No. 18-500

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

AMICUS CURIAE BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND STEWARDS MINISTRIES IN SUPPORT OF PETITIONERS

THOMAS H. DUPREE JR.
Counsel of Record
ANDREW G. I. KILBERG
T. ELLIOT GAISER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Amicus Curiae

November 19, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE*

The Becket Fund for Religious Liberty is a non-profit, public-interest law firm with a mission to protect the free expression of all religious faiths and the freedom of religious people and institutions to participate fully in public life. It exists to vindicate a simple but frequently neglected principle: that because the religious impulse is natural to human beings, religious expression is natural to human culture. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt v. Hobbs*, 135 S. Ct. 853 (2015), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Indeed, Becket has long worked to promote the vitality of the religious autonomy doctrine, ensuring that courts do not interfere in the internal affairs of religious organizations. It is deeply troubled by the Oklahoma Supreme Court's decision requiring courts to entangle themselves in religious disputes.

Stewards Ministries is a non-profit organization that exists to support the Plymouth Brethren, an evangelical Christian movement. In general, the

---

* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice and consented to the filing of this brief.

Plymouth Brethren do not have formal membership or pastors and meet in independent, local assemblies. Stewards Ministries is concerned that creating a threshold membership requirement for application of the religious autonomy doctrine, as the Oklahoma Supreme Court did below, will infringe the religious liberty of the Plymouth Brethren and other religious denominations.

SUMMARY OF THE ARGUMENT

There is always the danger that courts will allow bad facts to make bad law. Here, when presented with unquestionably bad facts concerning a claim of torture overseas for disclosure of a sacral ceremony performed in the United States, the Oklahoma Supreme Court made bad law by narrowing the religious autonomy doctrine to apply only to disputes between churches and "full member[s]." App. 14. But American courts cannot solve religious violence overseas by restricting religious liberty at home and thereby making our laws more like those of the very countries in which the violence occurs. Rather, courts must faithfully apply the longstanding constitutional doctrines that were created precisely to ensure civil peace and religious freedom.

The religious autonomy doctrine is one such longstanding doctrine, firmly grounded in both the text and history of the Religion Clauses of the First Amendment. It ensures religious liberty for all by protecting the freedom of religious organizations to determine internal affairs of governance and doctrine, and by preventing the government from becoming entangled in religious disputes.

Limiting application of the religious autonomy doctrine to disputes between a religious body and its "full members" will impinge the free exercise of minority religious organizations, like the Plymouth Brethren, which do not have formal membership requirements. This Court should grant certiorari to clarify that the religious autonomy doctrine must protect the free exercise of all faiths. To the extent that notions of membership are ever relevant to application of the

doctrine, a broader definition of membership than that imposed by the Oklahoma Supreme Court must be employed.

Questions of membership strike at the core of religious faith and practice. They are another way of asking who constitutes the followers, faithful, saved, elect, believers, and chosen. As such, they can raise a host of difficult doctrinal matters. Limiting application of the religious autonomy doctrine to disputes between a religious body and its members, and then defining membership in a narrow way, as the Oklahoma Supreme Court did here, will impermissibly embroil courts in religious hairsplitting. That is precisely why conditioning application of the doctrine on narrow conceptions of membership runs afoul of this Court's precedent. The Court developed the religious autonomy doctrine in the context of disputes over the composition of churches, where membership was both unclear and contested. But that did not stop this Court from applying important religious autonomy safeguards to prevent the invocation of government power to resolve internal religious disputes. Taken together, this Court's precedent and the principles of religious autonomy require that, to the extent membership is relevant in religious autonomy cases, it must be broadly defined in such a way that courts do not need to pass upon or resolve issues of doctrine. But that is not what the majority opinion below did. Thus, this Court should grant certiorari to clarify that the religious autonomy doctrine applies whenever courts are asked to intrude upon internal matters of faith and doctrine, even if the litigants are not formal "members" of a religious organization.

