No. _____

In the
Supreme Court of the United States

THE FIRST PRESBYTERIAN CHURCH U.S.A. OF TULSA, OKLAHOMA, and JAMES D. MILLER

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

More than 150 years ago, this Court held that courts may "exercise no jurisdiction" over matters that concern theological controversy or church discipline. *Watson v. Jones*, 80 U.S. 679 (1871). Since then, the Court has repeatedly reaffirmed this religious autonomy doctrine, explaining that the First Amendment guarantees a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The decision below threatens to eviscerate that guarantee. According to the Oklahoma Supreme Court, the autonomy that religious organizations enjoy derives not from the First Amendment, but from the "consent" of their "members." Accordingly, in its view, courts are free to intrude into and resolve questions of doctrine and faith, so long as they do so at the behest of a "non-member." Deepening a split among the lower courts, the Oklahoma Supreme Court also concluded that the religious autonomy doctrine operates not as a jurisdictional doctrine at the threshold, but rather as an affirmative defense that requires courts to resolve fact-bound disputes of religious doctrine such as whether baptism is an inherently public act and what constitutes "membership" in a religious organization.

The questions presented are:

1. Whether the religious autonomy doctrine derives from the First Amendment or rather is a

consent-based doctrine applicable only to disputes between a church and one of its own members.

2. Whether the religious autonomy doctrine is a threshold jurisdictional issue or an affirmative defense.

PARTIES TO THE PROCEEDING

The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and Dr. James D. Miller are petitioners here and were defendants-appellees below. John Doe is respondent here and was plaintiff-appellant below.

CORPORATE DISCLOSURE STATEMENT

The First Presbyterian Church U.S.A. of Tulsa, Oklahoma is an Oklahoma corporation that conducts church activities in Tulsa, Oklahoma. It has no parent corporation and no publicly traded company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The First Amendment guarantees religious organizations a fundamental "spirit of freedom" and "independence from secular control or manipulation." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). To that end, it vests religious organizations with a constitutionally protected "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* This religious autonomy doctrine protects religious organizations' "interest … in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring). The decision below threatens to eviscerate that core constitutional protection.

This case arises out of a lawsuit alleging tort and breach-of-contract claims against the First Presbyterian Church U.S.A. of Tulsa, Oklahoma ("the Church") and its minister, Dr. James D. Miller, for publicizing the baptism of an individual called John Doe. Doe was born in Syria and raised Muslim but converted to Christianity and decided that he wanted to be baptized. Doe asked Dr. Miller to baptize him; Dr. Miller agreed and baptized Doe publicly before the congregation in a regular (but non-televised) service at the Church. In accordance with the Church Constitution and practice, the Church included the fact of Doe's baptism in the weekly publication it

distributes to attendees and posts on its website. Doe subsequently returned to Syria, where he maintains that he was kidnapped by radical Muslims (including some of his family members) and threatened with beheading because his captors had learned of his baptism. He then brought tort and breach-of-contract claims against the Church and Dr. Miller, maintaining that Dr. Miller had promised him that his baptism would not be publicized.

There is no dispute that the Church has asserted a sincere religious belief that church doctrine requires a baptism to be visible and public—indeed, the Church Constitution requires baptism to be performed before the congregation. The trial court accordingly concluded that Doe's claims attempted to impose tort liability on church officials for following church doctrine and thus were barred by the religious autonomy doctrine, as they would require the court to entangle itself in questions of doctrine and faith. The Oklahoma Supreme Court initially agreed, only to reverse itself on rehearing and reach precisely the opposite result because, notwithstanding his baptism, Doe was not a full member of the Church. According to that court, the religious autonomy doctrine turns not on whether a secular court is asked to resolve a matter of faith or doctrine, but rather on whether the plaintiff is a "member" of the religious organization who "consented" to have the organization resolve these sensitive religious issues.

That radical reconceptualization of the religious autonomy doctrine as a species of arbitration law, rather than a First Amendment doctrine, not only deprives religious organizations of the right to resolve

questions of faith and doctrine for themselves and threatens them with potentially crippling liability for following church doctrine, but ensures the very entanglement that the religious autonomy doctrine is designed to avoid. Moreover, because membership is a question that different religions address in wholly disparate ways, the Oklahoma Supreme Court's "members-only" variant of the religious autonomy doctrine discriminates among religions, leaving those that do not have well-defined members without protection.

Making matters worse, the Oklahoma Supreme Court concluded—in direct conflict with decisions from numerous other courts—that the religious autonomy doctrine is not a jurisdictional doctrine that operates at the threshold to avoid entanglement, but rather is only an affirmative defense, with factual disputes to be resolved by a trier of fact. Under the decision below, churches cannot invoke the protections the religious autonomy doctrine provides without first proving to a secular court that the plaintiff is one of its "members" and "consented" to the church's exercise of its constitutional right to decide matters of faith and doctrine for itself. If the church cannot make that showing, it faces the prospect of monetary liability for failing to abide by "promises" that it could not make without violating its faith. And the plausibility of those contrary-to-doctrine promises will depend on examining how well-established and prominent the doctrine is, a role that no secular court should undertake. The decision below thus guarantees the kind of secular intrusion into religious affairs that the First Amendment and the religious autonomy doctrine prevent.

In doubly limiting the religious autonomy doctrine, the decision below contradicts centuries of this Court's jurisprudence, breaks with decisions of other lower courts, and empowers secular courts to second-guess the decisions of religious organizations on questions of faith, doctrine, custom, ecclesiastical law, and governance. Both questions presented warrant this Court's intervention to restore core First Amendment protections.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court on rehearing is reported at 421 P.3d 284 and reproduced at App.1-39. The court's initial opinion, which was withdrawn and superseded by that second opinion, is unreported and reproduced at App.41-89. The opinion of the Tulsa County District Court is unreported and reproduced at App.90-103.

