**NO. _____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

PRESBYTERIAN CHURCH (U.S.A.),
*Petitioner*,

v.

REVEREND ERIC HOEY,
*Respondent.*

# APPLICATION FOR A STAY OF PROCEEDINGS PENDING A PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

JOHN O. SHELLER
*Counsel of Record*
STEVEN T. CLARK
STOLL KEENON OGDEN PLLC
500 West Jefferson Street, Suite 2000
Louisville, Kentucky 40202
(502) 333-6000
john.sheller@skofirm.com
steven.clark@skofirm.com

*Counsel for Petitioner,*
*Presbyterian Church (U.S.A.)*

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To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Presbyterian Church (U.S.A.) (the "Church") respectfully applies for a stay of enforcement of the Kentucky Supreme Court's September 27, 2018 opinion (App. A) mandating further trial-court proceedings in this religious-immunity case pending resolution of a petition for a writ of certiorari to be filed with this Court on May 15, 2019. For the reasons explained below, the Kentucky Supreme Court's recent ruling violates the First Amendment of the United States Constitution. This Court is therefore likely to grant a petition for a writ of certiorari to review the case.

## INTRODUCTION

This is a case in which a Presbyterian minister sued his denomination for defamation for concluding and reporting to his Presbytery that he had violated the denomination's internal ethics policy by the manner in which he undertook his ministerial duties. However, the Church's determination that he committed an ethics violation was made pursuant to its ecclesial governance. The Church was also following its ecclesial governance when it notified the minister's Presbytery.

To succeed on his claim, any defamation plaintiff must prove that the defendant's statements about him were false. To determine whether Rev. Hoey did, in fact, commit an ethics violation would first require deciding whether his conduct complied with the Church's ethics policies. Such scrutiny of the Church's ethics policies falls well beyond the purview of secular courts; thus, the Church is immune from suit. Accordingly, the Church moved for judgment as a matter of law in the trial court based on the ecclesiastical-abstention doctrine. But, the trial court refused to rule on the Church's immunity, instead allowing discovery to proceed (App. E,

Jefferson Circuit Court Order, March 17, 2016). The Kentucky Court of Appeals (App. D, Kentucky Court of Appeals Order, November 21, 2016) and the Kentucky Supreme Court (App. A. Kentucky Supreme Court Opinion, September 27, 2018) affirmed that decision.

The Kentucky Supreme Court's decision to allow discovery to proceed prior to the Church receiving a threshold immunity determination was based on its observation that the ecclesiastical-abstention doctrine operates procedurally as an affirmative defense. But, regardless of whether the ecclesiastical-abstention doctrine is characterized as an affirmative defense or not, it requires dismissal of a plaintiff's claims immediately upon a showing that the claims turn on the interpretation of religious doctrine or discipline.

The Church intends to petition this Court for a writ of certiorari to review the Kentucky Supreme Court's decision. Because there is a reasonable probability certiorari will be granted, the Church respectfully requests a stay of the Kentucky Supreme Court's decision pending the disposition of the Church's forthcoming petition and any subsequent consideration of the case. A stay will not prejudice the Respondent, Reverend Eric Hoey ("Rev. Hoey"). However, if a stay is not granted, the Church will suffer continuing violation of its constitutional right to be free of excessive government entanglement in its affairs.

## STATEMENT

Rev. Hoey initiated the case by filing a complaint in the state trial court in Kentucky alleging that the Church had defamed him by publishing that he had engaged in "unethical" conduct as its minister. *Presbyterian Church U.S.A. v. Edwards*, 566 S.W.3d 175, 177 (Ky. 2018). The Church filed a summary-judgment motion demonstrating that the trial court would be unable to adjudicate Rev. Hoey's case because his claims are entangled with and would require examination of the Church's and its congregants' faith, religious doctrine, and ecclesiastical

governance. *Id.* Rather than ruling on the issue of the Church's immunity, the trial court entered an order allowing further prosecution of the matter, expressly requiring the Church to respond to broad, merits-based discovery requests served upon the Church by Rev. Hoey. *Id.*

The Church filed a petition for a writ of mandamus and/or prohibition to the Kentucky Court of Appeals, arguing that the trial court had effectively abrogated its immunity by forcing it to participate in discovery without a threshold, religious immunity determination ever having been made. *Id.* Further, because the issue of the Church's immunity was squarely before the trial court as a matter of law, the Church requested that the Court of Appeals direct the trial court to dismiss the underlying case on the basis of the Church's religious-immunity defense. *Id.*