Finally, given the importance of the religious autonomy doctrine, this Court should grant certiorari to resolve the jurisdictional question that has deeply divided lower courts. Even if the religious autonomy doctrine is not jurisdictional, it is nonetheless structural, in the sense that it is a categorical limitation on the ability of courts to entangle themselves in religious matters. Courts should resolve religious autonomy claims at the earliest possible juncture in litigation. Anything less transgresses the First Amendment's structural restriction on the reach of the government into internal religious affairs—a limitation that is woven deeply into the fabric of our founding.

ARGUMENT

I. THE RELIGIOUS AUTONOMY DOCTRINE IS FIRMLY ROOTED IN BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT.

Courts have explained that the religious autonomy doctrine is "best understood" as "marking a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). That boundary is mutually beneficial to both church and state—it ensures the freedom of churches to decide their internal affairs, and it protects government from entanglement in such matters. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (allowing "government standards" to control church affairs "would significantly, and perniciously, rearrange the relationship between church and state"). Indeed, as a matter of

both text and history, the Free Exercise and Establishment Clauses work hand-in-hand to prevent courts from interfering in matters of religious doctrine and governance. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 556 U.S. 171, 181 (2012).[2]

The religious autonomy doctrine is distinctly American—a hard-won product of the religious liberty that was both created in and woven into our founding. As this Court recounted in *Hosanna-Tabor*, many of the earliest settlers—Puritans and Quakers—came to America seeking to "escape the control" of the established Church of England. *Id.* at 182–83. In England and colonial America, "government control over the church" was accomplished in part through "laws governing doctrine," including civil definitions of "full church membership." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2132, 2177 (2003).

"[A]gainst this background . . . the founding generation sought to foreclose the possibility of a national church" by adopting the First Amendment. *Hosanna-Tabor*, 556 U.S. at 183. "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion clauses ensured that the new Federal Government—unlike the English Crown—would have no role" in deciding matters of doctrine. *Id*.

---

[2] *Amici*'s use of the term "church" throughout this brief is intended as a shorthand for all houses of worship and religious groups of all kinds, except where clearly noted otherwise.

This Court first articulated the religious autonomy doctrine in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a dispute between pro-slavery and anti-slavery factions of the Walnut Street Presbyterian Church in Louisville, Kentucky. Both sides had formed "distinct bodies, with distinct members and officers" each claiming to be the true "church." *Id.* at 717. The General Assembly, the highest governing body of the Presbyterian church, ruled that the anti-slavery faction was the legitimate church, but the dispute nonetheless ended up in federal court in a fight over who was entitled to control church property. *Id.* at 694.

In a now-famous passage, this Court refused to substitute its opinion for that of the General Assembly, explaining that "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 decisions as final, and as binding on them." *Id.* at 727. The Court further observed that "civil courts exercise no jurisdiction" over disputes which are "strictly and purely ecclesiastical in . . . character." *Id.* at 733.

Unlike the Lord Chancellor in England, who was "in a large sense, the head and representative of the Established Church," controlled "the church patronage," and had his "judicial decision . . . invoked in cases of heresy and ecclesiastical contumacy," this Court found it inappropriate to "grappl[e] with the most abstruse problems of theological controversy, or [to] constru[e] those instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages." *Id.* at

727–28. Moreover, the "dissenting church in England [wa]s not a free church," and "there did not exist that full, entire and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." *Id.* at 728. "In this country," because of the "full and free right to entertain any religious belief," "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.*

Thus, though *Watson* was not formally based on the Religion Clauses (it was pre-incorporation), the dual pillars of religious liberty—no establishment and free exercise—were present at the inception of the religious autonomy doctrine. The decision had "a clear constitutional ring." *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976) (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969)).

The Court ultimately did ground the religious autonomy doctrine in the First Amendment, which had by then been incorporated against the States, in *Kedroff*, 344 U.S. at 107. That case involved a New York law that attempted to give an archbishop elected by a convention of American churches "affiliated with the Russian Orthodox Church" control of St. Nicholas cathedral, over and against the claim of another archbishop appointed by the Patriarch of the Russian Orthodox Church in Russia. *Id.* at 95–97. Thus, at its core, the case was about who "who was the true archbishop." The Court rejected the New York law as both a violation of "the free exercise of religion" and the "rule of separation between church and state." *Id.* at 107, 110. Quoting heavily from *Watson*, it concluded

that "church rule controls" on matters of "church custom" or "ecclesiastical issues." *Id.* at 120–21.

