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 a Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF IN OPPOSITION

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

G. STEVEN STIDHAM
StidhamLaw, P.C.
204 Reunion Center
Nine East Fourth Street
Tulsa, Oklahoma 74103
(918) 707-8800

KEITH A. WARD
Keith A. Ward, PLLC
1874 S. Boulder Avenue
Tulsa, Oklahoma 74119
(918) 764-9011

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
mkimberly@
mayerbrown.com

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over the decision below given that it rests on an independent and adequate state-law ground.

2. Whether the Oklahoma Supreme Court's interlocutory reversal of the trial court's dismissal order is a "[f]inal judgment[]" over which this Court has jurisdiction under 28 U.S.C. 1257.

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INTRODUCTION

The petition should be denied for a host of reasons. To begin with, the Court is deprived of jurisdiction twice over: The judgment below rests on an independent and adequate state-law ground, and it is an interlocutory order of a state court. These two glaring jurisdictional deficiencies—which receive little more than a footnote's attention in the petition—are reason enough to deny review.

Even if the Court had jurisdiction, review would be unwarranted.

The first question presented is purely academic; nothing turns on whether the religious autonomy doctrine derives from the First Amendment or the consent of church members. Perhaps more fundamentally, no one disputes that the doctrine rests on the First Amendment's Religion Clauses. As the trial court recognized, moreover, the context in which petitioners raise this issue is "novel and unique," and it is a matter of "first impression across the country." Pet. App. 90-91. There is accordingly no conflict on the question, and it has no practical significance.

The Court cannot reach the second question presented—whether the religious autonomy doctrine is jurisdictional or goes to the merits—unless it first determines that the doctrine applies. But whether the doctrine applies turns on unresolved factual disputes, which is why the Oklahoma Supreme Court remanded to the trial court. For that same reason, the second question is unimportant: Factual disputes often arise in the jurisdictional context just as they do in the merits context, so the question whether of or not the doctrine is jurisdictional will rarely make a practical difference. Moreover, there is no conflict in practice over the second question.

Beyond all that, the decision below is unassailably correct. As the lower court explained, disposition of this case would not embroil the State's civil courts in a theological controversy or a dispute concerning church governance or doctrine. Respondent alleges that petitioners promised him not to widely publicize his baptism. Despite that alleged promise, petitioners gratuitously advertised the fact of his baptism on the internet, placing his life in grave peril and causing him serious injuries when he traveled abroad.

Against this background, respondent's claims require the trial court to determine only whether petitioners made a promise and broke it. This is a simple, secular matter that can be resolved by reference to neutral principles of tort and contract law; in these unusual circumstances (Pet. App. 90-91), it will not require secular judgment concerning church doctrine or governance. The Oklahoma Supreme Court was correct to order the litigation to proceed.

STATEMENT

A. Legal background

1. As a general matter, "[r]eligious organizations come before [civil courts] in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 714 (1871). Civil courts are thus empowered—indeed, bound—to resolve disputes involving churches and other religious organizations, "so long as [the dispute] involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979). The dispute must be capable of

resolution, in other words, according to "neutral principles of law." *Ibid*. Accord *Watson*, 80 U.S. at 714.

2. According to this framework, there are two broad categories of disputes that are generally off limits to civil courts under the so-called religious autonomy or ecclesiastical abstention doctrine.

a. In the first category, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976). Thus, civil courts must defer to church authorities on disputes that are "strictly and purely ecclesiastical," including those "concern[ing] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733.

In this category of cases, certain kinds of disputes will virtually never be appropriate for resolution by civil courts. For example, matters of church structure and governance ordinarily cannot be resolved according to neutral principles of law and are therefore inappropriate for resolution by civil courts. See *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 186-189 (2012) (citing *Serbian E. Orthodox Diocese*, 426 U.S. at 724-725). Similarly, "doctrinal matters" and controversies concerning "tenets of faith" will never be appropriate for resolution by a civil court. *Wolf*, 443 U.S. at 602 (quoting *Maryland & Va. Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)). Questions concerning qualifications for membership in the clergy (*Hosanna-Tabor*, 565 U.S. at 188; *Serbian E. Orthodox Diocese*, 426 U.S. at 698) and

the ownership and allocation of church property (*Wolf*, 443 U.S. at 602; *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969)) also frequently implicate inherently religious matters and are inappropriate for resolution by a secular tribunal.

b. The second category comprises those cases in which the parties have consented to a relevant church rule or an ecclesiastical resolution of their claim, independent of whether the dispute is also capable of resolution in civil court under neutral principles of law. As the Court first said in *Watson*, "[a]ll who unite themselves to [a religious] body do so with an implied consent to [its] government, and are bound to submit to it." 80 U.S. at 729. Thus, in *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), the Court stressed that adjudications by church tribunals on internal matters involving members, employees, or clergy "are accepted in litigation before the secular courts as conclusive, because the parties in interest *made them so*" by consent. *Id.* at 16 (emphasis added).

By joining a church or other religious organization, in other words, "individuals implicitly authorize their religious institutions to make rules and develop doctrine that can promote these shared religious objectives." Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. Cal. L. Rev. 539, 541 (2015). And it "would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Watson,* 80 U.S. at 729.