JURISDICTION

The Oklahoma Supreme Court issued an initial 5-3 opinion on February 22, 2017, and, upon rehearing of that initial decision, issued a subsequent 5-4 opinion on December 19, 2017. The court denied the Church's petition for rehearing of that second decision, by a 5-4 vote, on June 4, 2018. On August 21, 2018, Justice Sotomayor extended the time for filing a petition for certiorari to and including October 4, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480-84 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Religious Autonomy Doctrine

The First Amendment is premised on the notion that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)). As such, both Religion Clauses—the Establishment Clause and the Free Exercise Clause—work together to protect the autonomy of religious organizations and avoid excessive entanglement of secular and religious authorities. Based on these reinforcing First Amendment protections, state and federal courts have long abstained from interfering with the internal affairs of religious organizations under the religious autonomy doctrine.[1]

The religious autonomy doctrine dates back to this Court's decision in *Watson v. Jones*, 80 U.S. 679 (1871). *Watson* set forth a general "rule of action which should govern the civil courts": "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such

[1] The "religious autonomy" doctrine is sometimes referred to as the "church autonomy" or "ecclesiastical abstention" doctrine.

decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. The Court explained that this principle of deference to religious organizations on questions of doctrine and faith is "founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority." *Id.*

After the First Amendment was extended to the States by incorporation through the Fourteenth Amendment, the Court reaffirmed *Watson* and explained that the First Amendment grants to "religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. And the Court subsequently emphasized that "First Amendment values are plainly jeopardized when [religious disputes are] made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

This doctrine of abstention is essential both to prevent Establishment Clause concerns with excessive entanglement between religious organization and secular courts, and to promote free religious exercise: "If civil courts undertake to resolve such controversies …, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Id.* In short, "[t]his is

a situation where the two clauses work to the same end." Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 S. Ct. Rev. 347, 375 (1969).

B. Proceedings Below

1. Respondent John Doe, who was born in Syria and raised Muslim, became interested in converting to Christianity while living in the United States. App.3. On December 30, 2012, Doe was baptized, at his request, by Dr. James D. Miller at the First Presbyterian Church U.S.A. of Tulsa, Oklahoma (U.S.A.) in a public, but non-televised, ceremony that was open to members and guests of the church. *See* App.3; App.42. "In accordance with longstanding custom and practice of the Church," which treats baptism as a public event, the Church included Doe's baptism in the "Order of Worship"—"a weekly publication of the Church" that "is always distributed to attendees of worship services, is delivered to individuals who are unable to attend services in person, and is made available on the Church website." App.96 (quoting Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 1-2).

Upon his subsequent return to Syria, Doe alleges that he was "kidnapped and held against his will" by radical Muslims (including some of his family members) "with threats of being murdered for his conversion." App.3. Doe alleges that he had previously "expressed concern about his safety if he became baptized" because "conversion from Islam to Christianity can carry the grave consequence of death, which is often done by beheading." App.3, 6. He further alleged that "his captors learned of his

conversion from the internet publication announcing he had been baptized." App.4. While he eventually escaped, Doe maintains that, in doing so, he had to "kill[] one of his captors" (who was his paternal uncle) and "suffered significant physical and emotional harm from his kidnapping and escape." App.3-4.

2. On June 9, 2014, Doe filed suit in the Tulsa County District Court against the Church and Dr. Miller seeking monetary damages for various alleged tort and breach-of-contract claims "arising out of alleged harm he incurred from [the Church's] publishing notice of his baptism on the world wide web." App.2.

In particular, Doe claims that the publication of his baptism occurred in violation of and "contrary to an agreement he thought had been reached with defendants," App.91, under which all parties would "keep his baptism private and as confidential as possible," App.2. He maintains that "his consent [to baptism] was conditioned on insuring his privacy concerns were honored," and that "he repeatedly expressed … his need for a private and confidential baptism." App.3, 6. Doe claims that the Church's publication of his baptism in its Order of Worship gives rise to claims for (1) negligence, (2) breach of contract, and (3) outrage.

3. Petitioners moved to dismiss for lack of subject matter jurisdiction, maintaining that "the district court lacked jurisdiction over ecclesiastical matters, … includ[ing] the theology, usage and customs, and written laws of the church that controlled the ritual and publication of [Doe]'s baptism." App.44. As they explained, that is precisely

what this case involves, as the Church Constitution requires baptisms to be performed before the congregation. *See* Presbyterian Church (U.S.A.), *Book of Order*, pt. II, at W-3.0402 ("Baptism is ordinarily celebrated on the Lord's Day in the gathering of the people of God. The presence of the covenant community bears witness to the one body of Christ, into whom we are baptized. When circumstances call for the administration of Baptism apart from public worship, the congregation should be represented by one or more members."); *id.* at W-3.0404 ("No one comes to Baptism alone; we are encouraged by family or friends and surrounded by the community of faith."). The trial court granted petitioners' motion, holding that, under the First Amendment and the religious autonomy doctrine, it lacked "subject matter jurisdiction to parse out any liability arising from the free exercise of the deeply held sacrament of Christian baptism." App.102.