Since then the Court has repeatedly reaffirmed the religious autonomy doctrine—reiterating that it is supported by both Religion Clauses—most recently in *Hosanna-Tabor*, which dealt with the ministerial exception, a subset of the doctrine. 565 U.S. at 181.

For its part, the Free Exercise Clause requires that religious organizations have the "power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to[] 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1372, 1389 (1981)). Thus, free exercise concerns not only the free "operation of churches" and "appointment of clergy," but also the freedom to direct matters of doctrine. *Kedroff*, 344 U.S. at 107–08 (explaining that the "invalidity" of a law "establishing a different doctrine" "would be unmistakable"); *see also Presbyterian Church*, 393 U.S. at 450 (The "very core of a religion" is "the interpretation of particular church doctrines."). By involving themselves in matters of church governance and doctrine, moreover, courts may chill the free exercise of religion. *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 concerns.").

Likewise, when courts interfere in matters of church governance and doctrine, they also run afoul of "the Establishment Clause, which prohibits government involvement" regarding "ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89. "[T]here is a substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Milivojevich*, 426 U.S. at 709. Because of this danger, "the First Amendment severely circumscribes the role that civil courts may play in resolving church . . . disputes." *Id.* (quoting *Presbyterian Church*, 393 U.S. at 449). The Establishment Clause creates a "structural limitation imposed on the government" that safeguards courts from being "impermissibly entangle[d] . . . in religious governance and doctrine," by "categorically prohibit[ting] federal and state governments from becoming involved in religious . . . disputes." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4, 121 (3d Cir. 2018) (quoting *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015)). Because of this categorical limitation on government control over religious matters, it is a violation of the Establishment Clause for a court to "substitute[] its interpretation" of religious law for that of religious authorities vested with the power "to make that interpretation." *Milivojevich*, 426 U.S. at 721.

II. THE RULING BELOW UNDERMINES THE RELIGIOUS AUTONOMY DOCTRINE BY CONDITIONING ITS APPLICATION ON A NARROW UNDERSTANDING OF "MEMBERSHIP."

The Oklahoma Supreme Court held that the religious autonomy doctrine did not apply in this case because Doe "***never became a member***" of the First Presbyterian Church U.S.A. in Tulsa; he simply "wanted to be baptized into the *Christian* faith." App. 3, 15.

The Oklahoma Supreme Court's narrow "membership" test runs headlong into the Religion Clauses. First, it transgresses the fundamental principle that government must treat all religions equally. And second, it impermissibly forces courts to decide difficult doctrinal matters. To the extent that membership is ever relevant to application of the religious autonomy doctrine, it must be defined in a way that covers all faiths and does not require courts to split doctrinal hairs. The Court should grant certiorari to address this issue, which is exceptionally important to countless religious groups across the country.

A. Conditioning application of the religious autonomy doctrine on narrow conceptions of membership will discriminate among religions.

"[F]ull, entire, and practical freedom for all forms of religious belief and practice" is a fundamental "principle[]" in this country. *Watson*, 80 U.S. (13 Wall.) at 728. The First Amendment is thus categorical: "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Government must studiously avoid

even "subtle departures from neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quotation marks omitted). Conditioning application of the religious autonomy doctrine on judicial conceptions of formal "membership" fails this constitutional standard by preferring religious groups with clearly and broadly defined membership doctrines and practices over religious groups with ambiguous or narrower rules or no conception of formal membership at all.

American religious participation is immensely diverse and varied, reflecting the extraordinary diversity of the country as a whole and the freedom enjoyed by Americans "to organize voluntary religious associations to assist in the expression and dissemination of any religious Doctrine." *Watson*, 80 U.S. (13 Wall.) at 728–29; *see also Hosanna-Tabor*, 565 U.S. at 189 (emphasizing "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations"). There are roughly 350,000 religious congregations in the United States. *See* "Fast Facts about American Religion," Hartford Institute for Religion Research, http://www.hirr.hartsem.edu/research/fastfacts/fast_facts.html#numcong (last accessed Nov. 16, 2018). Hundreds of thousands of those congregations make up 236 distinct religious bodies, according to the most recent U.S. Religion Census (the leading empirical study of religious people in the United States). Clifford Grammich et al., *2010 U.S. Religion Census: Religious Congregations & Membership Study*, vii (2012). There are, moreover, approximately 35,500 independent congregations—a "very fluid grouping of churches" with roughly 12 million "adherents." *Id.* at xv, 688.

