No. 18-500

IN THE
Supreme Court of the United States

THE FIRST PRESBYTERIAN CHURCH U.S.A. OF TULSA, OKLAHOMA, *ET AL.*, *Petitioners*,

v.

JOHN DOE, *Respondent*.

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

**Brief *Amicus Curiae* of
Conservative Legal Defense
and Education Fund
in Support of Petitioners**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE FIRST AMENDMENT TERM "RELIGION" HAS A FIXED MEANING WHICH LIMITS THE JURISDICTION OF THE STATE, INCLUDING THE JUDICIARY 6

A. "WORDS MUST BE GIVEN THE MEANING THEY HAD WHEN THE TEXT WAS ADOPTED" 6

B. RELIGION ENCOMPASSES THOSE DUTIES OWED EXCLUSIVELY TO GOD, NOT SUBJECT TO THE JURISDICTION OF THE STATE 7

II. PETITIONERS' BAPTISMAL MINISTRY IS OUTSIDE THE JURISDICTION OF THE STATE OF OKLAHOMA 12

A. AS A DUTY OWED EXCLUSIVELY TO GOD, CHRISTIAN BAPTISM IS OUTSIDE THE JURISDICTION OF THE STATE 12

B. THE STATE CANNOT DICTATE HOW THE CHURCH IS TO BE GOVERNED 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

HOLY BIBLE
Matthew 3:1-8 13
Matthew 5:16 13
Matthew 18:15-17 18
John 1:23-34 13
Acts 4:5 13
Acts 4:18 13
Acts 4:19 13
Acts 4:21 13
Acts 5:17-18 13
Acts 5:19-22 14
Acts 5:27-29 14
Acts 5:40 14
I Timothy 3:1-13 17
Titus 1:5-11; 2:1-15 17

CONSTITUTION
First Amendment, U.S. Constitution . . . . . 2, *passim*
Article I, Virginia State Constitution 2

STATUTES
Virginia Act for Establishing Religious Freedom (1785), reprinted in 5 The Founders' Constitution at 84 14
Virginia Declaration of Rights, Section 16 (1776) reprinted in 5 The Founder's Constitution at 70 . . . . 2, 10

CASES
Employment Div. v. Smith, 494 U.S. 872 (1990) . 15

Glassroth v. Moore, 229 F. Supp. 2d. 1290 (M.D. Ala. 2002) 5
Holmes v. Jennison, 39 U.S. 540, 570-71 (1840) . . 7
Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952) 4,17
Marbury v. Madison, 5 U.S. 137 (1803) 6,7
Reynolds v. United States, 98 U.S. 145 (1879) 2,7,8,9
Watson v. Jones, 80 U.S. 679 (1872) 1,4

MISCELLANEOUS

Mark A. Beliles & Jerry Newcombe, Doubting Thomas: The Religious Life and Legacy of Thomas Jefferson (Morgan James Faith: 2014) 9
Daniel Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State (NYU Press: 2003) 9
Thomas Jefferson, Letter to the Danbury Baptist Association, reprinted in 5 The Founders' Constitution at 96 9
Peter A. Lillback, Wall of Misconception, (Providence Forum Press: 2007) 9
James Madison, *Memorial and Remonstrance* reprinted in 5 The Founders' Constitution at 82 8,11,12,16
A. Scalia & B. Garner, Reading Law (West: 2012) 6
W. Van Alstyne, First Amendment: Cases and Materials at 1022 (Found. Press: 1991) 5

INTEREST OF THE *AMICUS CURIAE*[1]

Conservative Legal Defense and Education Fund ("CLDEF") is a nonprofit educational, legal, and religious organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code that was founded in 1982. CLDEF seeks, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

SUMMARY OF ARGUMENT

From its inception in Watson v. Jones, 80 U.S. 679 (1872), this Court's "religious autonomy doctrine" has rested on common law reasoning and American tradition. When this Court grounded the doctrine in the two First Amendment religion guarantees, it failed to examine the original text and its historic context, substituting its own understanding in disregard of its duty to ascribe to the words the meaning they had when the text was adopted. This longstanding failure to adhere to the fixed-meaning canon has now opened the door for lower courts to ignore the jurisdictional line separating the powers of the Church and State as

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

recognized by the No Establishment and Free Exercise guarantees.