In this category of cases, courts have refused to entertain claims brought by "an employee of the church" who agreed to be "subject to its internal governance

procedures" (*Bryce* v. *Episcopal Church in Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002)); claims concerning divorce where the parties had "consented to the jurisdiction of the Roman Catholic Church regarding the validity of their sacramental marriage" (*Purdum* v. *Purdum*, 301 P.3d 718, 730 (Kan. Ct. App. 2013)); and claims for tort arising out of a church's disciplinary proceeding where the plaintiff had "freely consent[ed]" to defer to the church body "chosen to interpret and impose" church rules (*Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766, 774 (Okla. 1989)).

B. Factual background

Respondent, who was born in Syria, was raised as a Muslim. Pet. App. 3. He has spent most of his adult life in the United States, and he eventually became interested in converting to Christianity. See *ibid.*

Respondent had helped with various tasks at the home of two members of petitioner, the First Presbyterian Church U.S.A. of Tulsa. Pet. App. 88. After learning that respondent wanted to be baptized, these church members referred respondent to the church's pastor, petitioner James Miller. *Ibid.* Respondent had not attended any services at the church (*ibid.*), and it is undisputed that he was not and never became a member of the church. *Id.* at 2-3, 5.

Respondent recognized that conversion from Islam to Christianity is controversial in the Middle East—so much so that it has been grounds for death by beheading. Pet. App. 6. Moved by his burgeoning faith in Jesus Christ, respondent nevertheless resolved to be baptized before returning to Syria to visit his family there. See *id.* at 96-97. Respondent alleges that he informed petitioners of the serious physical danger he would face if his conversion became public knowledge abroad and that petitioners assured him that his baptism would be

kept private. *Id.* at 6, 38. Petitioners deny these allegations. *Id*. at 3.

Pastor Miller baptized respondent in an untelevised service. Pet. App. 3. The day after the baptism, however, petitioners published notice of respondent's baptism on the internet. *Ibid.*

When respondent thereafter returned to Syria, he was kidnapped and threatened with death for his conversion. Pet. App. 3, 42-43. Respondent alleges that his captors had learned of respondent's baptism from the church's website. *Id.* at 4. Respondent managed to escape captivity, but only after killing one of his abductors in a violent struggle. *Id*. at 3. Respondent asserts that he has suffered significant physical and emotional harm as a result of the ordeal. *Id*. at 3-4.

C. Procedural background

Respondent sued, asserting claims sounding in tort and breach of contract. Pet. App. 1. At the heart of his complaint, respondent alleges that all parties agreed that his baptism, though performed before the congregation, would otherwise be kept quiet. *Id.* at 2, 91.

1. Petitioners moved to dismiss, arguing that they are immune from liability for any cause of action arising out of the baptism. As the lower court described it, petitioners' position was that "all actions related to the baptism of [respondent] are protected from judicial scrutiny under the Free Exercise Clause of the First Amendment." Pet. App. 4. Petitioners thus sought immunity from civil liability because, they asserted, their actions were required by their religion.

The trial court denied the motion. Pet. App. 5. It held that the notice of the baptism on the internet was not part of the baptismal service and thus not protected by the religious autonomy doctrine as an ecclesiastical practice. *Id*. at 4-5. And, according to the trial

court, because respondent was not a member of the church, he did not consent to an ecclesiastical adjudication of his claim or any other church practice beyond "the actual baptism ceremony and service." *Id.* at 5. Thus, petitioners could not claim immunity from liability for publishing notice of respondent's baptism on the internet. *Id.* at 4-5.

Petitioners moved to dismiss a second time, raising essentially the same arguments but framing them in terms of subject matter jurisdiction. Pet. App. 4. Petitioners argued that, because Presbyterian church doctrine requires publicity of the names of those whom it baptizes, publication to the internet was "so intertwined with the baptismal requirements as to render it part of the church doctrinal policy." *Id.* at 6. Because the subsequent publication of notice on the internet was part of the baptismal rite, in other words, petitioners argued that "the church immunity doctrine, rooted in the guarantees of the First [A]mendment, prohibits any secular court from making inquir[ies] into anything relating to [the] baptism." *Ibid.*

The trial court this time granted the motion (Pet. App. 90-103), recognizing that "a non-member's claims of torts and breach of contract in the context of baptism is a case of first impression in Oklahoma and beyond" (*id.* at 93). In the trial court's view, it was required to "make a factual determination about the sincere representation of the Church as far as the sacramental nature of the act of baptism." *Id.* at 7 (emphasis omitted). Relying on the Presbyterian Book of Order, affidavits from church officials, and limited deposition testimony, the court concluded that the publication was indeed a part of the baptism for purposes of the ecclesiastical abstention doctrine and that petitioners were therefore immune from suit. *Id.* 4, 7. According to the court, it therefore lacked subject matter jurisdiction "to parse

out any liability arising from the free exercise of the deeply held sacrament of Christian baptism." *Id.* at 102.

2. The Oklahoma Supreme Court initially affirmed (Pet. App. 19-39) but reversed on respondent's petition for rehearing (*id.* at 1-18).

The supreme court first addressed the trial court's procedural errors, which "alone" required that the case "be remanded back to the trial court." Pet. App. 9-11.