Unsurprisingly, it is impossible to distill a single definition of "membership" from this pool of religious diversity. *See id.* at xvi (researchers explaining that they measure "total adherents," which includes "those regularly attending services," because "there is no generally acceptable definition of membership applicable across [religious] bodies"). Different religious groups define membership differently based on different conceptions of what it means to be a member. Some may have broad definitions and some may have narrow definitions and some distinguish between different types of members. For example, some Unitarian Universalist "congregations have only one category of membership, whereas other congregations maintain several categories of membership (for example, voting, associate, student, and inactive)." *Categories of Membership: Writing Congregational Bylaws*, Unitarian Universalist Association, https://www.uua.org/leadership/learning-center/governance/bylaws/membership/ 48038.shtml (last accessed Nov. 16, 2018). Many non-Christian religions do not link membership exclusively to a particular congregation. *See Summary*, *Religious Congregations and Membership* Study, 2000, http://www.thearda.com/Archive/Files/Descriptions/RCMSST.asp (last accessed Nov. 16, 2018).

In fact, some minority religious organizations do not have *any* formal membership, a decision that is often rooted in their theology and intentional religious structure. The Plymouth Brethren, the evangelical Christian movement *amicus* Steward Ministries supports, is one such example. "Because of the emphasis on fellowship rather than on membership in the assemblies of Christian brethren, membership

rolls are a rarity," and the association between separate Brethren assemblies is loose and informal. Harold Mackay, *Who are the Brethren?*, http://www.believershome.com/html/who_are_the_brethren.html (last accessed Nov. 16, 2018). The connection between individual adherents is "the Name of the Lord Jesus Christ." *Id.*

The ability to define (or not) formal membership is plainly the kind of core religious "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" that is protected by the First Amendment. *Kedroff*, 344 U.S. 94.

As a consequence, applying the religious autonomy doctrine only to disputes between religious organizations and their formal members impermissibly discriminates against religions without clearly defined membership structures or processes. The rule adopted by the Oklahoma Supreme Court will disproportionately "impose burdens," *Lukumi*, 508 U.S. at 543, on those religious groups—particularly small, minority sects—that subscribe to a narrow or idiosyncratic conception of membership or even lack or deliberately eschew membership structures entirely. Such disparate treatment is starkly contrary to the Constitution's free exercise guarantee, which "naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs," and to the "history and logic of the Establishment Clause," which ensures that government cannot "prefer one religion over another." *Larson*, 456 U.S. at 245–46 (quotation marks omitted).

Thus, to the extent that the identity of the parties is relevant to the applicability of the religious autonomy doctrine, *but see* Petition for Certiorari at 21–24, the Oklahoma Supreme Court's line-drawing is much too narrow. "Because virtually every religion in the world is represented in the population of the United States, it would be a mistake" to focus on a "term" or "concept" like "membership"—which "some [churches] eschew"—"as central to the important issue of religious autonomy[.]" *Hosanna-Tabor*, 565 U.S. at 199, 202 (Alito, J., concurring) (counseling against focusing on the term "minister" and "the concept of ordination" in the context of the ministerial exception). Failure to set a broad standard would particularly harm minority faith groups, whose membership or participation practices are unfamiliar to courts and litigants. A constitutionally sound approach must account for disparate religious views.

B. The membership test articulated by the Oklahoma Supreme Court will require courts to decide religious questions.

The religious autonomy doctrine protects the power of religious groups "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. But the Oklahoma Supreme Court's rule treating a narrow judicial definition of "membership" as a precondition to applying religious autonomy doctrine will force courts into answering the religious questions that the doctrine seeks to avoid.