The court concluded that "a close[] look at Presbyterian polity shows that the publication of the baptism is *a required part* of making public a profession of faith" and that "the publication of [Doe's] baptism on the World Wide Web" is thus "a question of faith and polity" beyond secular courts' jurisdiction. App.93, 95 (emphasis added); *see also, e.g.*, App.96 ("The Book of Order is Part II of the Constitution of the Presbyterian Church (U.S.A.) [and] requires that baptisms be recorded in the minutes of the Church Session and be made publically available as part of the Parish Register."); App.97 ("A key tenet of the Presbyterian Church is that baptism makes one part of 'the visible Church.'") (quoting Presbyterian Church (U.S.A.), *Book of Confessions*); App.97-98 ("The

detailed description of presentation for, administration of, and publication about baptism appears to be the Presbyterian way of telling the world that one has become a Christian. … This public dissemination is a key part of how the Church requires a conversion and baptism to be 'visible' to the world.").

In reaching that conclusion, the court readily acknowledged that religious organizations "do not have complete immunity from tortious liability simply because they are religious organizations," and recognized that secular courts "have jurisdiction over secular matters," including those that may be related to ecclesiastical matters. App.93, 98. For example, the court suggested that a secular court may properly consider a tort claim arising out of "someone being baptized [who] slips and falls on an object negligently left near the baptismal font," because "[t]he church's negligence would not be related to the act of baptism itself." App.98.

But the court found that, unlike the slip-and-fall example, and based on petitioners' "sincere representation of the Church as far as the sacramental nature of the act of baptism," Doe's baptism-based claims were wholly "rooted in religious belief" and thus nonjusticiable under the religious autonomy doctrine. App.98-100; *see also, e.g.*, App.100 ("the detailed sacrament of baptism—including each and every step of it—is 'rooted in religious belief'"); App.101 ("Defendants' deeply held religious belief about the *visible, public nature of baptism* must not be disturbed by this Court.").

4. Doe appealed to the Oklahoma Supreme Court, which initially affirmed the trial court's decision by a

5-3 vote. The majority held that "the church autonomy doctrine, rooted in the First Amendment to the United States Constitution, bars the courts from considering [Doe]'s claims." App.42. The court explained that "[c]ivil courts are prohibited from reviewing internal church disputes involving matters of faith, doctrine, church governance, and polity," and that "this principle is rooted in the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution." App.47 (citing *Kedroff*, 344 U.S. at 115-16).

Guided by those well-established principles, the court recognized that "the public nature of baptism is an integral part of the Presbyterian Church's understanding of the sacrament" and emphasized that "[t]he context of the online posting of [Doe]'s baptism is not secular"—instead, "the manner in which [Doe]'s baptism was conducted, including its subsequent publication online, was rooted in religious belief." App.61, 66-67. Because Doe's "tort claims all rest on an act that, per church doctrine, is an integral part of what the church considers to be the public nature of the sacrament" and "arise from the performance of his baptism," the court found that the "dispute is one over ecclesiastical rule, custom or law, and is not purely secular." App.67; *see also, e.g.*, App.67 (Doe's "tort and contract claims in this matter cannot be separated from the doctrinal requirements of the baptism he asked for" and "this entanglement … moves this dispute into the realm of one about discipline, faith, internal organization, or ecclesiastical rule, custom, or law"). The court thus held that it lacked jurisdiction under the religious autonomy doctrine to second-guess the Church's "right to conduct the sacrament of

baptism in accordance with custom and doctrine, even if doing so resulted in alleged torts against [Doe], who himself requested the sacrament be administered." App.67.

The three dissenting judges would have held that the publication of Doe's baptism was not "an action 'deeply rooted in religious belief,'" and was not protected by the religious autonomy doctrine. App.73 (Kauger, J., dissenting). In their view, the religious autonomy doctrine is "only applicable to church action involving one of its own members." App.69 (Kauger, J., dissenting). Because Doe "was not a formal member of" and had only a "tenuous" connection with the Church, the dissenting judges maintained that his claims were outside the scope of the religious autonomy doctrine. App.88 (Kauger, J., dissenting).

5. Doe filed a petition for rehearing, and the Oklahoma Supreme Court did an about-face. By a 5-4 vote, the court withdrew its initial opinion and reversed the state trial court. This subsequent decision was based almost entirely on the initial three-judge dissent's position that the religious autonomy doctrine is wholly inapplicable solely because "Doe *did not become a member of the Appellee church*." App.5. In particular, the court held that the religious autonomy doctrine "arises solely from ***membership*** and the consent by the person to be governed by the church," such that "a church should be free from secular control and interference by state courts [only] for claims against a church brought by a ***member who has agreed and consented to the ecclesiastical practices of the church***." App.13 (citation omitted). Even though Doe had consented to be baptized, the

court held that doctrine inapplicable because he was not a full "member" of the Church. *See* App.5.

The court further held that the religious autonomy doctrine is an "*affirmative defense to an otherwise cognizable claim, not a jurisdictional bar*." App.16-17 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012)). Because it concluded that there is no jurisdictional bar, the court ordered that "contested issues of fact," including "[w]hat Doe consented to and what the [Church] communicated to Doe," "must be resolved by the trier of fact in an adversarial hearing below." App.17-18.[2]

REASONS FOR GRANTING THE PETITION

The religious autonomy doctrine, rooted in both Religion Clauses of the First Amendment, protects a core "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as

[2] Although the Oklahoma Supreme Court remanded for further proceedings based on its refusal to find Doe's claims barred by the religious autonomy doctrine, that is no bar to this Court's jurisdiction under 28 U.S.C. §1257. Not only has the federal issue been "finally decided by the highest court in the State"; "refusal immediately to review the state court decision might seriously erode federal policy," as the remand proceedings could be resolved in a way that precludes the Church from vindicating its First Amendment rights at a later juncture. *Cox*, 420 U.S. at 480, 483. "[R]eversal of the state court on the federal issue," by contrast, "would be preclusive of any further litigation" in this case. *Id.* at 482-83. Indeed, the whole point of the religious autonomy doctrine is to foreclose claims like these from being litigated at all.

those of faith and doctrine." *Kedroff*, 344 U.S. at 116. This fundamental constitutional protection is critical both to preserve the free exercise of religion and to prevent excessive government entanglement in religious affairs.