Ordinarily, when the parties submit evidence on a motion to dismiss and the evidence "relates to an element of the cause of action [alleged] by [the plaintiffs], the motion to dismiss for lack of subject matter jurisdiction is converted to one for summary judgment." Pet. App. 9-10 (emphasis omitted). According to this general rule of Oklahoma procedure, if there are material disputes in the evidence, the court must hold a trial or evidentiary hearing. *Ibid.*

The trial court did not take that approach here. It instead entered a "factual determination about [petitioners'] 'sincere representation' of the governing church body's policies regarding the sacramental nature of baptism," without the benefit of a trial or evidentiary hearing. Pet. App. 10 (emphasis omitted). "The findings made by the district court," the supreme court observed, "are pivotal to [respondent's] claims and inextricably intertwined with the issue of subject matter jurisdiction." *Id.* at 8. "Because of [these] disputed material facts," the supreme court held that "this matter was not ripe for summary adjudication and for this reason alone, should be remanded back to the trial court." *Id.* at 10-11.

The Oklahoma Supreme Court went on to explain the particular issues that the trial court would have to resolve. As a starting point, the court concluded that,

for the trial court to adjudicate respondent's case, "it is not necessary * * * to determine * * * doctrinal positions relating to baptism." Pet. App. 7. That is because respondent does not dispute that a baptism in the Presbyterian Church must be open and visible to the congregation.

Thus, in the unique factual context of this case, the question whether respondent's claim may be resolved in civil court turns "on membership in the church" and respondent's consent to the rules of the church. *Id.* at 13. That is, when a claim otherwise turns on neutral principles, a religious organization's "protection from [scrutiny by] secular courts * * * is directly tied to church membership and the consent of the member to enter under the control of the church." *Ibid.* "[T]he foundation for a church to be entitled to" protection from civil-court review in these circumstances is, in other words, "rooted in * * * the consent by the person to be governed by the church." *Id.* at 13-14. As a "shield from liability," the religious autonomy doctrine "evaporates for claims that arise" between the church and a non-consenting third party (*id.* at 13), assuming that it is otherwise not necessary to resolve any doctrinal matters (*id.* at 7).

Applying those principles here, the supreme court ruled that the dismissal of respondent's claim was error because the facts surrounding respondent's consent to the baptism are disputed and must be resolved on remand following further factual development. Pet. App. 10-11.

3. Chief Justice Combs dissented. Pet. App. 19-36. In his view, the religious autonomy doctrine is a jurisdictional bar, not an affirmative defense. *Id.* at 20-27. Furthermore, the motion to dismiss should not in his view have been converted to one for summary judg-

ment under state procedural law, as the majority had held. *Id*. at 28-30.

Chief Justice Combs recognized that, insofar as the religious autonomy doctrine applies to "actions of church disciplinary authorities or tribunals," the questions of consent and membership are relevant. Pet. App. 31. But outside that context, the question is "whether the underlying dispute is a secular one, capable of review by a civil court, or an ecclesiastical one about discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Ibid*. He took the view that respondent's claims are essentially ecclesiastical and cannot be resolved by a secular court according to neutral principles. *Id*. at 34-35.

Justice Reif separately dissented, taking the view that the issues presented are matters for the legislature. Pet. App. 37.

Justice Winchester also separately dissented. Pet. App. 38-39. He would have held that respondent had failed to state a claim under contract or tort law. *Ibid*.

REASONS FOR DENYING THE PETITION

Review should be denied for several independently fatal reasons. As an initial matter, the Court doubly lacks jurisdiction: (1) The decision below rests on independent and adequate state-law grounds, and (2) the Oklahoma Supreme Court's judgment is non-final.

Besides that, the first question presented is academic; it makes no difference to the outcome of the case, and it does not implicate any division of authority among the lower courts. Petitioners' true, underlying argument—that churches should be immune from scrutiny in civil court for otherwise tortious actions that are dictated by church doctrine—is a radical and unsupported position not embodied in either of the questions presented in the petition.

The second question presented—whether the religious autonomy doctrine is jurisdictional or concerns the merits—arises only if the doctrine is found applicable here. But regardless of whether the issue is jurisdictional, further factual development is needed to answer whether the doctrine applies. That is why the case was remanded to the trial court. Review before those proceedings are complete would be wildly premature. In any event, the issue lacks importance, and there is no conflict.

I. THIS COURT LACKS JURISDICTION

The petition should be denied for the threshold reason that the Court lacks jurisdiction.

A. The decision below rests on independent and adequate state-law grounds

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) (collecting cases). Crucially here, "[t]his rule applies whether the state law ground is substantive or procedural." *Ibid.*

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman*, 501 U.S. at 729. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Ibid.* (citing *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected

its views of federal laws, our review could amount to nothing more than an advisory opinion.")).

That rule precludes a grant of the petition in this case. As the lower court explained, "[t]he foundational inquiry is to discern exactly what [respondent] asked [petitioners] to do with respect to baptism, what [petitioners] agreed to perform for [respondent], and ultimately the nature and extent of [respondent's] consent surrounding baptism." Pet. App. 7 (emphasis omitted).

Yet these "factual inquiries * * * are clearly disputed." Pet. App. 7 (emphasis omitted). Thus, "[petitioners'] motion to dismiss for lack of subject matter jurisdiction should be treated as a motion for summary judgment." *Id.* at 8.

The trial court did not so treat the motion, instead disposing of the motion under Oklahoma's procedural rule for dismissal. Pet. App. 8. "The trial court erred" in taking that course. *Ibid.* Thus, the Oklahoma Supreme Court concluded that, "[b]ecause of [these] disputed material facts, this matter was not ripe for summary adjudication and *for this reason alone*, should be remanded back to the trial court." *Id.* at 10-11 (emphasis added).