To begin, the question of "who is the church"—*i.e.*, who are the chosen, faithful, saved, elect, true believ-

ers—has plagued theologians of many faiths for centuries. Questions of membership are merely another way of asking this question: Who constitutes the church, synagogue, temple, faith, or religion? Indeed, it is difficult to define a religious sect or organization without reference to its members; at least in some circumstances, a religious organization might be seen as the sum total of its members. *E.g.*, 1 Cor. 12:27 (KJV) ("Now ye are the body of Christ, and members in particular."); *see also In re Mt. Calvary Methodist Protestant Church Trustees*, 116 A. 319, 320 (Pa. 1922) (explaining that "the members constitute the individual church"). Thus, often the question whether a particular individual is a member, like "[t]he question whether an employee is a minister[,] is itself religious in nature, and the answer will vary widely." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

Moreover, because they are central to the identity and definition of religious faiths, issues of membership commonly raise core doctrinal matters. *See, e.g.*, *Paul v. Watchtower Bible & Tract Soc. of N.Y., Inc.*, 819 F.2d 875, 881 (9th Cir. 1987) (holding that Jehovah Witnesses' membership rules were "part of its religious teachings"); *Canovaro v. Bros. of Order of Hermits of St. Augustine*, 191 A. 140, 145 (Pa. 1937) ("Church membership is an ecclesiastical matter, not temporal."); *cf. Watson*, 80 U.S. (13 Wall.) at 713, 717 (holding that "question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church" was "ecclesiastical").

In many religious groups, membership involves the judgment that an individual has subscribed to

particular doctrines. *Askew v. Trustees of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 419 (3d Cir. 2012) (defendant Church's membership "conditions an individual's membership on living in conformity with the 'doctrine of the Church'"). For example, "[m]embership requires commitment to sound doctrine as expressed in our Statement of Faith." Distinctives of the Evangelical Free Church of America, https://www.efca.org/resources/document/efca-distinctives (last accessed Nov. 16, 2018). Other religious groups require members to participate in a formal instructional class: "completion of some form of instruction classes or 'membership classes' is normally required of non-Lutherans who wish to become communicant members of [Lutheran Church Missouri Synod] congregations." *Frequently Asked Questions – Doctrine*, Lutheran Church Missouri Synod, https://www.lcms.org/ about/beliefs/faqs/doctrine (last accessed Nov. 16, 2018).

In other instances, membership corresponds closely with ethnicity: "many Orthodox churches [] consider as their members all representatives of corresponding ethnicities living in the country" such that "all Armenians, Serbians, or Greeks living in the USA would be seen as the members of the Armenian, Serbian or Greek Orthodox Churches." Association of Religion Data Archives, *Summary*, *Religious Congregations and Membership Study*, *supra*.

Adjudicating membership thus will often entail answering plainly religious—and often challenging—questions. As an initial matter, a membership requirement raises high-level, metaphysical questions

about how religious groups themselves are defined, such as:

- Are congregations all that matter, or is the broader faith group the appropriate benchmark? *The Constitution of the Presbyterian Church (U.S.A.)* 301 (2014) ("The faith we confess unites us with the one, universal church. The most important beliefs of Presbyterians are those we share with other Christians").

- Are Anglicans, Baptists, Catholics, Episcopalians, Methodists, Pentecostals, Seventh-day Adventists, and members of the Church of Jesus Christ of Latter-day Saints all "members" of the Christian faith, or is each a religion unto itself?

Courts will further have to confront a host of particularized questions about whether membership in a specific religious group necessitates active worship with other adherents, subscription to a particular statement of faith, the performance of certain sacral practices, a certain familial history, or contribution of money to a local congregation:

- If a Sikh moves to the middle of Wyoming where there is no Gurdwara, does he cease being a "member" of Sikhism?

- To be a "member" of the Jewish faith, is Jewish descent sufficient, or must one financially support a local synagogue? Lisa Miller, *Young Jews Rebelling Against Paying Dues*, Wash. Post, Jan. 18, 2013, https://wapo.st/2PQSwl7.

- If one meditates on the Buddha in the confines of one's home or on the subway, is she a "member" of

the Buddhist faith, or must she attend a Buddhist temple? *Still, In the City: Creating Peace of Mind in the Midst of Urban Chaos* (Angela Dews, ed., 2018) (collecting stories of urban Buddhism, where a subway in New York City can become a moving temple).