The decision below undermines these principles and guarantees the very intrusion into religious affairs and second-guessing of religious doctrine that the religious autonomy doctrine is designed to prevent. According to the Oklahoma Supreme Court, the religious autonomy doctrine operates not as a fundamental matter of First Amendment doctrine, but as a matter of consent, and thus applies only to disputes between a religious organization and a "member" who has "consented" to be bound by the rules of the faith. In the Oklahoma court's view, "a church has no defense of ecclesiastical jurisdiction for a claim brought by a *non-member*." App.13-14. That radical reconceptualization of the religious autonomy doctrine fails as matter of law and logic. Centuries of jurisprudence confirm that the religious autonomy doctrine is not grounded in "membership" or "consent." It is grounded in the free exercise and establishment problems that inevitably arise when a secular court claims the power to resolve question of faith or doctrine.

Far from avoiding those constitutional problems, Oklahoma's radical reconceptualization of the doctrine as a species of forum-selection law binding only on "members" would guarantee them, as who is and is not a "member" of a religious organization is itself a question of faith, doctrine, and governance. Worse still, some religions do not have members, as

such, so this members-only variant of the religious autonomy doctrine would leave some religions unprotected and work the kind of discrimination among religions that the Religion Clauses strictly forbid. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244-46 (1982). Simply put, it is not for the Oklahoma courts to decide whether and to what extent Doe's baptism made him a "member" of the Church or manifested his "consent" to be bound by its rules—any more than it is for the Oklahoma courts to decide whether the Church was compelled by faith and doctrine to publicize Doe's demonstrably religious act.

Compounding these problems, the decision below deepens an existing conflict over whether the religious autonomy doctrine operates at the threshold as a jurisdictional doctrine. While most courts have held that the religious autonomy doctrine is jurisdictional, the decision below joins several courts that have (mis)read *Hosanna-Tabor* to render the doctrine only an affirmative defense. This split of authority is critically important because, for the doctrine to serve its intended function—*i.e.* to prevent entanglement—it must operate at the threshold. Particularly when coupled with a profoundly flawed "members-only" view of the doctrine, the minority view adopted below threatens disastrous consequences, both for religious organizations and for the courts.

This case is illustrative. Notwithstanding the Church's "sincere representation" that baptism must be a "visible, public" affair, App.98, 101, the Oklahoma Supreme Court concluded that a trier of fact must decide whether and to what extent Church officials deviated from and Doe agreed to accept that doctrine

of faith, which necessarily will involve judgments about the firmness and centrality of the doctrine. Wading into such matters to determine whether the religious autonomy doctrine even applies is akin to a diagnostic procedure that identifies the illness but kills the patient. The very process of determining whether to protect religious autonomy and avoid entanglement will sacrifice autonomy and entangle the courts in fact-bound disputes touching on religious doctrine.

Each of the questions presented is exceptionally important, as they involve nothing less than whether religious organizations can continue to rely on a fundamental constitutional right that this Court has long recognized. Indeed, some religious organizations do not even have formal membership, leaving them in the dark as to whether they can welcome Oklahomans without risking tort and contract claims over matters as innately religious as to how to conduct a baptism. This Court should grant certiorari, resolve a split in authority, and restore to religious organizations the freedom from government intrusion into matters of faith that the First Amendment guarantees them.

I. The Court Should Grant Certiorari To Determine Whether The Religious Autonomy Doctrine Is Limited To Church Action Involving One Of Its Own Members.

Nearly 150 years ago, this Court held that civil courts do not have the power to resolve a dispute that is "strictly and purely ecclesiastical in its character"—*i.e.*, "a matter which concerns theological controversy," "church discipline," or "ecclesiastical government." *Watson*, 80 U.S. at 733. Since then, "a long line of

Supreme Court cases [has] affirm[ed] the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff*, 344 U.S. at 116). That fundamental right emanates from both First Amendment Religion Clauses, as it not only ensures "religious organizations[] an independence from secular control or manipulation," *Kedroff*, 344 U.S. at 116, but also avoids "the hazards … of implicating secular interests in matters of purely ecclesiastical concern," *Presbyterian Church*, 393 U.S. at 449.

The decision below eviscerates that core constitutional protection. According to the Oklahoma Supreme Court, the religious autonomy doctrine is limited to "claims against a church brought by ***a member who has agreed and consented to the ecclesiastical practices of the church***." App.13. Relying on language from this Court's decision in *Watson* noting that those "who unite themselves to [a religious] body do so with an implied consent to this government," *Watson*, 80 U.S. at 729, the court concluded that "ecclesiastical protection for a church arises solely from ***membership*** and the consent by the person to be governed by the church." App.13-14. In its view, the fundamental right of religious organizations to resolve matters of faith and doctrine—even matters as core as how a baptism must be conducted—is more a matter of contractual agreement to a forum than a matter of first principles, and "evaporates" if the person asking courts to usurp that role is not "a church member." App.13. As the court unequivocally put it, "a church has no defense of

ecclesiastical jurisdiction for a claim brought by a *non-member*." App.14.