In the case of Reynolds v. United States, 98 U.S. 145 (1879), the Court began its analysis by expounding on the meaning of "religion" — the key word which governs the scope of both clauses. Finding no definition in the constitutional text, the Court conducted a limited historic inquiry into the origin of the two freedoms. Based on that modest effort, the Court determined that the word "religion," as it appears in the First Amendment ratified in 1791 meant the same as it did in 1785 when James Madison, Thomas Jefferson, and the Virginia General Assembly all traced its meaning back to the June 12, 1776 Virginia Declaration of Rights, which asserted:

> [t]hat **religion**, or the duty which we owe to our Creator, and the manner of discharging it, can be directed **only** by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion.... [Virginia Declaration of Rights,[2] Section 16 (1776) reprinted in 5 The Founder's Constitution at 70 (emphasis added).]

Although this Court began in Reynolds to apply this jurisdictional distinction, albeit in a nascent form, it later abdicated the fixed-meaning canon, forging its own understanding of the two freedom of religion guarantees. Neglecting to adhere to the original public

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[2] The Declaration of Rights was later incorporated into the Virginia State Constitution as Article I.

meaning of "religion" as a term of jurisdiction, this Court has given itself — and lower courts both state and federal — wide latitude to decide for themselves what is "religious" and thus for the church, and what is "secular" and thus for the State. But "religion" and "religious" have very different meanings.

Religion is quintessentially a jurisdictional term. Both the No Establishment and the Free Exercise guarantees protect the people from the misuse of the power of the State to coerce or punish a person for performing a duty that, by nature, he owes **only** to the Creator. In sum, freedom of religion protects individuals, both religious and secular, from State intrusion with respect to those duties that, by nature, each individual owes exclusively to the Creator.

In the case under review, the trial judge correctly applied the jurisdictional principle underpinning the religious autonomy doctrine. The trial judge granted Petitioners' motion to dismiss Doe's complaint alleging breach of contract and negligence arising out of a baptismal service. On appeal, the Oklahoma Supreme Court initially affirmed, only then to reverse itself, putting the entire baptismal dispute under the legal purview of a state judge, because it believed that Doe had not "agreed and consented" to be governed by the church.

But it is not for Doe, nor even the Petitioners, to decide whether this dispute belongs to the Church or to the State. Rather, jurisdiction is fixed by the nature of the duty — whether it is subject to enforcement only by "reason and conviction," or by "force or violence."

By its very nature, public baptism, like all proselytizing outreaches undertaken by Petitioners, appeal only to a person's individual conscience, not by threat of force or violence. Therefore, Doe's dispute is under the jurisdiction of the Church, not the State.

Not only should this petition be granted because the Oklahoma Supreme Court seriously misapplied this Court's religious autonomy doctrine, but granting the petition would provide this Court with the opportunity to restore the fixed textual meaning of the constitutional term "religion," thereby restoring the jurisdictional principle undergirding the separation of church and state.

ARGUMENT

Petitioners trace the "religious autonomy doctrine" back to a well-settled judicial understanding of the relation between church and state first articulated by this Court in 1872,[3] then again in 1952[4] "rooted ... in both Religion Clauses of the First Amendment." Based on those principles, Petitioners make a compelling argument in support of their Petition. *See* Petition for a Writ of Certiorari ("Pet.") at 5, 13, and 31. Indeed, Petitioner has uncovered a minefield of splits, reversals, divides, confusion, and other good reasons for granting review on the merits. *See* Pet. at 24-31.

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[3] Watson v. Jones, 80 U.S. 679 (1872).

[4] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952).

That showing alone is reason enough to grant the Petition.