- Are baptized individuals who attend services only at Christmas and Easter "members" of their local church? *See* Frank Newport, *Five Key Findings on Religion in the U.S.*, Gallup (Dec. 23, 2016), https://news.gallup.com/poll/200186/five-key-findings-religion.aspx (explaining that while 56 percent of Americans claim to be members of a church, synagogue, or mosque, only 36 percent of Americans report attending a religious service on a weekly basis).
- If a Zoroastrian marries a non-Zoroastrian is he no longer a "member"? Laurie Goodstein, *Zoroastrians Keep the Faith, and Keep Dwindling*, N.Y. Times, Sept. 6, 2006, https://www.nytimes.com/2006/09/06/us/06faith.html ("Zoroastrians . . . are divided over whether to accept intermarried families and converts and what defines a Zoroastrian.").
- Are adherents of certain Christian sects—like the Plymouth Brethren—who eschew the concept of local church "membership," nonetheless "members" of a religious body?
- Which mosque is a Muslim actually a "member" of? Association of Religion Data Archives, *Summary*, *Religious Congregations and Membership Study*, *supra* ("Since western membership concepts do not apply to mosques, . . . two mosques that are in close

> proximity may be claiming many of the same people . . . That is, a mosque with 5,000 adherents may be claiming most of the same people that a neighboring mosque with 3,000 adherents is claiming.").

The questions are endless, the answers nearly as infinite.

Whatever their answers, one thing is certain—the questions the Oklahoma Supreme Court's narrowly defined membership rule would require courts to ask are inherently and impermissibly intertwined in matters of religious dogma. If "litigation is made to turn on the resolution by civil courts of [such] controversies over religious doctrine and practice," courts will necessarily be embroiled in difficult doctrinal questions in contravention of the Establishment Clause. *Presbyterian Church*, 393 U.S. at 449; *see also Milivojevich*, 426 U.S. at 709–11.

The decision below proves the point. In its application of a threshold requirement of "membership," the Oklahoma Supreme Court engaged in precisely the type of doctrinal hairsplitting outlined above by making a distinction between "Christian" and "Presbyterian." The court explained that Doe "wanted to be baptized into the *Christian* faith, not to become a member of [Petitioners'] church" and did not "***become a full member***" of the church. App. 3, 8 (quotation marks omitted). Implicit in this critical sentence are religious judgments: that baptism did not make Doe a member of the church under either normative principles or Presbyterian doctrine; and that Presbyterianism is distinguishable from Christianity. Neither are within the province of the judiciary to decide.

C. Precedent forecloses entirely conditioning the religious autonomy doctrine on church membership.

Moreover, the Oklahoma Supreme Court's application of a threshold membership requirement is utterly at odds with this Court's application of the religious autonomy doctrine. Many of this Court's canonical cases applying the doctrine have involved disputes over composition of the church where questions about membership and consent were far from settled. Thus, *Watson*—where the doctrine first began to take shape—involved the "question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church" with each side counting "distinct members and officers," and "each claiming to be the true . . . Church and denying the right of the other to any such claim." 80 U.S. (13 Wall.) at 717. Similarly, *Kedroff* centered on a dispute over the true archbishop—whether the archbishop appointed by the Patriarch of the Russian Orthodox Church or the archbishop elected "by the convention of American churches." 344 U.S. at 95–97. *Milivojevich* likewise focused on a disagreement over the proper bishop (and "control") of the American-Canadian Diocese of the Serbian Orthodox Church. 426 U.S. at 697–98. And *Presbyterian Church* involved two local congregations—Hull Memorial Presbyterian Church and Eastern Heights Presbyterian church—that "renounced . . . the jurisdiction and authority" of the Presbyterian Church in the United States. 393 U.S. at 441–43.

Far from being disputes between parties who "freely . . . agree[d] and consent[ed] to th[e] church's ecclesiastical jurisdiction," or a church and its formally recognized members, App. 14, in all of these

cases the parties rejected the authority and control of the other side. Yet, in all of these cases this Court nonetheless applied the religious autonomy doctrine. Thus, *Watson*, *Kedroff*, *Milivojevich*, and *Presbyterian Church* illustrate that the *sine qua non* for application of the religious autonomy doctrine is not membership *per se*, but rather whether the dispute requires courts to inject themselves into matters of religious doctrine or governance.

