV. The district court correctly concluded that Konchar's unsupported accusations were insufficient to compel an inspection of privileged communications.

A. Error preservation.

Defendants dispute error preservation. During discovery, Defendants served privilege logs, which identified documents withheld on the basis of the attorney-client privilege. *See* Iowa R. Civ. P. 1.503(1), (5)(a). (JA-V.II-0021-0041). Without any support for her sweeping accusations, Konchar twice moved to compel the production of these privileged communications pursuant to the crime-fraud exception.[29]

[29] On appeal, Konchar challenges only the order denying her first motion to compel. (Appellant Br. 17, 50).

Finding Konchar's motion was "based on mere speculation that something in the communications may be helpful to [her] fraud claim," the district court correctly held that her conclusory allegations fell far short of the particularized showing required for each communication to be subjected to an *in-camera* review. (JA-V.I-1023-1029). The court did not, however, address the defamation-related contentions raised in Konchar's motion to compel, and she did not file a Rule 1.904 motion to request a ruling on the issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). As such, Konchar's arguments inviting this Court to expand the crime-fraud exception to include defamation were not preserved for appeal. *See 33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 75–76 (Iowa 2020) ("We routinely hold that when an issue is raised in a motion but not decided in the district court ruling, the issue is not preserved for review."). Furthermore, because Konchar has not appealed the dismissal of her fraud claim, any argument about the applicability of the crime-fraud exception based on her civil claim for fraud is moot. *See Riley Drive Ent. I, Inc. v. Reynolds*, 970 N.W.2d 289, 296 (Iowa 2022).

B. Standard of review.

The standard for reviewing a ruling on a motion to compel is for an abuse of discretion. *See Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009). To the extent the ruling implicates a statutory evidentiary privilege, the Court's review is for errors at law. *Id.*; *State v. Anderson*, 636 N.W.2d 26, 30 (Iowa 2001).

C. Konchar failed to meet the particularized, factual showing required to invoke the crime-fraud exception.

"It is a fundamental tenet of the law of evidence that, generally, communications between attorney and client are privileged and not subject to compelled disclosure." *Pfizer Inc. v. Lord*, 456 F.2d 545, 548–49 (8th Cir. 1972) (citation omitted). The privilege "is premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his [or her] advice free from any fear of disclosure." *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009). Konchar does not dispute that the communications she sought to compel were protected by the attorney-client privilege. (Appellant Br., 51-55). She nevertheless insists the district court should have compelled the production of these privileged communications under to the crime-fraud exception. *See* Iowa Code § 622.10; Iowa R. Civ. P. 1.503(1), (5)(a).

Pursuant to the crime-fraud exception, the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 563

(1989) (quotation omitted).[30] Where applicable, the exception has a very narrow application:

> It applies only when the communications between the client and his [or her] lawyer further a crime, fraud or other misconduct. It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they *must actually have been made with an intent to further an unlawful act.*

United States v. White, 887 F.2d 267, 271 (D.C. Cir. 1989) (emphasis added). Mere allegations are not sufficient, nor is it enough that the moving party claims to have a "suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney." *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (citation omitted). Instead, there must be "a specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud." *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (citing *Rabushka ex rel. United States v. Crane Co.,* 122 F.3d 559, 566 (8th Cir. 1997)).[31]

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[30] There is little Iowa case law on the crime-fraud exception. *E.g., State v. Kirkpatrick*, 263 N.W. 52, 55 (Iowa 1935); 03-09-2020-Ruling, 3). The standard articulated in *Zolin* for determining whether *in camera* review is warranted is frequently utilized by both state and federal courts. *E.g., United States v. Christensen*, 828 F.3d 763, 798 (9th Cir. 2015); *In re Gen. Motors Corp.*, 153 F.3d 714, 716 n.3 (8th Cir. 1998); *People v. Radojcic*, 998 N.E.2d 1212, 1223 (Ill. 2013); *Frease v. Glazer*, 4 P.3d 56, 61 (Or. 2000). The district court applied the *Zolin* standard, and the parties appear to agree that is the proper standard to utilize on appeal. (Appellant Br., pp. 53-54).