But there is another good and sufficient reason favoring review on the merits. To eliminate confusion, this Court needs to re-examine the original public meaning of the term "religion" — the "differentiating key noun" that is the fulcrum of the "no establishment" and "free exercise" guarantees, and yet a constitutioal term that has gone virtually undefined by this Court. *See* W. Van Alstyne, First Amendment: Cases and Materials at 1022 (Found. Press: 1991). This omission has left the lower courts to fend for themselves, as did District Judge Myron Thompson who, in Glassroth v. Moore, 229 F. Supp. 2d. 1290 (M.D. Ala. 2002), confessed that he could not "formulate" any one definition of religion, curiously asserting that he thought to do so would be "unwise, and even dangerous." *Id.* at 1313, n.5, 1314.

Judge Thompson is not alone. In his First Amendment teaching materials, William Van Alstyne, Perkins Professor of Law at the Duke University School of Law, assembled an "assortment of dictionary definitions" of "religion" — a total of six — with the observation that, under the constitutional presumption of generous construction, religion "might readily embrace *all* of these dictionary meanings, even if some of these were not necessarily generally recognized in common usage in 1787 or 1789." Van Alstyne, First Amendment at 1022-23. The Court's failure to identify and apply a fixed definition of "religion" has opened the door to a floodgate of lower court decisions threatening the jurisdictional principle undergirding

the autonomy of the Church and other entities, contrary to the no establishment and free exercise guarantees.[5] *See* Pet. at 24-31.

I. THE FIRST AMENDMENT TERM "RELIGION" HAS A FIXED MEANING WHICH LIMITS THE JURISDICTION OF THE STATE, INCLUDING THE JUDICIARY.

A. "Words must be given the meaning they had when the text was adopted."[6]

Although hotly debated today, under Scalia and Garner's **"Fixed-Meaning Canon,"** the meaning of words in constitutions "do[] not alter[;] [t]hat which [they] meant when [they were] adopted [they] mean[] now." A. Scalia & B. Garner, Reading Law at 81 (West: 2012). There can be no doubt that this interpretive canon should control our understanding of the United States Constitution and its Amendments. *Id.* at 80-81. Indeed, as Chief Justice John Marshall attested in Marbury v. Madison, 5 U.S. 137 (1803):

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[5] A settled meaning of the term "religion" would help resolve contentions disputes over "religious" displays on public property, as evidenced in the fight over the Bladensburg World War I War Memorial with Latin Cross which is currently being briefed before this Court. *See* American Legion v. American Humanist Association (No. 18-18); Petition for Certiorari (June 29, 2018); Brief *Amicus Curiae* of Citizens United, *et al.* (July 27, 2018).

[6] A. Scalia & B. Garner, Reading Law at 78 (West: 2012).

> That the people have an original right to establish, for their **future** government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The principles, therefore, so established are deemed fundamental ... and ... are designed to be **permanent.** [Marbury at 176 (emphasis added).]

B. Religion Encompasses Those Duties Owed Exclusively to God, Not Subject to the Jurisdiction of the State.

Seventy-six years after Marbury, this Court faced for the first time a claim arising under one of the religion guarantees. Brought by a member of the Mormon church contesting his prosecution for the crime of bigamy for having married more than one wife, the claimant argued that his conviction was prohibited by the guarantee of his "free exercise of religion." Reynolds v. United States, 98 U.S. 145 (1879). In keeping with the rule that in "expounding the Constitution ... every word must have its due force, and appropriate meaning,"[7] and in recognition that the key word in the guarantee is "religion," the Court began its analysis. Correctly noting that "[t]he word 'religion' is not defined in the Constitution," and in further keeping with the "fixed-meaning canon," the Court went "elsewhere ... to ascertain its meaning, and

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[7] Holmes v. Jennison, 39 U.S. 540, 570-71 (1840).

nowhere more appropriately ... than to the history of the times in the midst of which the provision was adopted." Reynolds at 162.