That is an independent and adequate state-law basis for reversing the dismissal of respondent's claim. Chief Justice Combs's dissent makes this clear: Although he disagreed with the majority's analysis of the religious autonomy doctrine, he laid out separate, independent bases for disagreeing with the majority's state-law procedural holding. See Pet. App. 28-30. In his view, the proper course was for the trial court to consider the evidentiary submissions on the motion to dismiss, without converting the motion to one for summary judgment. *Ibid.* The majority disagreed as a matter of state law, which was an independently suffi-

cient basis for reversal. *Id.* at 7-11.

"Because this Court has no power to review [that] determination," petitioners' First Amendment argument "[can]not affect the judgment" at this interlocutory stage of the litigation, and this Court lacks jurisdiction over the questions presented in the petition. *Coleman*, 501 U.S. at 729-730.

B. The judgment below is interlocutory

There is yet another reason the Court lacks jurisdiction: The judgment below is non-final.

1. Section 1257 confers jurisdiction only over final state court decisions

a. Section 1257 confers jurisdiction to review "[f]inal judgments" of state high courts. As this Court has recognized, "a state-court judgment must be final 'in two senses.'" *Jefferson* v. *City of Tarrant,* 522 U.S. 75, 81 (1997). *First*, "it must be subject to no further review or correction in any other state tribunal," and *second*, it must be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Ibid.* This "final-judgment rule has [therefore] been interpreted 'to preclude reviewability * * * where *anything further* remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981) (emphasis added) (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).

The finality requirement is no mere formality; it is, instead, "an important factor in the smooth working of our federal system." *Radio Station WOW*, 326 U.S. at 124. Its faithful application is especially important in cases like this one, "when the jurisdiction of this Court is invoked to upset the decision of a State court," which risks creating a "potential conflict between the courts

of two different governments." *Ibid.* Strict adherence to the finality requirement thus reduces to "a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973).

b. The Oklahoma Supreme Court's decision below is, on its face, "merely interlocutory." *Jefferson,* 522 U.S. at 81. As the court explained, the ultimate resolution of this case turns on "fundamental factual inquiries" that are "clearly disputed." Pet. App. 7 (emphasis omitted). Accordingly, the court held that petitioners' motion to dismiss should have been decided following development of a more complete factual record and the holding of an evidentiary hearing. See *id.* at 10-11. Thus, the court concluded, "this matter was not ripe for summary adjudication and for this reason alone, should be remanded back to the trial court." *Ibid.*

Proceedings on remand will involve additional discovery that is certain to affect the course of the litigation. Again, "[t]he foundational inquiry is to discern exactly what [respondent] asked [petitioners] to do with respect to baptism, what [petitioners] agreed to perform for [respondent], and ultimately the nature and extent of [respondent's] consent surrounding baptism." Pet. App. 7 (emphasis omitted). These factual issues, which were improperly resolved by the trial court on a motion to dismiss, are "inextricably intertwined with the issue of subject matter jurisdiction." *Id.* at 8.

Further fact development is therefore essential to an adequately informed resolution of the case. Pet. App. 10. Discovery to date has been extremely limited; respondent himself has not yet been deposed. There has been no meaningful discovery of documents or communications, which could well determine the outcome of the motion for summary judgment. And if the

case proceeded to an evidentiary hearing—which seems highly likely in light of the "fundamental factual inquiries" that are "clearly disputed" (Pet. App. 7 (emphasis omitted))—the finder of fact may conclude that petitioners should prevail, either on the jurisdictional question or the merits. For instance, respondent claims that he told petitioners about the risks to his physical safety if news of his conversion to Christianity became public. Petitioners deny this. In light of these factual issues, which go to the heart of respondent's claims, the judgment below cannot be considered a final judgment reviewable by this Court.

2. None of the* Cox Broadcasting *exceptions applies here

Petitioners say next to nothing about this defect. In the "Jurisdiction" section of the petition (at 4), they simply assert that "[t]his Court has jurisdiction under 28 U.S.C. §1257(a)." Later, petitioners drop a cursory footnote (Pet. 13 n.2) purporting to explain why *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), permits review. Their argument is unpersuasive.

Cox Broadcasting recognized four exceptions to Section 1257's plain text. Only these "four exceptional categories of cases" may be "regarded as 'final' * * * despite the ordering of further proceedings in the lower state courts." *Johnson* v. *California*, 541 U.S. 428, 429-430 (2004). Petitioners suggest (Pet. 13 n.2) that two of the four exceptions apply here. In fact, none does.

First, the Court has accepted review over interlocutory state court judgments where "the federal issue is conclusive or the outcome of further proceedings preordained," such that "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. The quintessential example is *Mills* v. *Alabama*, 384 U.S. 214 (1966). In *Mills*, the state court had ordered the trial court to

convict the petitioner if the petitioner wrote an editorial that he admittedly had written. *Id.* at 217. This Court agreed to hear the case because a trial would inevitably have ended in a conviction, and it would have been a "completely unnecessary waste of time" to require the petitioner to march through the appeals process once more. *Ibid.*

This case does not fall under that category; petitioners do not disagree. The Oklahoma Supreme Court remanded the case for further development of the factual record, further briefing on summary judgment, and (if necessary) a trial. The issues that must be resolved are those surrounding respondent's agreement with petitioners to be baptized: Did he understand and consent to the church's rules or its internal procedures for resolving disputes of this sort? Did he consent to publication of his baptism on the internet? Do the facts lie somewhere in between? The outcomes of these proceedings, including the facts that they establish, are as yet uncertain. Further proceedings will not be a "waste of time." Far from it, they will be essential to an orderly resolution of respondent's lawsuit.