Oklahoma's sweeping exception to the religious autonomy doctrine finds no support in law, logic, or the decisions of this Court. The religious autonomy doctrine is not a species of forum-selection law that depends on the "consent" of parties to submit their disputes to an ecclesiastical body. It is a product of the grave constitutional problems that would arise were the government to claim the power to resolve "strictly and purely ecclesiastical" disputes. *Watson*, 80 U.S. at 733. Not only are secular courts ill-equipped to resolve matters of "theological controversy," *id.*; authorizing them to do so would inject courts into matters that the Constitution's Religion Clauses compel the government to leave to religious organizations. *See Presbyterian Church*, 393 U.S. at 449 ("If civil courts undertake to resolve such controversies …, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

To be sure, disputes about "conformity of the members of the church to the standard of morals required of them," *Watson*, 80 U.S. at 733, are among those the doctrine covers. But courts are no better equipped to resolve "matters of church government" or "faiths and doctrine," *Kedroff*, 344 U.S. at 116, when the request comes from someone who does not belong to the faith. If anything, a rule that allows courts to resolve "issue[s] at the core of ecclesiastical affairs" at the behest of *non*-members poses an even greater risk of "entangl[ing]" church and state. *Serbian E.*

Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696, 721 (1976).

More fundamentally, it makes no sense to limit the religious autonomy doctrine to claims brought by "members" because whether someone is a "member" of a religion is itself a question of religious doctrine fraught with difficulty for civil courts. It is hard to imagine a case less suited for secular courts than a "wrongful excommunication" claim, but such a claim would by definition be brought by a non-member. Respondent's "wrongful baptism" claim is equally problematic, whether or not someone who consents to baptism is a "member" of the Church. Questions of membership implicate shades of gray that should not be the subject of civil litigation in secular courts. Some religions have multiple steps to full "membership," not all of which every "member" may have undertaken. *See, e.g.*, The Holy See, *Compendium of the Catechism of the Catholic Church*, pt. I (The Vatican, 2005) (three sacraments of Christian initiation in the Catholic Church: (1) Baptism, (2) Confirmation, and (3) the Holy Eucharist). Others may distinguish between membership in a particular *organization* and membership in the faith *itself* by. *See, e.g.*, Rabbi Michael Knopf, *What's Driving Jews Away From Synagogues? Not Dues, but "Membership"*, Haaretz (May 26, 2016), https://bit.ly/2NmzdL0 ("Membership [in a particular synagogue] grants the individual (and his/her family, if relevant) certain rights and privileges within the congregation.").

This is a case in point. While John Doe may have been baptized on the understanding that he was not becoming a "member" of the First Presbyterian

Church U.S.A. of Tulsa, Oklahoma, that does not mean that he was not becoming a member of the Presbyterian faith. *See Book of Order* at G-1.04, G-1.0404 ("[t]he membership of a congregation of the Presbyterian Church (U.S.A.) includes baptized members, active members, and affiliate members," as well as "other participants"). Like the question of whether the Parish Register listing Doe's baptism and its publication to the congregation at large is an essential component of baptism, whether someone can be baptized without being a member of the faith is a question for the Church, not for the Oklahoma state courts. Any test that renders application of the religious autonomy doctrine dependent on who is and is not a "member" thus would create precisely the First Amendment problems that the doctrine is designed to avoid.

Worse still, some religious organizations do not have a concept of "membership," as such, at all. For example, "Chinese culture does not require an explicit decision to join an identifiable group," so "no call to personal conversion stands as prerequisite for participation" in some indigenous religious groups. Fan Lizhu & Chen Na, *"Conversion" and the Resurgence of Indigenous Religion in China*, *in* Oxford Handbook of Religious Conversion 558 (Lewis R. Rambo & Charles E. Farhadian eds., Oxford Univ. Press Apr. 2014). In fact, in one study of membership in 236 religious groups, "49 reported members and adherents; 37 reported adherents only; 63 reported members only; four suggested a method for estimating adherents without reporting members; and 83 reported only congregation locations." The Association of Religion Data Archives, *Summary of*

U.S. Religion Census: Religious Congregations and Membership Study (2010), https://bit.ly/2NllqnX.

Oklahoma's members-only variant of the religious autonomy doctrine thus creates two fatal problems. First, it leaves some religions wholly outside the protection of the doctrine. Second, the Oklahoma approach discriminates among religious denominations, giving substantial protection to those with broad conceptions of their membership, while leaving other denominations wholly unprotected. There is no warrant in the First Amendment for the former (the underprotection of some religions), and the latter (discrimination among religions) is affirmatively precluded by the Religion Clauses, *see, e.g.*, *Larson*, 456 U.S. at 242-46.

For all these reasons, courts have long recognized that the religious autonomy doctrine depends not on membership or the nature of the parties, but on the nature of the dispute. "The question … is whether the dispute … is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law[.]'" *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997). If it is, then the "church autonomy doctrine prohibits civil court review," *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002), no matter who the parties to that dispute may be.

Consistent with that understanding, courts have routinely applied the religious autonomy doctrine without regard to whether the dispute before them was between a religious organization and one of its "members." For example, in *Bryce*, the Tenth Circuit expressly rejected the plaintiff's argument that the

religious autonomy doctrine did not apply because "she had no relationship with [the church] and must be considered a third party who is not subject to internal church disciplinary procedures." *Id.* at 658. As the court explained in doing so, "[t]he applicability of the doctrine does not focus upon the relationship between the church and" the plaintiff. *Id.* "It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members *and non-members*." *Id.* (emphasis added).

Likewise, in *Mammon v. SCI Funeral Services of Florida, Inc.*, a Florida court applied the religious autonomy doctrine to a dispute that was not between a religious organization and one of its members—namely a widow's claims that a secular cemetery "violated 'Jewish burial customs and traditions'" by burying her husband, a Jew, in the same section of the cemetery as non-Jews. *See* 193 So.3d 980, 982 (Fla. Dist. Ct. App. 2016). Because the disposition of the widow's claims could not "be accomplished without first determining, as a matter of fact, what constitutes 'Jewish burial customs and traditions,' … the dispute [was], at its core, … about [an] ecclesiastical rule, custom or law,'" precluding judicial review under the First Amendment. *Id.* at 985 (first alteration added). That the suit was brought by Jewish woman against a secular cemetery made no difference at all.