The Kentucky Court of Appeals granted in part the Church's petition for writ of prohibition. *Id.* The Court of Appeals held that the trial court had abused its discretion by allowing broad-reaching merits discovery before determining the immunity issue and ordered the trial court to limit discovery to the issue of immunity. The Court of Appeals denied without explanation that portion of the Church's writ petition seeking a determination of the Church's immunity by the Court of Appeals. *Id.*

The Church appealed to the Kentucky Supreme Court, arguing that the Court of Appeals' order did not go far enough. Because Rev. Hoey's complaint fails to plead facts that could conceivably take his claim outside the scope of the Church's immunity, the Church argued he is not even entitled to limited discovery; rather, Rev. Hoey is not entitled to any discovery whatever prior to a threshold immunity determination being made. Additionally, the Church argued that the Kentucky Supreme Court should take up the immunity issue to prevent further unwarranted and irreparable erosion of the Church's religious freedoms.

On September 27, 2018, the Kentucky Supreme Court narrowly affirmed the Court of Appeals (App. A). *Id.* The Court held, 4-3, that forcing the Church to engage in discovery concerning the issue of the Church's immunity did not merit the extraordinary remedy of a writ. *Id.* at 179. Further, the Kentucky Supreme Court stated that the trial court on remand will need to determine whether Rev. Hoey's actions in approving a transfer of grant money without ensuring that the Church's incorporation criteria were followed—the actions which the Church adjudicated to be an ethics violation—raised an issue of ecclesiastical doctrine or if they amounted to "a mere failure to follow organizational procedures." *Id.* at 180 n.1. Following rendition of the Kentucky Supreme Court's opinion, the Church filed a petition for rehearing, which was denied on February 14, 2019. App. C.

The Church moved the Kentucky Supreme Court to stay enforcement of its opinion while the Church prepared its petition for a writ of certiorari. On April 12, 2019, the Kentucky Supreme Court denied the Church's motion. App. B**.** The Church intends to file a petition for a writ of certiorari on or before May 15, 2019.

**ARGUMENT**

Under 28 U.S.C. § 2101(f), this Court may stay further proceedings in the state court pending the disposition of the Church's forthcoming petition for a writ of certiorari. This Court has identified three factors to be considered when deciding whether to stay enforcement of a lower court's opinion pending the filing and disposition of a certiorari petition:

> To obtain a stay pending the filing and disposition of a petition for writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

*See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). In close cases, the Court will "balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citations omitted). Applying this test here results in the Church's motion for stay being granted.

**A. There is a reasonable probability this Court will grant certiorari.**

Rule 10 of the U.S. Supreme Court sets forth the considerations governing review on certiorari. Relevant here, the Rule states that review is warranted when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[.]" SCR 10(b). Additionally, review is warranted when a state court has decided "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SCR 10(c). The Kentucky Supreme Court's 4-3 opinion conflicts with several decisions of other state courts of last resort and federal circuit courts by holding that the trial court may allow further discovery into the Church's internal policies where there is no discovery that could conceivably alter the issue of the Church's immunity as pled in Rev. Hoey's complaint.

Rev. Hoey's claims of defamation derive from the Church's report to his Presbytery of his violation of Church ethics. However, the report (and its dissemination within the denomination) was the direct result of the Church's and its congregants' faith, religious doctrine, and ecclesiastical governance holding teaching elders to the highest ethical and moral standards. For this reason, the Church requested judgment in the trial court on the basis of the ecclesiastical-abstention doctrine. The Kentucky Supreme Court erred by ruling that discovery can be taken in the case before a decision is made on the Church's threshold, immunity defense.

In the seminal case of *Watson v. Jones*, 80 U.S. 679, 680 (1879), this Court explained that when resolving a case depends on "doctrine, discipline, ecclesiastical law, rule, or custom, or Church [or a religious organization's] government," the ecclesiastical-abstention doctrine requires a court to abstain from hearing a plaintiff's claims. *See also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976) (recognizing, consistent with *Watson*, that courts are categorically barred from adjudicating "controversies over religious doctrine"). The ecclesiastical-abstention doctrine not only preserves the rights of religious groups to determine their own affairs, but also prevents the State from becoming unnecessarily involved in those affairs. *See Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) ("This constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious . . . disputes."); *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 900 F.3d 113, 118 n.4 (3d Cir. 2018) (the doctrine is "structural limitation imposed on the government" that safeguards courts from being "impermissibly entangle[d] . . . in religious governance and doctrine").