The Court's quest led it to the Virginia House of Delegates, where in 1784 "that State ha[d] under consideration 'a bill establishing provision for teachers of the Christian religion.'" *Id.* at 163. This bill, the Court declared, "brought out a determined opposition[,] [a]mongst [which] was [the] widely circulated and signed" *Memorial and Remonstrance* prepared by James Madison, "demonstrat[ing] 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government." *Memorial and Remonstrance,* reprinted in 5 The Founders' Constitution at 82 (item # 43) (P. Kurland & R. Lerner, eds., Univ. Chi. Press: 1987). One year later, the Court observed, after the Christian-teacher bill was defeated, Thomas Jefferson's bill "'for establishing religious freedom,'" was enacted, denying to a civil magistrate any and all jurisdiction over "the field of opinion," permitting the "civil government [and] its officers to interfere [only] when principles break out into overt acts against peace and good order." *Reynolds.* at 163.

This jurisdictional principle, the Reynolds Court observed, was adopted in 1791 in its present form "at the first session of the first Congress [as] proposed with others by Mr. Madison." *Id.* at 164. And, as the Court concluded in Reynolds, in 1801, newly elected President Jefferson popularized this jurisdictional understanding of the meaning of "religion" as it

appears in the First Amendment. In a letter to the Danbury Baptist Association, Jefferson wrote:

> Believing with you that **religion** is a matter which **lies solely between man and his god;** that he owes account to noneother [sic] for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus **building a wall of separation** between church and State....[8] [reprinted in 5 The Founders' Constitution at 96 (emphasis added).]

Apparently satisfied that it had sufficiently addressed the meaning of "religion," as it appeared in the First Amendment, the Reynolds Court turned its attention to the question whether laws prohibiting bigamy were within or outside the jurisdiction of civil government. *Id.* at 164-66. Unnoticed by the Reynolds justices, the seed bed for the jurisdictional definition of religion in the First Amendment is found in the June

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[8] The limitations of the "wall of separation" metaphor fashioned by Jefferson as a legal test are beyond the scope of this *amicus* brief, but have been discussed extensively by scholars. *See, e.g.*, Daniel Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State (NYU Press: 2003); Peter A. Lillback, Wall of Misconception, (Providence Forum Press: 2007); Mark A. Beliles & Jerry Newcombe, Doubting Thomas: The Religious Life and Legacy of Thomas Jefferson (Morgan James Faith: 2014).

12, 1776 Virginia Declaration of Rights, Article I, Section 16, of which reads in full:

> That **religion**, or **the duty which we owe to our Creator**, and the **manner of discharging** it, can be directed only by **reason and conviction, not by force or violence**; and therefore all men are equally entitled to the **free exercise of religion**, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love and charity towards each other. [*Id.* (emphasis added).]

Three things stand out. First, the Virginia Declaration contains an explicit definition of "religion" — a duty that is owed to the Creator, and the manner of discharging it can **only** be directed by reason and conviction, not by force or violence. Second, this definition relates specifically to "the free exercise of religion." Third, "religion" is a jurisdictional term distinguishing between:

> (i) duties owed **to God**, which are subject only to an appeal to an individual's conscience by "reason and conviction" and therefore unenforceable by the state; and
>
> (ii) duties owed **to the state**, where obedience may be compelled by "force or violence" through the power of the sword given to civil government.

Notably, Madison remonstrated against the bill providing for government funding of Christian teachers "[b]ecause we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.'" *Memorial and Remonstrance*. But Madison did not just rest his case upon that definition. Rather, he explained its origin and its justification. He stated, "[t]his right is in its nature an unalienable right," outside the authority of civil government, because it is a "duty towards the Creator." *Id.* As to such duties owed to the Creator, Madison continued, "every man [must] render to the Creator such homage and such only as he believes to be acceptable to him," because:

> [t]his duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its cognizance.** [*Id.* (emphasis added).]