Second, this Court has accepted review of interlocutory state court judgments where the federal issue is "dissociated" from other issues that remain to be decided, such that the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox,* 420 U.S. at 480. *Radio Station WOW* is the paradigm. There, the Court granted review of federal constitutional challenge to a transfer of property, even though the state court had ordered an accounting of the property on remand. 326 U.S. at 126-128. The Court held that immediate review was appropriate because "[n]othing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on

the federal question." *Cox,* 420 U.S. at 480 (citing *Radio Station WOW*, 326 U.S. at 126-127).

The same cannot be said here—and, again, petitioners do not disagree. In fact, further proceedings may well obviate the need for resolution of the federal question presented in the petition, because the case might yet be resolved on fact-bound, state-law grounds that render the federal question irrelevant to the outcome of the case. The second *Cox Broadcasting* exception accordingly does not apply.

Third, this Court has held that it has jurisdiction over interlocutory judgments where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox,* 420 U.S. at 481. In such cases, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Ibid.*

That does not describe this case. If petitioners lose below, they will be free to continue to assert on appeal (including before this Court) that the civil courts improperly resolved questions of church doctrine or tenets of faith. Alternatively, if respondent loses (on the religious autonomy ground or any other), petitioners will be free to defend their victory on any supported basis, including the religious autonomy doctrine. Thus, there is no need for the Court to take the extraordinary step of intervening at this interlocutory stage.

Petitioners assert that "the whole point of the religious autonomy doctrine is to foreclose claims like these from being litigated at all." Pet. 13 n.2. That is wrong; the doctrine is one of deference to church pro-

nouncements, not one of immunity from trial and liability. See, *e.g.*, *Wolf*, 443 U.S. at 602 ("[T]he First Amendment prohibits civil courts from resolving * * * disputes on the basis of religious doctrine" and thus "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.") (collecting cases). If a civil court decided a question of church governance or ecclesiastical doctrine without properly deferring to church authorities, the doctrine would be fully vindicated by a reversal on appeal.

Finally, this Court has held that it has Section 1257 jurisdiction over interlocutory judgments "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds" and yet "a refusal immediately to review the state court decision might seriously erode federal policy" as it respects the pendency of the state court proceedings. *Cox,* 420 U.S. at 483. The Court has therefore taken review of cases presenting pressing questions of national security (*Goodyear Atomic Corp*. v. *Miller*, 486 U.S. 174, 179-180 (1988)) and free speech protections in the context of an impending election (*Miami Herald Publ'g Co*. v. *Tornillo*, 418 U.S. 241, 246-247 & n.6 (1974)).

No such extraordinary circumstances are present here. In fact, the question that petitioners ask this Court to decide—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" (Pet. i-ii)—is an academic query. As we explain further below, there is no dispute here that the religious autonomy doctrine derives from the First Amendment, nor does anything turn on the answer to the question. Regard-

less, there is no risk of eroding any important, practical federal policy by allowing the proceedings below to conclude and reaching that question (if at all) after all of the relevant facts are aired and the finder of fact (whether the judge on jurisdiction or the jury on the merits) renders its decision.

If this case qualified for review under *Cox Broadcasting*, "[a]ny federal issue finally decided on an interlocutory appeal in the state courts would [also] qualify for immediate review." *Flynt*, 451 U.S. at 622. That is not the law.

II. THE PETITION SHOULD BE DENIED IRRESPECTIVE OF THE TWO JURISDICTIONAL OBSTACLES

Even if the Court's jurisdiction were not doubly undermined in this case, review would be unwarranted. None of the traditional criterial for certiorari is present here: There is no relevant division among the lower courts on either of the questions presented, both questions have *zero* practical importance, the circumstances here are unique and unlikely to arise again, and neither question is suitably presented here in any event. In addition, the lower court's decision is correct.

A. The first question presented is academic

1. The first question presented—"[w]hether 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" (Pet. i)—might be at home in a law review article, but it is wholly irrelevant to the outcome in this case.

Indeed, all agree that the religious autonomy doctrine is grounded in the First Amendment. The lower court expressly concluded that "the authority and autonomy of the church to be free from the secular control

in matters of church government, faith and doctrine" rests upon "the guarantees of the First Amendment to the U.S. Constitution." Pet. App. 13 (citing *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115-116 (1952)).

Lest there be any doubt on this score, petitioners concede that the religious autonomy doctrine derives from the First Amendment. There is simply no dispute on this point. Thus, nothing in the case turns on the answer to the first question presented.

2. Petitioners and their *amici* inaccurately describe the lower court's opinion, insisting that it has imposed an inflexible "membership requirement" as a precondition to application of the religious autonomy doctrine. See Becket Fund Br. 3, 11-15; Pet. 14, 17-19. Not so.

The Oklahoma Supreme Court held that the operative issue in these circumstances is *consent*, not membership per se. Because nothing in the case would otherwise require the court to pass upon questions of church doctrine (Pet. App. 7), the only issue is whether respondent "agreed and consented to the ecclesiastical practices of the church" (*id.* at 13 (emphasis omitted)). In particular, did he consent to resolution of his dispute by church authorities? And did he consent to publication of his baptism on the internet? After all, those "who unite themselves to [a religious] body do so with an implied consent to [its] government, and are bound to submit to it." *Watson*, 80 U.S. at 729. Absent such consent, the religious autonomy doctrine is "not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." *United Methodist Church* v. *Superior Court of Cal.*, 439 U.S. 1369, 1373 (1978) (Rehnquist, J., in chambers).