Given the ecclesiastical-abstention doctrine's purpose of preventing governmental intrusion into religious affairs, the majority of federal and state courts have embraced approaches that allow a religious defendant to assert and receive a ruling upon its religious immunity at the earliest possible stage of legal proceedings. *See, e.g.*, *Myrhe v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 19 F. App'x 926, at *2 (11th Cir. 2018) (affirming dismissal of claims pursuant to ecclesiastical-abstention doctrine under Fed. R. Civ. P. 12(b)(1)); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 n.1 (10th Cir. 2002) ("By resolving the question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters."); *Wipf v. Hutterville Hutterian Brethren, Inc.*,

808 N.W.2d 678, 682 (S.D. 2012) (ecclesiastical-abstention defense may be asserted via Rule 12(b)(1) motion); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 363, 371 (Haw. 1994) (affirming trial court's dismissal of case based upon appellee's motion to dismiss under Rule 12(b)(1)); *Decker by Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W.2d 357 (S.D. 1999) (affirming trial court's dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction based upon the ecclesiastical abstention doctrine).

Notwithstanding the above-cited authorities, the Kentucky Supreme Court's 4-3 opinion allows Rev. Hoey to conduct discovery without a determination ever having been made regarding the Church's religious immunity. The Kentucky Supreme Court's holding was based on its determination that the ecclesiastical-abstention doctrine operates as an affirmative defense. This holding, in turn, was based on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012). Notably, *Hosanna-Tabor* did not involve the ecclesiastical-abstention doctrine, but instead addressed the far narrower ministerial exception to statutory Title VII claims. The *Hosanna-Tabor* Court concluded that the ministerial exception is an affirmative defense, rather than a jurisdictional bar. The Kentucky Supreme Court's opinion places it among the small minority of courts that treat the ecclesiastical-abstention doctrine as an affirmative defense, rather than as a jurisdictional bar, post-*Hosanna-Tabor*. *See, e.g.*, *Doe v. Presbyterian Church U.S.A.*, 421 P.3d 284, 291 (Okla. 2017) (deciding on rehearing by 5-4 vote that ecclesiastical-abstention doctrine is affirmative defense, after having decided it was jurisdictional, by 5-3 vote, several months earlier).

The principal problem with the Kentucky Supreme Court's treatment of the ecclesiastical-abstention doctrine as an affirmative defense is that the Court literally applies the

doctrine as a garden-variety affirmative defense that necessarily allows cases to proceed with discovery without a threshold immunity determination having been made. But, this excessively cramped application of the ecclesiastical abstention doctrine is an offense to the Church's constitutional rights. It is axiomatic that even a slight infringement of constitutional rights constitutes injury sufficient to confer standing to seek redress. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("very process of inquiry" may otherwise "impinge on rights guaranteed by the Religion Clauses" where inquiry probes internal church affairs).

Regardless of whether the ecclesiastical-abstention doctrine is labeled an affirmative defense, a subject-matter jurisdiction issue, or something else, it is imperative that the Church's immunity be resolved at the earliest possible stage of litigation to minimize the constitutional injury. Numerous federal circuit courts and state courts of last resort have determined that ecclesiastical-abstention questions must be resolved "early in litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1; *see also Whole Women's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018) (granting interlocutory appeal of ecclesiastical-abstention question implicated in discovery that would otherwise be "effectively unreviewable" later in the case); *Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002) (ecclesiastical abstention 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").

The Kentucky Supreme Court's holding permits discovery to proceed in ecclesiastical-abstention cases—even where a plaintiff has failed to plead facts alleging a claim outside the religious defendant's immunity. The decision conflicts with the approaches of other state courts and federal circuit courts that require an immunity determination as a threshold matter. Given

this entrenched disagreement among the lower courts on a matter of constitutional importance, there is a reasonable probability certiorari will be granted.

**B. There is a fair prospect this Court will reverse the Kentucky Supreme Court.**

The Kentucky Supreme Court's 4-3 Opinion cannot be reconciled with this Court's longstanding precedent or with decisions of a majority of inferior courts applying that precedent. In *Watson v. Jones*, the Court described the ecclesiastical-abstention doctrine in purely jurisdictional terms, holding that "civil courts exercise no jurisdiction" over matters of theological controversy, church discipline, and ecclesiastical government. 80 U.S. at 733. Relying on that precedent, federal circuit courts and state courts of last resort have consistently held that a religious defendant's immunity should be resolved at the earliest possible stage of litigation.