[31] *Accord Zolin*, 491 U.S. at 572; *White*, 887 F.2d at 271; *In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005) ("Allegations in pleadings are not evidence

The party seeking to overcome the privilege "must make a threshold factual showing that the [crime-fraud] exception applies," meaning that party "must present facts warranting a reasonable belief that the [client] obtained legal advice to further a crime or fraud." *Kilpatrick v. King*, 499 F.3d 759, 766 (8th Cir. 2007); *accord Zolin*, 491 U.S. at 572. This showing must be supported by evidence sufficient to allow the court to "determine that the communication was itself in furtherance of the crime or fraud, not merely that it has the potential of being relevant evidence of criminal or fraudulent activity." *In re Pub. Def. Serv.*, 831 A.2d 890, 906 (D.C. 2003); *see also Stone Surgical, LLC v. Stryker Corp.*, 858 F.3d 383, 392 (6th Cir. 2017) (requiring evidence independent from the privileged communications).[32] Additionally, the crime or fraud "must be of such a serious nature so as to warrant the obviation of the privilege." *Stauffer Chem. Co. v. Monsanto Co.*, 623 F. Supp. 148, 152 (E.D. Mo. 1985).

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and are not sufficient to make a prima facie showing that the crime-fraud exception applies.").

[32] Courts have not come to a consensus as to what quantum of proof is necessary in order to make a threshold showing that the crime-fraud exception may apply. *See In re Green Grand Jury Proceedings*, 492 F.3d 976, 983 (8th Cir. 2007) (collecting cases); *see also Zolin*, 491 U.S. at 563 (declining to "decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception"). However, most courts apply a higher standard of proof when a private party, rather than the government, seeks to compel production of otherwise privileged documents under the crime-fraud exception. *E.g., Rabushka*, 122 F.3d at 566. Konchar's failure to make a specific showing as to why the exception should apply to even one of the communications in Defendants' privilege log is insufficient under any of the standards articulated by various courts. *See Green*, 492 F.3d at 983.

Konchar's conclusory allegations did not rise to the level of specificity or severity required to vitiate the privilege. According to Konchar, she alleged a (now-dismissed) civil claim for fraud, the Defendants consulted with legal counsel, and therefore, she should be entitled to compel production of these privileged communications. (*See* JA-V.I-0941). Such circular logic rests on nothing more than her mere allegations—a far cry from the showing required to compel production of privileged communications. *See BankAmerica*, 270 F.3d at 642; *Rabushka*, 122 F.3d at 565–66; *see also United States v. Arthur Andersen, L.L.P*, 273 F. Supp. 2d 955, 960–61 (N.D. Ill. 2003) (noting such an argument was "at the best bootstrapping").

The *in-camera* inspection Konchar urged the district court to undertake is a procedure "to be invoked cautiously." *Halkin v. Helms*, 598 F.2d 1, 5 (D.C. Cir. 1978). Instead of identifying specific documents for *in-camera* review, Konchar generally referred to Defendants' entire privilege log—encompassing a total of 90 privileged communications—and demanded that the court inspect every one of the documents withheld as attorney-client privileged. (*See* JA-V.I-941). She offered no evidentiary showing sufficient to warrant the conclusion

that the crime-fraud exception applied to *all* the communications in Defendants' privilege logs as a whole.[33] (JA-V.I-1027-1028).

This Court can discern the nature of the communications from Defendants' privilege logs, which properly set out the dates and descriptions of the documents withheld on the basis of attorney-client privilege. (JA-V.II-0021-0041); *see also* (JA-V.I-0956-0995). As the privilege logs make clear, Defendants sought legal advice regarding the investigation, personnel issues, and other matters directly related to Konchar. (JA-V.I-0983 & 0990). In determining whether the crime-fraud exception applies, "timing is crucial." *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 (8th Cir. 1984). It is well-settled that "the justifications for the shield are strongest where a client seeks counsel's advice to determine the legality of conduct before the client takes any action." *White*, 887 at 272.[34] This is precisely why the crime-fraud exception places a

[33] Even when applicable, the "proper reach" of the crime-fraud exception "does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct." *Grand Jury Subpoena*, 419 F.3d at 344. In other words, the district court was required to "determine, separately for each document," whether she made the requisite threshold showing of "a factual basis adequate to support a good faith belief by a reasonable person" that Defendants were engaged in criminal or fraudulent activities and consulted counsel with the intent to further their misdeeds. *BankAmerica*, 270 F.3d 639 at 644 (quoting *Zolin*, 491 U.S. at 572).

[34] Cited at Appellant Brief, p. 51.

"strong emphasis on intent" to facilitate criminal or fraudulent activity. *U.S. v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997).

At no point has Konchar offered any evidence suggesting that Defendants sought the advice of counsel with the intent to further ongoing wrongful activity, as opposed to seeking legal advice before acting with respect to Konchar or her employment. *See BankAmerica*, 270 F.3d at 643 (explaining "it is not enough to show that an attorney's advice was sought before a decision was made"). Simply put, her "blanket assertion that every communication was 'in furtherance of' a crime or fraud does not make it so." *In re 650 Fifth Ave.*, No. 08 CIV. 10934 KBF, 2013 WL 3863866, at *2 (S.D.N.Y. July 25, 2013).