Thus, in these circumstances, "[t]he key to the defense raised by [petitioners] stems from an agreement that arises between the church and the individual who has freely chosen to join in membership and agree and consent to that church's ecclesiastical jurisdiction." Pet. App. 14 (emphasis omitted). Cf. *id.* at 31, 34-35 (dissent agreeing that consideration of intent was "valid" in theory and disagreeing only on application).

To be sure, membership will often be a relevant factor when evaluating the broader question of consent, but that does not at all suggest that the lower court adopted a "members-only variant of the religious autonomy doctrine" (Pet. 3, 15, 21, 23).

The Becket Fund (Br. 11) worries that the lower court's discussion of "membership" will itself "force[] courts to decide difficult doctrinal matters." See also Pet. 14-15, 18-20. To the extent that is a valid concern as a general matter, it is not present in this case: The lower court repeatedly stressed that the parties all *agree* that respondent is not and has never been a member of the church. See Pet. App. 2-3, 13-14. Having said that, in cases where (1) membership is relevant to the question of consent, (2) membership is disputed, and (3) determining membership risks entangling the courts in ecclesiastical matters or questions of church governance, deference under the religious autonomy doctrine *would* be appropriate. See *Wolf*, 443 U.S. at 602. It is only for "unique," case-specific reasons (Pet. App. 90-93) that the lower court found no risk of such entanglement here.

3. Against this backdrop, the first question presented offers no basis for granting review. Petitioners do not assert a split on the question whether the religious autonomy doctrine derives from the First Amendment. The absence of any confusion among the lower

courts is unsurprising, because the doctrine obviously *does* rest on the First Amendment's Religion Clauses. See *Kedroff*, 344 U.S. at 119. See also, *e.g.*, *Church of God in Christ, Inc.* v. *L.M. Haley Ministries, Inc.*, 531 S.W.3d 146, 157 (Tenn. 2017) (the doctrine "derive[s] from the First Amendment"). But that does not mean that the issue of consent is irrelevant to the doctrine's application; on the contrary, this Court has said that consent is *central*. See, *e.g.*, *Watson*, 80 U.S. at 729; *Gonzalez*, 280 U.S. at 16. In any event, no court has expressly addressed the question as framed in the petition because it is purely academic.

Petitioners half-heartedly suggest (Pet. 23) that the outcome in this case "conflicts" with an assortment of decisions from miscellaneous courts. But their assertion doesn't withstand scrutiny. The cases cited in the petition implicate clear entanglement of courts with ecclesiastical doctrine; all fall squarely within the heartland of the religious autonomy doctrine, in utter contrast with this case.[1]

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[1] See *Bell* v. *Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332-333 (4th Cir. 1997) (claims concerning "the nature, extent, administration, and termination of a religious ministry" fell under the religious autonomy doctrine and could not be considered by a civil court); *Bryce*, 289 F.3d at 659 (civil courts could not consider the case because it involved not "secular disputes with third parties," but disputes that "were part of an internal ecclesiastical dispute and dialogue"); *St. Joseph Catholic Orphan Society* v. *Edwards*, 449 S.W.3d 727, 739 (Ky. 2014) (because "the underlying dispute [was] about the internal governance of" the church, civil-court review of the plaintiff's claims would be inappropriate).

Beyond those three cases, petitioners cite a hodgepodge of non-precedential, vacated, and unpublished cases. Pet. 22-24. Each is likewise distinguishable. To the extent any case addresses remotely similar circumstances, it is broadly consistent with the decision below. *E.g.*, *Purdum*, 301 P.3d at 730 (discussing the role of the parties' consent before applying the doctrine).

There is nothing to indicate that a "unique and novel" case like this one (Pet. App. 91)—implicating a purely civil dispute capable of resolution by reference to neutral principles only—would have come out differently in any other court.

B. The question whether religious organizations are immune from liability for conduct dictated by religious doctrine is not expressly posed in the petition and is unworthy of review in any event

"[A] non-member's claims of torts and breach of contract in the context of baptism is a case of first impression in Oklahoma and beyond." Pet. App. 93. Nothing about the unusual facts or posture of this case (*id.* at 91) would require the state civil courts to pass on questions of Christian faith or ecclesiastical doctrine; the question is only whether a promise was made and subsequently broken. For their part, petitioners decline to identify with any specificity what "'purely ecclesiastical' disputes" (Pet. 18) allowing the case to proceed would implicate.

Against this background, the subtext of the petition is clear: Petitioners' true position is that the religious autonomy doctrine should work as a rule of absolute immunity for church defendants when the church asserts a sincere belief that its challenged actions were dictated by religious doctrine. *E.g.*, Pet. 2. That argument is a reason for denying review, not granting it.

1. The question whether petitioners are immune from either suit or liability is not "'fairly included' within the question[s] presented" in the petition. *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006). Petitioners ask this Court to answer whether the religious autonomy doctrine derives from the First Amendment and whether it is a ju-

risdictional rule. Neither question concerns immunity. Yet petitioners effectively argue in favor of a new form of religious immunity and fault the lower court for not adopting it.