In *Wallace v. ConAgra Foods, Inc.*, a Minnesota federal district court applied the religious autonomy doctrine to bar claims that a secular corporation misrepresented that its Hebrew National products were "100% Kosher." 920 F. Supp. 2d 995 (D. Minn. 2013), *vacated on other grounds*, 747 F.3d 1025 (8th

Cir. 2014). There too, the defendant was not a religious organization, but moved to dismiss for lack of subject matter jurisdiction on the ground that the nature of the plaintiffs' claims rendered them "barred by the Establishment Clause and the Free Exercise Clause of the First Amendment." *Id.* at 997. The district court agreed, concluding that "Supreme Court precedent has firmly established the principle that civil courts may not be called upon to interpret doctrinal matters or tenets of faith." *Id.* at 998 (collecting cases). As the court explained, while the defendant may have been "a secular entity," "[t]he laws of Kashrut, … and the determination of whether a product is in fact 'kosher,' are intrinsically religious in nature." *Id.* As such, "[a]ny judicial inquiry as to whether Defendant misrepresented that its Hebrew National products are '100% kosher' (when … an undisputedly religious entity[] certified them as such) would necessarily intrude upon rabbinical religious autonomy." *Id.* These cases hardly stand alone.[3]

The Oklahoma Supreme Court's members-only variant of the religious autonomy doctrine not only conflicts with these decisions, but also reflects a deeper doctrinal incoherence. The Oklahoma Supreme Court treats the doctrine as a species of

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[3] *See also, e.g.*, *Rymer v. Lemaster*, No. 3:16-cv-2711, 2017 WL 4414163 (M.D. Tenn. Aug. 30, 2017); *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013); *Teen Challenge Int'l USA v. Elleson*, No. 5-463 DAE-BMK, 2006 WL 3388471 (D. Haw. Nov. 21, 2006); *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727 (Ky. 2014); *Abdelhak v. Jewish Press, Inc.*, 985 A.2d 197 (N.J. Super. Ct. App. Div. 2009); *Patton v. Jones*, 212 S.W.3d 541 (Tex. Ct. App. 2006); *Nussbaumer v. State*, 882 So.2d 1067 (Fla. Dist. Ct. App. 2004).

forum-selection or arbitration principles under which parties are deprived of civil court jurisdiction only if they have agreed to have their disputes adjudicated by religious organizations of which they are members. But the doctrine exists not to hold parties to the terms of their agreement to be bound by religious officials, but to protect both religions and civil courts from undue entanglement. The doctrine arises not from the parties' agreement, but directly from the First Amendment. This Court's cases recognize as much: "First Amendment values are plainly jeopardized when [religious disputes are] made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church*, 393 U.S. at 449. That remains the case regardless of whether those disputes are resolved at the behest of a "member" or a "non-member" of the faith. The Oklahoma Supreme Court's contrary conclusion is wildly out of step with the decisions of this Court and nearly every other, and guarantees the very Free Exercise and Establishment Clause concerns that the religious autonomy doctrine is designed to avoid.

II. The Court Should Grant Certiorari To Resolve A Square Split Of Authority Over Whether The Religious Autonomy Doctrine Is Jurisdictional.

The decision below compounded the problems with its cramped view of the religious autonomy doctrine by concluding that the doctrine is not a jurisdictional issue for courts to resolve as a gatekeeper at the threshold, but is instead an affirmative defense that must be pled and proven by the religious organization invoking it. That conclusion

cannot be reconciled with this Court's decisions or with decisions from other courts applying them. The nature of the doctrine requires its application at the threshold, lest the very process of determining the doctrine's applicability entangle the courts in religious inquiries and sacrifice religious autonomy. Nonetheless, on this jurisdictional question, the decision below does not stand alone. Several lower courts have mistakenly reached the same affirmative-defense conclusion based on a (mis)reading of this Court's decision in *Hosanna-Tabor*. This Court should grant certiorari to resolve this open and acknowledged division of authority.

In its first explication of the religious autonomy doctrine in *Watson*, the Court described the doctrine in plainly jurisdictional terms, holding that "civil courts exercise no jurisdiction" over matters of theological controversy, church discipline, and ecclesiastical government. *Watson*, 80 U.S. at 733. As the Court explained, "where a subject-matter of dispute" is "strictly and purely ecclesiastical in its character," courts have "no jurisdiction … to try the" case. *Id.* Since then, both this Court and others have consistently treated the religious autonomy doctrine as a jurisdictional doctrine that operates at the threshold to deprive courts of the power to resolve religious disputes. *See, e.g.*, *Westbrook v. Penley*, 231 S.W.3d 389, 398 (Tex. 2007) ("courts must decline jurisdiction over disputes" seeking to "regulate matters of religion"); *Abdelhak v. Jewish Press, Inc.*, 985 A.2d 197, 204 (N.J. Super. Ct. App. Div. 2009) ("When adjudicating the merits of a claim requires a court to interpret … religious tenets, the court must abstain for lack of subject matter jurisdiction.");

Church of God in Christ, Inc. v. Bd. of Trs., 280 P.3d 795, 802 (Kan. Ct. App. 2012) ("The jurisdiction of the courts to address matters involving church affairs is limited.").