Indeed, as the district court observed in denying the motion, Konchar did not "set forth any facts…that tend[] to show the privileged communications were made with the intent to further criminal or fraudulent activity." (JA-V.I-1027). Finding Konchar's "mere conclusory allegations" fell short "of the particularized factual showing required…to invade such an important privilege," the court concluded:

> Plaintiff's basis for [her] claim that the Court should conduct an *in camera* review of the documents at issue are, at their heart, simply based on mere speculations that something in the communications may be helpful to [her] fraud claim. The Court concludes that these speculations are not sufficiently supported by any showing of particularized facts that are legally sufficient to support a good faith reasonable belief…that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. The attorney-client privilege is a sacrosanct privilege. Even an *in camera* review of attorney-client privileged materials serves as an invasion of that privilege to some degree, and it must only be done when necessary.

(JA-V.I-1027-1028).

D. The court should decline to expand the crime-fraud exception.

On appeal, Konchar urges this Court to expand the crime-fraud exception beyond communications made in furtherance of a crime or fraud. (Appellant Br., p. 51).[35] Though she generally contends that defense counsel "participated…in conduct that forms the basis of [her] lawsuit," she does not articulate, precisely, what wrongdoing that she believes Defendants were engaged in and allegedly sought legal advice to further. *Id.* at 55. Her brief can, at best, be construed as accusing Defendants of engaging in some unspecified transgression *other than* a crime or fraud. By itself, this is insufficient to warrant intruding into privileged communications, even by the standards set by courts that have expanded the crime-fraud exception. *E.g., Koch v. Specialized Care Servs.,*

[35] It is not clear what position Konchar urges this Court to adopt. Is she advocating for a crime-fraud-defamation exception? A crime-fraud-tort exception? A crime-fraud-wrongdoing exception?

Inc., 437 F. Supp. 2d 362, 373 (D. Md. 2005) (analyzing the exception's applicability to "an intentional tort involving misrepresentation, deception, and deceit").[36] *But see United Bank v. Buckingham*, 301 F. Supp. 3d 547, 553 (D. Md. 2018) (expressing "extreme[] reluctan[ce]" to adopt the *Koch* court's "expansive view of the exception").

Essentially, Konchar would have this Court vitiate the attorney-client privilege any time an opposing party alleges wrongful conduct—a position that would allow litigants to compel *in-camera* inspection of privileged materials in virtually any lawsuit. *See In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (explaining under such an interpretation, "the privilege would be virtually worthless"); *accord Zolin*, 491 U.S. at 571–72 (citing concerns that *in-camera* inspection would "permit opponents of the privilege to engage in groundless fishing expeditions" and therefore requiring a particularized factual showing). Even if the exception could be expanded in particularly egregious circumstances, the record here is devoid of any such facts. This Court should

[36] Cited at Appellant Brief, pp. 51-52. The other cases Konchar cites likewise involved far more egregious conduct or claims with "similar elements of malicious or injurious intent and deliberate falsehood," *Safety Today, Inc. v. Roy*, No. 2:12-CV-510, 2013 WL 5597065 at *6 (S.D. Ohio Oct. 11, 2013), and critically, actual evidence supported the allegations. *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283–84 (E.D. Va. 2004) (noting it was "beyond question" that party intentionally shredded 20,000 pounds of documents relevant to litigation); *In re Sealed Case*, 676 F.2d 793, 813 (D.C. Cir. 1982) (citing to record evidence establishing conspiracy to defraud government, bribe officials, and make illegal campaign contributions). The record here fails to establish any comparable facts.

affirm the district court's deference to the attorney-client privilege and decline Konchar's invitation to expand the crime-fraud exception.

V. The Court should apply the ministerial-exception doctrine as an immunity and affirm dismissal of Konchar's claims on alternate grounds.

This Court should hold that the ministerial-exception doctrine operates as an immunity preventing courts from adjudicating claims like those Konchar asserted. The trial court determined Konchar was a minister of the Roman Catholic Church. (JA-V.I-0930-0931). That determination should have been dispositive, requiring the dismissal of all of claims to prevent constitutional interference with the Catholic Church's internal self-governance and constitutionally-protected decisions regarding its ministers. The fact that trial witnesses included a Roman Catholic bishop, a Roman Catholic monsignor, two Roman Catholic priests, the chancellor for the Diocese, and a Catholic canon law expert underscores the imprudence and unconstitutionality of entertaining Konchar's claims.[37] This should never have happened.