If petitioners wanted the Court to consider that question, they should have presented it expressly. "The framing of the question presented has significant consequences," and this Court will consider issues not expressly presented "only in the most exceptional cases." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). This is not such a case.

2.a. Petitioners' bid for immunity is, in any event, meritless. As we explained in the Statement (at 2-5), the religious autonomy doctrine recognizes two broad categories of cases in which secular judicial review is barred: those involving matters of church governance, faith, or doctrine; and those involving matters that the parties have agreed will be resolved by a church tribunal or that arise out of such proceedings.

Outside of those narrow circumstances, however, the law is crystal clear that "churches are not—and should not be—above the law." *Bryce*, 289 F.3d at 657 (quoting *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)). "Like any other person or organization, they may be held liable for their torts and upon their valid contracts." *Ibid.* (quoting same).

It is therefore no answer to say that tortious "actions or practices are required by one's religion." *Purdum*, 301 P.3d at 724. This Court has not "even remotely * * * impl[ied] that, under the cloak of religion, persons may, with impunity, commit [torts] upon the public" without answering for their conduct in civil court. *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). As Justice Rehnquist put it, the religious au-

tonomy doctrine is "not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." *United Methodist Church*, 439 U.S. at 1373.

The lower court properly understood and applied the law as described. It concluded that resolving the case does not require deciding any ecclesiastical issues. Pet. App. 7. The dispute here turns exclusively on whether or not a promise was made and broken; it is a dispute capable of resolution by reference to neutral principles of law alone, and deference to church authority would be warranted only if respondent consented to it. See *Watson*, 80 U.S. at 714, 729. See also, *e.g.*, *Bryce*, 289 F.3d at 658.

b. Petitioners see the religious autonomy doctrine differently. In their view, it means that civil courts are categorically forbidden from "impos[ing] tort liability on church officials for following church doctrine." Pet. 2. This is an express bid for a new form of religious immunity from civil liability. That is exactly how petitioners' arguments were framed below: They asserted that "all actions related to the baptism of Plaintiff are protected from judicial scrutiny under the Free Exercise Clause of the First Amendment" (Pet. App. 4) and that "the church *immunity* doctrine, rooted in the guarantees of the First [A]mendment, prohibits any secular court from making inquir[ies] into anything relating to [the] baptism" (*id*. at 6 (emphasis added)).

Petitioners' *amici* make the bid for immunity all the more clear. The Becket Fund says expressly (Br. 23) that the doctrine should "function like a form of souped-up qualified immunity." Oklahoma Wesleyan University goes yet further, expressing its disbelief (Br.

14) that a church would be "relegated to a position akin to" a mere "corporation or business entity," subject to "state-imposed tort boundaries." It therefore takes the startling position (Br. 20) that it is "entitled" by the Religion Clauses to (for example) disparage anyone it likes "for their expressions or conduct that is contrary to the tenets of the school's faith," and that it may do so free from liability under "Oklahoma defamation or privacy law."

No court has ever endorsed such a radical reconceptualization of the religious autonomy doctrine. On the contrary, *Watson* held that the First Amendment does *not* free churches or their members from civil liability for religious conduct; they "come before [civil courts] in the same attitude as other voluntary associations * * *, *and the actions of their members [are equally] subject to [the law's] restraints*." 80 U.S. at 714 (emphasis added). It can't be gainsaid that "laws may reach one's actions or practices when they are found to violate some important social order, although the actions or practices are required by one's religion." *Purdum*, 301 P.3d at 724.

Again, "churches are not * * * above the law" and "may be held liable for their torts." *Bryce*, 289 F.3d at 657 (quoting *Rayburn*, 772 F.2d at 1171). Thus, the religious autonomy doctrine "does not necessarily immunize religious institutions from all claims for damages." *L.M. Haley Ministries*, 531 S.W.3d at 159.

It hardly could be otherwise. Accepting petitioners' extreme outlier position would lead to absurd results. For example, some religious doctrines require female genital mutilation. See Anne Sofie Roald, *Women in Islam: The Western Experience* 239 (2003). Others call for animal sacrifice. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524-525

(1993). By petitioners' lights, these religious organizations would be immune from general civil liability for mutilating young women's genitalia and killing innocent animals—regardless of whether the young women or the animals' owners consented—simply because their tenets of faith call for such behavior. The First Amendment demands no such thing.

For present purposes, it suffices to observe that this case raises questions of generally-applicable tort law brought against a church by an admitted nonmember. The Oklahoma Supreme Court correctly recognized that, unless respondent consented to the relevant church doctrine or agreed to an internal resolution of his claims, the religious autonomy doctrine does not bar the State's civil courts from hearing such a case, precisely because no ecclesiastical controversies are involved. Pet. App. 7, 11. Because contested issues of material fact remain on the question of the parties' conduct and the scope and nature of respondent's consent, the Oklahoma Supreme Court correctly reversed the dismissal of respondent's claims.

C. The second question posed in the petition is not cleanly presented and would not warrant further review even if it were

1. The second question (actually) posed in the petition is not clearly presented here. It would arise only if the religious autonomy doctrine applied on the facts of this case; but as the lower court correctly concluded, resolution of that question turns on factual disputes no matter whether the issue is jurisdictional or goes to the merits.