In the wake of this Court's decision in *Hosanna-Tabor*, however, a division of authority has arisen over whether that decision compels the conclusion that the religious autonomy doctrine is only an affirmative defense. *Hosanna-Tabor* did not involve the constitutional religious autonomy doctrine, but instead involved the statutory ministerial exception to Title VII claims. Resolving a conflict that had arisen, the Court concluded that the ministerial exception is "an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar … because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.'" *Hosanna-Tabor*, 565 U.S. at 195 n.4 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010)) (second alteration in original). Nothing in *Hosanna-Tabor* purported to address the very different issues raised by the religious autonomy doctrine, let alone to confront questions of *stare decisis* or to distinguish *Watson*.

As a consequence, it is not surprising that most courts have continued to treat the religious autonomy doctrine as a jurisdictional bar since *Hosanna-Tabor*, recognizing that *Hosanna-Tabor* "did not address the ecclesiastical abstention doctrine" or change that long-settled rule. *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 157 (Tenn.

2017).[4] As the Tennessee Supreme Court explained, "the ecclesiastical abstention doctrine predates the ministerial exception by almost a century," and "[t]he Supreme Court itself has described the ecclesiastical abstention doctrine in a manner that suggests it constitutes a subject matter jurisdictional bar." *Id.* "Specifically, the Supreme Court stated that civil courts exercise 'no jurisdiction' over a matter 'strictly and purely ecclesiastical in its character." *Id.* (quoting *Watson*, 80 U.S. at 733). Nothing in *Hosanna-Tabor* changes that constitutional rule.

The first time around, the Oklahoma Supreme Court reached that same conclusion in this case, continuing to treat the religious autonomy doctrine as "bar[ring] the courts from considering [Doe]'s claims" attempting to challenge the manner in which he was baptized. App.41-42. But the court then reversed course on rehearing and reached precisely the opposite result, concluding that the doctrine is an "*affirmative defense to an otherwise cognizable claim, not a*

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[4] *See, e.g.*, *Flynn v. Estavez*, 221 So.3d 1241, 1247 (Fla. Dist. Ct. App. 2017) ("In Florida, courts have interpreted the doctrine as a jurisdictional bar, meaning a claim should be dismissed upon a determination that it requires secular adjudication of a religious matter."); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (N.C. Ct. App. 2016) ("We next address the ecclesiastical abstention doctrine, which North Carolina courts hold is a jurisdictional bar to courts adjudicating ecclesiastical matters of a church."); *In re St. Thomas High School*, 495 S.W.3d 500, 506 (Tex. Ct. App. 2016) (describing "the ecclesiastical abstention doctrine" as a "threshold jurisdictional question"); *Greater Fairview Missionary Baptist Church v. Hollins*, 160 So.3d 223, 233 (Miss. 2015) ("the court's jurisdiction is limited to purely secular issues, and the court must not be involved in ecclesiastical issues").

jurisdictional bar," and ordering that "contested issues of fact," including "[w]hat Doe consented to and what the [Church] communicated to Doe," "must be resolved by the trier of fact in an adversarial hearing below." App.16-18. The (new) majority did not ground that conclusion in any analysis of this Court's religious autonomy cases. Instead, the court simply assumed without explanation that the religious autonomy doctrine and the ministerial exception are one and the same, positing that *Hosanna Tabor* "recognized that the ministerial exception *or the church autonomy doctrine*" is an affirmative defense. App.16 (emphasis added).

The Supreme Court of Kentucky recently engaged in a similar about-face. In 2014, the court contrasted the jurisdictional nature of the religious autonomy doctrine with the narrower, but related, ministerial exception. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014). As the court explained, the ministerial exception "does not operate as a jurisdictional bar" because "[i]t is an exception, not an exemption." *Id.* "From a broad perspective," the court explained, "the ministerial exception does not strip a court of its jurisdiction but, instead, simply disallows the forward progress of the particular suit." *Id.* But the court distinguished the ministerial exception from "the broader principle of ecclesiastical abstention" (*i.e.*, the religious autonomy doctrine), which it explained *is* jurisdictional: "Secular courts do not have jurisdiction to hear disputes over church doctrine." *Id.* Six months later, however, the court changed its mind, holding that "the similar purposes served by both the ministerial exception and ecclesiastical [exception]" compel the conclusion that

"the ecclesiastical-abstention doctrine is an affirmative defense." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 737 (Ky. 2014).[5]

The Supreme Court of Minnesota has charted yet another course. While that court likewise "[p]reviously … characterized the [religious autonomy] doctrine as a jurisdictional bar," it recently decided that "*Hosanna-Tabor* leads us to conclude that the ecclesiastical abstention doctrine is not a jurisdictional bar." *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528, 534-35 (Minn. 2016). But the court then declined to decide *what* the religious autonomy doctrine is. Instead, it suggested that it could be "an affirmative defense on the merits" or "a form of abstention," and ultimately "decline[d] to characterize the doctrine" other than to reject the proposition that it is jurisdictional. *Id.* at 535.

As the foregoing illustrates, the lower courts are squarely divided and deeply confused over whether the religious autonomy doctrine is a threshold issue or an affirmative defense. This not merely a matter of pleading or whether to file a motion under the equivalent of Federal Rule of Civil Procedure 12(b)(1) or (b)(6). Rather, whether the religious autonomy doctrine operates at the jurisdictional threshold or only as an affirmative defense goes to the very nature of the doctrine and whether it can perform its intended function of avoiding undue entanglement. If the question whether the doctrine even applies requires

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[5] The court also inexplicably claimed that this holding was based on the "persuasive … reasoning espoused in *Kirby*" and otherwise "[c]onsistent with the logic of *Kirby*." *Id.*

factual development of matters on which the defendant bears the burden of proof, then the entanglement the doctrine avoids will become routine. Civil courts will oversee discovery into church records to determine the precise facts of a baptism or church teaching on the public nature of baptism more generally. And a litigant's failure to timely raise an affirmative defense—whether through inadvertence or a considered interest in obtaining the imprimatur of civil courts—could give courts no choice but to become entangled in religious disputes, even though the doctrine exists to protect courts as much as to protect religious defendants.