II. PETITIONERS' BAPTISMAL MINISTRY IS OUTSIDE THE JURISDICTION OF THE STATE OF OKLAHOMA.

A. As a Duty Owed Exclusively to God, Christian Baptism Is Outside the Jurisdiction of the State.

On June 9, 2014 — 229 years after James Madison's June 30, 1785 *Memorial and Remonstrance* — the John Doe in this case "filed suit in the Tulsa County District Court" asking the court to take cognizance of a dispute regarding a church baptismal service. Pet. at 7-8. Alleging "claims for (1) negligence, (2) breach of contract, and (3) outrage," Doe seeks "monetary damages" caused him by the church's action treating Doe's baptism as a public event, in violation of a promise made to Doe by the Church. Pet. at 8. In response to Doe's complaint, Petitioners maintained that the district court lacked "'jurisdiction over ecclesiastical matters.'" *Id.* In particular, Petitioners asserted that "the Church Constitution requires baptisms to be performed before the congregation ... 'bear[ing] witness to the one body of Christ, into whom we are baptized.'" *Id.* at 9. Additionally, as the Tulsa County District Court itself found, "'Presbyterian polity shows that the publication of the baptism is *a required part* of making public a profession of faith'" beyond the four walls of the church building. *Id.* Indeed, citing church publications, the district court judge correctly concluded: "[The] publication about baptism appears to be the Presbyterian way of telling the world that one has become a Christian." *Id.* at 10.

Scriptural support for Petitioners' view of public profession abounds. In the Sermon on the Mount, Christ instructed his disciples to speak and to live so that others might hear and believe, and they too would glorify the Father in heaven. *See Matthew* 5:16. Indeed, Christianity is a proselytizing faith. Thus, baptizing is not "put under a bushel basket," as if it were a hidden rite for the privileged few, but a public act. *See, e.g.*, *Matthew* 3:1-8. Baptism is a very public event in which the individual being baptized is making a public profession of a personal proclamation of commitment to Christ as Savior and Lord that others might see and believe. *See John* 1:23-34.

In the book of Acts the early church encountered opposition to its public proselytizing mission. *See Acts* 4:2. Ordered by the "rulers, elders and scribes," two of the apostles — Peter and John — were thrown in jail, and "commanded ... not to speak at all nor teach in the name of Jesus." *See Acts* 4:5 and 18. In response, the two men answered: "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." *Acts* 4:19. Threatening punishment, but "finding nothing how they might punish them," the rulers "let them go." Acts 4: 21. Not long after, "filled with indignation," the "high priest ... and all they that were with him ... laid their hands on the apostles, and put them in the common prison." *Acts* 5:17-18. The next morning the rulers sent officers to fetch the apostles only to discover that the "angel of the Lord by night" had set them free. *Acts* 5:19-22. After rounding up the previously imprisoned apostles, the religious council found them in contempt, to which Peter and the other apostles said: "We ought to obey

God rather than men." *Acts* 5:27-29. While the council let the apostles go, they beat them and commanded them once again to cease "speak[ing] in the name of Jesus." *Acts* 5:40.

Although Doe is not seeking an order shutting down the Petitioners' proselytizing baptismal policies and practices, he has invoked the jurisdiction of the Oklahoma courts, seeking an award of significant monetary damages, thereby, burdening Petitioners' evangelical ministry. *See* Pet. at 7-8. Should the state courts find Petitioners liable for such a damages award, that order would undermine the very foundation upon which the two Religion guarantees rest.

As Thomas Jefferson so aptly put it, both the No Establishment and Free Exercise guarantees rest on the nature of the created order, and on the nature of the Creator who established that order:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by **temporal punishments or burthens**, or by civil incapacitations ... are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.... [Virginia, Act for Establishing Religious Freedom, reprinted in 5 The Founders' Constitution at 84 (emphasis added).]

Just as the first Christian Apostles rested their claim on an appeal to the law of God, so Jefferson explained that God could have forwarded his kingdom by authorizing the state or the church to use force or violence, but chose not to. Yet, Jefferson observed, it has been "the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own **opinions and modes of thinking** as the only true and infallible, and as such endeavouring to impose them on others...." *Id.* (emphasis added).