As the principal of St. Joseph's, Konchar was a minister of the Roman Catholic faith. (JA-V.III-0014-0073, 0076-0090, 0145-0149, 0183, 0373); (JA-V.I-930-931). Yet remarkably, Konchar refuses to acknowledge the

[37] Msgr. Edward Hurley (JA-V.I-2000-2001[78:3-79:10]); Fr. Parker (JA-V.I-2060-2062[169:14-171:12]); Fr. Pins (JA-V.I-2116-2117[171:21-172:1]); Chancellor Kurth (JA-V.I-2168-2169 & 2170-2172[129:13-130:1 & 142:13-144:2]); Bishop Pates (JA-V.I-2177 & 2179-2180[11:10-20, 19:8-20:6]); Deacon Jorgensen (JA-V.I-2146-2147[8:3-9:11]).

unconstitutionally impermissible nature of her claims. Like any other Catholic school, St. Joseph's engages in the apostolic mission of the Catholic church by teaching and proclaiming the gospel, catechizing students, and instructing students to live by the gospel and the principles of the Catholic faith. (JA-V.I-2551[13:11-22]).

Canon law mandated that Father Pins provide moral and spiritual support to the St. Joseph's community. (JA-V.I-2551-2552[13:23-14:11]). Ultimately responsible for the operation of the parish and school, Father Pins' canonical obligations included monitoring the professional competence of another minister of the Catholic faith, Konchar. (JA-V.I-2253[15:5-19]). Pursuant to canon law, he and Bishop Pates also had the obligation to communicate with parishioners about, and in response to, the imbroglio Konchar generated and her religious obligations as a school principal. (JA-V.I-2552-2555[14:12-15:4, 15:20-17:9]). Rather than deferring to the Catholic church, the district court allowed a jury to second-guess the actions taken under divine directives.

Concurring in *Hosanna-Tabor*, Justice Alito emphasized that courts analyzing the applicability of the ministerial exception "should focus on the function performed by persons who work for religious bodies." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 198 (2012) (Alito, J., concurring). By focusing the analysis on an employee's function within a

religious organization, and whether the claims at issue relate to that function, courts can avoid excessive entanglement with decisions regarding church governance. *See id.* That is precisely how the court should have proceeded in this case. Instead, by reaching the merits of Konchar's breach-of-contract claim and allowing a jury to evaluate the Catholic church's decision to terminate Konchar and communicate with the church faithful in response to her social medial campaign, the court caused the government to effectively interfere with and impermissibly oversee church functions. The State of Iowa became the ultimate arbiter of whether Konchar was properly performing her ministerial duties rather than leaving that decision to the church.

Excessive entanglement occurs long before trial. The very process of imprudent factual discovery is unconstitutionally entangling. The ministerial exception is not just an immunity from liability; it is a prohibition against all stages of litigation. *Heard v. Johnson,* 810 A.2d 871, 876-77 (D.C. 2002) (expounding the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial") (citation omitted); *see also NLRB v. Catholic Bishop of Chi.*,440 U.S. 490, 502 (1979) (observing "the very process of inquiry" can violate the First Amendment). Recognizing this principle, several Circuit Courts of Appeals have analogized the ministerial exception to qualified immunity. *See Petruska v. Gannon Univ.,* 462 F. 3d 294, 302 (3d Cir. 2006); *Bryce v. Episcopal Church in the*

Diocese of Colorado, 289 F. 3d 648, 654 (10th Cir. 2002); *see also* Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post Hosanna-Tabor* 10 FIRST AMEND L. REV. 233, 293 n.355 (2012).

By resolving the ministerial exception "early in litigation," courts can "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Any other result (*i.e.*, allowing claims to proceed, as Konchar's did) unnecessarily transgresses the structural separation of church and state because "the discovery and trial process itself a [F]irst [A]mendment violation." *Dayner v. Archdiocese of Hartford*, 23 A3d 1192, 1200 (Conn. 2011); *accord Skrzypczak v. Roman Catholic Diocese of Tulsa* 611 F.3d 1238, 1245 (10th Cir. 2010) (stating that to hold otherwise could "only produce…the very opposite of that separation of church and State contemplated by the First Amendment") (citation omitted); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 (Ky. 2014) (agreeing that subjecting religious institutions to discovery and trial risks "constitutional injury"). To avoid unconstitutional interference into religion, the ministerial exception must be "resolved expeditiously at the beginning of litigation." *Id.* The trial court should have dismissed Konchar's claims prior to trial, and this Court should therefore affirm the results below on this alternative ground.

Conclusion

Defendants-Appellees Reverend Joseph Pins, St Joseph's Church of Des Moines, Polk County, and the Roman Catholic Diocese of Des Moines

respectfully request that the Court affirm the judgment of the district court regarding the issues raised in this appeal.

Request for oral argument

Defendants-Appellees respectfully request oral argument regarding the issues presented in this appeal.

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Certificate of Filing and Service

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