Such questions of religious doctrine or practice can arise in a variety of situations, and it is inappropriate for courts to resolve them, even where the dispute is not between a religious body and its members. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) ("The applicability of the doctrine does not focus upon the relationship between a church and [third party]."); *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995, 998–99 (D. Minn. 2013) (dismissing claims that hot dogs produced by secular corporation were not "100% kosher," because they could not be resolved "without delving into questions of religious doctrine"), *vacated on other grounds*, 747 F.3d 1025 (8th Cir. 2014).

Here, resolution of Doe's suit would require the district court to determine the contours of one of "*the most sacred beliefs of th[e] religious institution*," the "*sacrament*" of baptism. App. 101. Clearly this is a doctrinal matter that—regardless of Doe's membership status—is improper for a civil court to decide.

III. THIS COURT SHOULD CLARIFY THAT THE RELIGIOUS AUTONOMY DOCTRINE IS A THRESHOLD ISSUE.

This Court should grant certiorari to clarify that the application of the religious autonomy doctrine—whether as a jurisdictional limitation or an affirmative defense—must occur in a manner that preserves sensitive Religion Clause rights. *See* Petition for Certiorari at 24–31.

That courts are categorically barred from resolving "controversies over religious doctrine," *Milivojevich*, 426 U.S. at 709–11 (quoting *Presbyterian Church*, 393 U.S. at 449), strongly suggests that the religious autonomy doctrine is jurisdictional, *see* App. 21. But even as an affirmative defense, religious autonomy claims should function like a form of souped-up qualified immunity.

This reflects the reality that religious autonomy doctrine not only preserves the individual rights of religious groups to determine their own affairs, but also prevents the State from becoming unnecessarily entangled in those affairs. *Conlon*, 777 F.3d at 836 ("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"); *Sixth Mount Zion*, 903 F.3d at 118 n.4 (the doctrine is "structural limitation imposed on the government" that safeguards courts from being "impermissibly entangle[d] . . . in religious governance and doctrine").

Contrary to the majority opinion below, then, this approach would resist unnecessary discovery and in-

stead require that religious autonomy questions be resolved "early in litigation," to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1; Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 292–293 (2012) (autonomy issues must be decided at the outset of the lawsuit). Cases that proceed unnecessarily transgress the structural separation of church and state, making "the discovery and trial process itself a [F]irst [A]mendment violation." *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011). As this Court has explained, the "very process of inquiry" may otherwise "impinge on rights guaranteed by the Religion Clauses" where the inquiry probes internal church affairs. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *accord Skrzypack v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (unnecessary proceedings can "only produce by their coercive effect the very opposite of that separation of church and State contemplated by the First Amendment" (alteration omitted)).

Indeed, the religious autonomy doctrine is properly understood not just as an immunity from liability, but also from unnecessary trial or litigation, and should be considered on interlocutory appeal. *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018) (granting interlocutory appeal of church autonomy question implicated in discovery that would otherwise be "effectively unreviewable" later in the case), *petition for cert. filed sub nom. Whole Woman's Health v. Texas Catholic Conference of Bishops*, No. 18-622 (U.S. Nov. 12, 2018); *McCarthy*

v. Fuller, 714 F.3d 971, 974–76 (7th Cir. 2013) (coercive "governmental intrusion into [church] religious affairs" would cause "irreparable" harm, "just as in the other types of case in which the collateral order doctrine allows interlocutory appeals"); *Heard v. Johnson*, 810 A.2d 871, 876–77 (D.C. 2002) (autonomy 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" (citations and quotation marks omitted)); *see also* Peter Smith & Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) (church autonomy rights "closely resemble[ ] qualified immunity for purposes of the collateral-order doctrine").

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to clarify the scope, contours, and application of the religious autonomy doctrine.

Respectfully submitted,

THOMAS H. DUPREE JR.
Counsel of Record
ANDREW G. I. KILBERG
T. ELLIOT GAISER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Amicus Curiae

November 19, 2018