This Court has followed a similar approach with qualified immunity. *See Bryce*, 289 F.3d at 654 (comparing ecclesiastical abstention to qualified immunity). Government officials enjoy a qualified immunity from suit for their official conduct provided that their conduct did not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has described the defense as "immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), that courts should resolve at the "earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

The Sixth Circuit has further explained that where, as here, a "plaintiff has failed to allege facts that are outside the scope of the defendant's immunity" such failure of pleading "precludes a plaintiff from proceeding further, even from engaging in discovery." *Kennedy v.*

*Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986); *see also Mitchell*, 472 U.S. at 526 (in immunity cases, "even such pretrial matters as discovery are to be avoided if possible").

In contrast to the approach to immunity adopted by the federal appellate courts, which would prevent any discovery whatever from being taken when a plaintiff fails to plead facts outside the defendant's immunity, the Kentucky Supreme Court's restrictive treatment of the ecclesiastical-abstention doctrine obliterates a religious defendant's opportunity to avoid judicial entanglement in ecclesiastical matters. As noted, the Kentucky Supreme Court views the doctrine as an affirmative defense. Ordinarily, affirmative defenses are pled in the answer and then resolved by a motion for summary judgment after discovery. *See* Fed. R. Civ. P. 8(c)(1); Fed. R. Civ. P. 56(a). By treating the doctrine as a traditional affirmative defense, the Kentucky Supreme Court's holding precludes religious defendants from being able to prevail on the pleadings only. This will result in additional litigation and discovery (including discovery of ecclesiastical matters). Further, the religious defendant will be subjected to discovery in every case because a Kentucky court cannot enter summary judgment without discovery having occurred. *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007) (summary judgment "is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence"). Additionally, any factual dispute in the Rule 56 context will result in trial. *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013).

Thus, Kentucky cases that should be dismissed in their infancy because they clearly involve matters of ecclesiastical concern will now routinely proceed through protracted litigation that will lead to far greater judicial entanglement in the religious defendant's ecclesiastical affairs. Because the Kentucky Supreme Court has adopted an untenable position on an issue of

constitutional importance that will irreparably injure religious defendants, there is at least a "fair prospect" this Court will reverse.

### C. There is a likelihood irreparable harm will result from the denial of a stay.

#### *1. Improper governmental intrusion into religious affairs constitutes irreparable harm.*

Absent a stay of the Kentucky Supreme Court's decision, the Church will suffer irreparable, constitutional injury. To begin with, the Kentucky Supreme Court's decision will subject the Church to the constitutional injury of improper government entanglement in its affairs. *See Conlon*, 777 F.3d at 836; *Lee*, 903 F.3d at 118 n.4.

Cases that proceed improvidently necessarily violate the structural separation of church and state, making the "discovery and trial process itself a First Amendment violation." *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011). Indeed, the "very process of inquiry" may "impinge on rights guaranteed by the Religious Clauses" where the inquiry probes internal church affairs. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *Skrzypack v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (improvident proceedings can "only produce by their coercive effect the very opposite of that separation of church and State contemplated by the First Amendment").

Such governmental intrusion into religious affairs constitutes irreparable harm. *McCarthy v. Fuller*, 714 F.3d 971, 974-76 (7th Cir. 2013); *In re St. Thomas*, 495 S.W.3d 500, 514 (Tex. Ct. App. 2016) ("[A]ppeal is often inadequate to protect the rights of religious organizations when there are important issues relating to the constitutional protections afforded by the First Amendment.").

### *2. The Kentucky Supreme Court's decision invites improper governmental intrusion into religious affairs by suggesting that the trial court on remand re-assess the Church's proffered religious reasons for its adjudication of Rev. Hoey.*

The Church adjudicated that Rev. Hoey committed a violation of the Church's ethics policy by mishandling funds that were gifts from God. This adjudication was a matter of Church discipline, internal organization, and ecclesiastical rule, custom, or law. There is a "constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization or hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich*, 426 U.S. at 712-13.