These problems become even more pronounced when the Oklahoma Supreme Court's misguided affirmative-defense view is coupled with its deeply flawed members-only approach to the doctrine. If the applicability of the religious autonomy doctrine really did turn on questions of membership or whether the plaintiff consented to resolution of a dispute by the religious organization, then it would be all but impossible to determine the applicability of the doctrine before examining fact-bound and religiously fraught questions of consent and membership. Those are precisely the questions that the Oklahoma Supreme Court ordered the trial court to explore, remanding this case for "an adversarial hearing" on "[w]hat Doe consented to and what the [Church] communicated to Doe" about his baptism. App.17-18. The religious autonomy doctrine would be meaningless if it could be invoked only after an adversarial hearing entangling the civil courts in questions of church doctrine. Such inquiries plainly deprive the Church of the freedom granted by the First

Amendment and recognized by this Court "to decide for [itself], free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116.

III. The Questions Presented Are Exceptionally Important, And This Case Is An Ideal Vehicle To Consider Them.

How to define the contours of the religious autonomy doctrine is a "question of magnitude every way," as the answer "determines the relations of the church to the state in this country." *Watson*, 80 U.S. at 702-03. Not only is the doctrine essential to ensure "the freedom of the churches from governmental control"; it is essential to ensure to protect the courts from being dragged into religious controversies and preserve "the freedom of the state from ecclesiastical control." Kauper, *Church Autonomy and the First Amendment*, 1969 S. Ct. Rev. at 347; *see also* Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J. L. & Pub. Pol'y 253, 264 (2009) ("The reason these decisions are beyond the jurisdiction of government is to protect religious believers and to protect churches from government interference."). That remains every bit as true now—indeed, more so—as it was when this Court first recognized the doctrine nearly 150 years ago. Yet the decision below poses a profound threat to the delicate balance between church and state that the doctrine seeks preserve.

This is a case in point. Based on its doubly erroneous misconception of the religious autonomy doctrine, the Oklahoma Supreme Court has given a green light for further factual development in a case challenging how someone was baptized. With the

possible exception of a wrongful excommunication case that the logic of the decision below would also countenance, it is difficult to imagine a dispute more ill-suited for resolution by the secular courts than a dispute over "a 'church-approved, church-defined, and church-controlled process' that the church must determine the parameters of for reasons of faith." App.35 (Combs, J., dissenting). The "trier of fact" is directed to conduct "an adversarial hearing," App.18, to determine whether Doe was promised that his baptism would not be publicized. How is that dispute to be resolved without considering the extent to which Presbyterian doctrine precluded the fulfillment of that promise? If Presbyterian doctrine is clear that baptisms must be public, the claim that a promise was made contrary to that doctrine becomes less plausible. If the public nature of baptism is a central and prominent feature of Presbyterian doctrine, the claimed promise becomes even less plausible. And if, despite that doctrine, the court determines that a promise was made, are the Oklahoma courts truly to impose damages on the Church and its minister for failing to depart from the dictates of their faith, just because the request to do so was made at the behest of a "non-member"?

As these and other questions that the court will have to confront powerfully illustrate, there is simply no way for a secular court to resolve this case without inserting itself deeply, and impermissibly, into matters of "faith, or ecclesiastical rule, custom, or law." *Watson*, 80 U.S. at 727. While that reality may be particularly vivid in the context of a challenge to how someone was baptized, it is the inevitable result in *every* case if the religious autonomy doctrine is no

longer a threshold question that may be resolved simply by asking whether the dispute before the court is ecclesiastical in nature, but is instead an affirmative defense that may be invoked only after demonstrating that the plaintiff is a member of the defendant religious organization that consented to have the church answer questions of doctrine and faith.

This is an ideal case in which to resolve the exceedingly important questions presented. As its dramatic volte-face on rehearing underscores, the Oklahoma Supreme Court's decision rests squarely and expressly on its conclusions that "a church has no defense of ecclesiastical jurisdiction for a claim brought by a *non-member*," App.13-14, and that the religious autonomy is an "*affirmative defense to an otherwise cognizable claim, not a jurisdictional bar*." App.16. And the proceedings below thoroughly explored both of those issues; between the trial court's opinion, the supreme court's first opinion, its subsequent opinion, and all the dissents, these proceedings produced *seven* separate opinions on these critical constitutional questions. Moreover, while the court ultimately remanded for a "trier of fact in an adversarial hearing" to resolve "contested issues of fact" about "[w]hat Doe consented to and what the [Church] communicated to Doe," App.17-18, that only underscores the need for this Court to intervene now, as those inquiries are antithetical to the religious autonomy doctrine, and a failure to grant review now will compromise the federal interests served by a federal constitutional doctrine. *See Cox*, 420 U.S. at 482-84.

The stakes here are considerable. The religious autonomy doctrine as construed by the Oklahoma Supreme Court operates only as an affirmative defense that requires factual development and is limited to suits by church "members." Such a doctrine is contrary to this Court's cases, the vast majority of lower court decisions, and the fundamental justification for the doctrine. To serve its intended function, the religious autonomy doctrine must operate at the jurisdictional threshold. Its application cannot turn on factual development by civil courts that involves the very entanglement the doctrine seeks to avoid. Nor can it turn on questions of membership, which is itself a matter of religious doctrine. And a members-only doctrine would underprotect some denominations and discriminate among religions. At every turn, the decision below is simply incompatible with the Religion Clauses of the First Amendment and this Court's decisions faithfully applying them. This Court should grant plenary review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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