Thus, Jefferson's bill establishing "religious freedom" extended to "opinions" generally, religious ones being but one subset, but all matters of opinion being protected by the same jurisdictional line. For this reason, the truth or falsity of an opinion, as a matter of law, is outside the coercive power of the State.

In other words, the jurisdictional barrier invoked by the first-century Christian church applied no matter the subject matter, religious or nonreligious, or the identity of the proselytizer, religious or nonreligious. Or, to restate the case — the truth or falsity of "opinions" belong exclusively to God, and are enforceable only by "reason and conviction," not by "force or violence" wielded by the state. As this Court has affirmed in Employment Div. v. Smith, 494 U.S. 872, 877 (1990), "the 'exercise of religion' ... involves not only belief and profession but the performance of ... physical acts [including] proselytizing...." To open the courthouse door to Doe's damage claims based

upon Petitioners' proselytizing baptismal event would deny the free exercise of religion.

B. The State Cannot Dictate How the Church is to be Governed.

The Oklahoma Supreme Court's ruling that the jurisdictional barrier to the adjudication of Doe's damage claims is nullified by Doe's not being a "church member" violates the No Establishment guarantee. Under the Establishment Clause, it is not within the power of a court to craft exceptions to, or waivers to the freedom of religion guarantees. As Madison wrote in his *Memorial and Remonstrance*:

> **every man** who becomes a member of any particular Civil Society, **[must] do it with a saving of his allegiance to the Universal Sovereign....** [5 The Founders' Constitution at 82 (emphasis added).]

As Madison explained, "The Religion ... of every man must be left to the conviction and conscience of every man [and] what is here a right towards men, is a duty towards the Creator." After all, Madison reasoned, no man can lawfully escape from his individual responsibility to perform those duties owed exclusively to the Creator by following the "dictates of other men;" rather they are duty-bound to exercise their own "reason" and come to their own "convictions." In short, freedom of religion, whether it be an unconstitutional establishment or a prohibited exercise, "is in its nature an unalienable right," one that cannot be compromised. *Id.* Neither guarantee

allows for any judicially created loopholes or exceptions.

Additionally, it is outside the power of the State to dictate how the church is to be governed. It, therefore, is outside the power of the civil authorities to dictate to the church how and by whom its members — the body of Christ — is to function and thrive. *See, e.g., I Timothy* 3:1-13; *Titus* 1:5-11; 2:1-15. By its action limiting the anchoring of the religious immunity doctrine to disputes between members of the same local church, and setting the standard by which membership standards would be enforced, the Oklahoma Supreme Court seized control over the proceeding by which Doe's claims would be adjudicated. Such a judicially dictated transfer of power from the Petitioners to Doe on the sole ground that Doe had not "'***agreed and consented to the ecclesiastical practices of the church***'" (Pet. at 17 (emphasis original)), is unmistakably invalid, being subject only to the "fiat" and "will" of a civil judicial officer "violates our rule of separation between church and state." *See* Kedroff, 344 U.S. at 109-10. As the Kedroff Court observed:

> it would be a vain consent and would lead to the total subversion of ... religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. [*Id.* at 114-15.]

This does not mean that someone wronged by the violation of another's duty owed exclusively to God is left without remedy. The Bible instructs that:

- "[i]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother."
- "But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established."
- "And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican." [*Matthew* 18:15-17.]

If promises of confidentiality were made to Doe, then appropriate relief for injuries caused may be forthcoming out of repentance, forgiveness, and restitution without bringing to bear the enforcement powers of the civil government.[9] All of these matters are outside the jurisdiction of the state and its courts.

The Oklahoma Supreme Court would have it otherwise, ordering the trial court to conduct an "'adversarial hearing' to resolve 'contested issues of fact' about '[w]hat Doe consented to and what the [Church] communicated to Doe.'" Pet. at 33. Such a proceeding would violate the First Amendment's Religion Clauses and therefor cannot be allowed to proceed.

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[9] Numerous mechanisms exist to resolve disputes between and among Christians, both local and national, for-profit and nonprofit, and church-based and para-church.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted,

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