Judicial assessment of whether Rev. Hoey did, in fact, commit an ethics violation requires a determination of what constitutes an ethics violation—a question that would necessarily entangle the courts in religious discipline, governance, and doctrine prohibited by the First Amendment. Further judicial re-assessment (i.e., second-guessing) of the Church's adjudication of Rev. Hoey is now unavoidable, absent this Court's intervention, because the Kentucky Supreme Court's 4-3 opinion invited the trial court to assess whether the Church's determination that Rev. Hoey committed an ethics violation raised an issue of ecclesiastical doctrine or if Rev. Hoey had "mere[ly] fail[ed] to follow organizational procedures." *Presbyterian Church U.S.A. v. Edwards*, 566 S.W.3d 175, 180 (Ky. 2018).

It is undisputed that the Church determined Rev. Hoey committed an ethics violation. The Kentucky Supreme Court's directions to the trial court on remand are tantamount to permitting the trial court to review the religious reasoning behind the Church's adjudication of Rev. Hoey for arbitrariness or pretext, but this second-guessing of the Church's motivations is undoubtedly prohibited by the First Amendment. As this Court has stated in an analogous context, any suggestion that an asserted religious reason for a minister's discipline is "pretextual

. . . misses the point of the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 194-95; *see also Hosanna-Tabor*, 565 U.S. at 205-06 (Alito., J., & Kagan, J., concurring) (engaging in pretext inquiry to "probe the real reason" for church leader's discipline would require impermissible judgments about church doctrine); *Lee*, 903 F.3d at 112 ("[P]arsing the precise reasons for" a minister's discipline "is akin to determining whether a church's proffered religious-based reason is mere pretext, an inquiry the Supreme Court has explicitly said is forbidden by the First Amendment's ministerial exception."); *Fratello v. Archidiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017) ("Judges are not well positioned to determine whether ministerial employment decisions rest on practical and secular considerations or fundamentally ones that . . . are perfectly sensible—and perhaps even necessary—in the eyes of the faithful."); *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008) ("[T]he First Amendment prohibits . . . [courts] from inquiring into an asserted religious motive to determine whether it is pretextual.").

No court, let alone a jury, could decide that the Church's adjudication of Rev. Hoey was "organizational," rather than ecclesiastical, without infringing upon the Church's constitutional rights and the sanctity of the Church's ecclesiastical determinations. Any further discovery or assessment of the Church's determination will cause irreparable harm to the Church and warrants entry of a stay.

***3. Rev. Hoey will not be prejudiced by a stay.***

Rev. Hoey will not face any prejudice comparable to the constitutional injury to be suffered by the Church if the case is not stayed pending consideration by this Court. Rev. Hoey's complaint has been pending for nearly four years. The slight additional delay that will occur while this Court considers the Church's petition will not harm Rev. Hoey at all, let alone to a degree that exceeds the harm the Church will suffer if a stay is denied. And if this case proceeds

without a stay, the trial court's and the parties' resources will be wasted by litigating a matter from which the Church is immune. A consideration of the irreparable harm to the Church and the balancing of equities in this case favors a stay.

## CONCLUSION

In a 4-3 Opinion, the Kentucky Supreme Court narrowly decided to remand this case to the trial court for further proceedings. The Church intends to seek review of this case in the U.S. Supreme Court under the sincere conviction that further proceedings without an assessment of the Church's immunity will cause irreparable injury to the Church of a constitutional magnitude. Because the Church faces great and inevitable harm if the opinion of the Kentucky Supreme Court is not stayed pending this Court's review, the Church's motion for a stay of proceedings pending its petition for a writ of certiorari (and any subsequent proceedings in this Court) should be granted.

Respectfully submitted,

JOHN O. SHELLER
*Counsel of Record*
STEVEN T. CLARK
STOLL KEENON OGDEN PLLC
500 West Jefferson Street, Suite 2000
Louisville, Kentucky 40202
(502) 333-6000
john.sheller@skofirm.com
steven.clark@skofirm.com

## CERTIFICATE OF SERVICE

In accordance with Sup. Ct. R. 29.5, I hereby certify that on this 30th day of April, 2019, I caused a true and correct copy of Petitioner's Application for a Stay of Proceedings Pending a Petition for Writ of Certiorari to the Kentucky Supreme Court to be served via U.S. Mail, postage prepaid, upon the following, constituting all parties required to be served:

R. Dale Warren
600 West Main Street, Suite 300
Louisville, Kentucky 40202
Phone: (502) 589-6190
Fax: (502) 736-3195
dwarren@600law.com

*Counsel for Respondent,*
*Reverend Eric Hoey*

*/s/ John O. Sheller*
*Counsel for Petitioner*

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