Contrary to petitioners' repeated insistence that jurisdictional questions always operate cleanly at the "threshold" of a case (Pet. 3, 15, 24-25), jurisdictional questions often require the development of a factual

record. As this Court has observed, "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351 n.13 (1978). Thus, "[w]hen resolving a factual attack on subject matter jurisdiction, a court may consider matters outside the pleadings, such as affidavits or other documents" and "may hold an evidentiary hearing * * * to resolve jurisdictional factual disputes." *L.M. Haley Ministries*, 531 S.W.3d at 160.

Here, the Oklahoma Supreme Court held that factual disputes stand in the way of a threshold dismissal regardless of whether the religious autonomy doctrine is a jurisdictional bar or goes to the merits. Pet. App. 7-8, 10-11. Thus, it makes no difference to the nature of the proceedings that will take place on remand or to the ultimate outcome of the case whether the doctrine is an affirmative defense or a jurisdictional bar.

That has implications for the importance of this issue as well: Because factual disputes often arise in the context of jurisdictional issues just as well as merits issues, the second question will rarely have a practical impact on the course of any proceedings.

2. Regardless, the doctrine is not jurisdictional. The Court held in *Hosanna-Tabor* that the closely-related ministerial exception is an affirmative defense. 565 U.S. at 195 n.4. Petitioners incorrectly assert (Pet. 26) that the ministerial exception is "statutory" only and that it and the religious autonomy doctrine are therefore "very different issues." In fact, *Hosanna-Tabor* expressly grounded its analysis in the Religion Clauses, and other courts have uniformly held that the ministerial exception is a constitutional doctrine. *E.g.*, *L.M. Haley Ministries*, 531 S.W.3d at 157 (the "ministerial exception" "derive[s] from the Religion Clauses of

the First Amendment"). There is therefore no basis for treating the ministerial exception differently from the religious autonomy doctrine.

For precisely that reason, several state supreme courts to consider the issue since *Hosanna-Tabor* have extended that holding to the religious autonomy doctrine, concluding that it is non-jurisdictional. See, *e.g.*, *St. Joseph Catholic Orphan Soc'y* v. *Edwards*, 449 S.W.3d 727, 736-737 (Ky. 2014) (holding that "ecclesiastical abstention does not divest Kentucky courts of subject-matter jurisdiction"); *Pfeil* v. *St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528, 535 (Minn. 2016) (similar).[2]

Even before *Hosanna-Tabor*, federal courts had concluded that the religious autonomy doctrine is an affirmative defense. See, *e.g.*, *Bryce*, 289 F.3d at 654 (a motion to dismiss under the religious autonomy doctrine is appropriately "considered as a challenge to the sufficiency of plaintiff's claims under Rule 12(b)(6)" for failure to state a claim).

3. Although petitioners attempt to drum up a split on this point (Pet. 26-27 & n.4), most of the cases that they cite are from intermediate appellate courts and trial courts that do not have the final word on the law for their respective States.

The petition cites just two state supreme court cases decided after *Hosanna-Tabor*; neither suggests a

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[2] The petition cites *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), as an example of a case holding that the doctrine is jurisdictional. See Pet. 28. That case was admittedly overtaken by *St. Joseph Catholic Orphan Society*. Pet. 28-29. This is not evidence of "deep[] confus[ion]" (Pet. 29)—it is evidence that courts are appropriately adapting in light of *Hosanna-Tabor*.

conflict worthy of this Court's attention.

Take first *Greater Fairview Missionary Baptist Church* v. *Hollins*, 160 So. 3d 223 (Miss. 2015). That case involved the ministerial exception. Although the court unthinkingly suggested that the trial court was "without jurisdiction" to entertain the dispute in that case (*id.* at 233), the court did not meaningfully address the merits-jurisdiction distinction. To the extent that it did (the court's reasoning it somewhat opaque), it appears to have acknowledged that the ministerial exception goes to the merits: It reasoned that the plaintiff "*cannot prevail on the merits*, because the United States Supreme Court has made it clear that the First Amendment places ministerial church-employment decisions beyond the reach of courts." *Id.* at 229 (citing *Hosanna Tabor*).

Petitioners point to the Tennessee Supreme Court's decision in *L.M. Haley Ministries*, but that case is fully consistent with the Oklahoma Supreme Court's decision in this case. The Tennessee court held, in particular, that "courts in Tennessee should apply the neutral-principles of law approach when called upon to resolve church property disputes." 531 S.W.3d at 170. Applying the neutral principles approach, the court "defer[red]" to "the Ecclesiastical Council's determination" concerning certain elements of the plaintiffs' claim but ultimately concluded pursuant to neutral principles of law that "[p]laintiffs are entitled to summary judgment on their claims regarding the real and personal property" at issue in the case. *Id.* at 173. No matter what language the court may have used to describe the doctrine earlier in its opinion, its grant of summary judgment to the plaintiffs obviously did not reflect a refusal to exercise subject matter jurisdiction over the case.

The lower courts are of one mind with regard to how to handle cases like this. Because the Court lacks jurisdiction, the petition should be dismissed. The petition otherwise should be denied because there is no conflict, and the resolution of the questions presented will have no practical impact on the future course of proceedings in this case.

CONCLUSION

The petition should be denied.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

G. STEVEN STIDHAM
StidhamLaw, P.C.
204 Reunion Center
Nine East Fourth Street
Tulsa, Oklahoma 74103
(918) 707-8800

KEITH A. WARD
Keith A. Ward, PLLC
1874 S. Boulder Avenue
Tulsa, Oklahoma 74119
(918) 764-9011

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Respondent

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[*] The representation of respondent by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.