No. 19-158

IN THE

# Supreme Court of the United States

MARCUS TURNER, SR., *et al.*,

*Petitioners,*

*v.*

ALVA C. HINES, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT**

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

Respondents, eighteen congregants of Beulah Baptist Church in the District of Columbia (the "Church"), sued Petitioners for tort claims alleging misappropriation of Church funds and waste of Church assets to benefit the Church's pastor. In an unreported per curiam decision, the D.C. Court of Appeals affirmed the trial court's denial of a motion to dismiss, holding that the claims could be adjudicated under neutral principles of law without implicating matters of religious doctrine or church governance, which are shielded from judicial intervention by the ecclesiastical abstention doctrine of the First Amendment. Two core questions arise from the Petition:

1. Do the D.C. Court of Appeals and any other courts exclude claims ffecting church governance from their test for applying the ecclesiastical abstention doctrine?

2. Does the ecclesiastical abstention doctrine completely bar litigation of tort claims seeking to redress Petitioners' pilfering and waste of church funds if remedies sought by the complaint potentially touch upon church governance?

## PARTIES TO THE PROCEEDINGS

Respondents concur with Petitioners' statement of the parties to the proceedings (Pet. iii), with one addition. The Columbia Bank, located in Columbia, Maryland and a subsidiary of Fulton Financial Corporation, is a named defendant and current party to the proceedings.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All Respondents are individuals.

## RULE 12(B)(III) LIST OF PROCEEDINGS

The Petition's statement of related proceedings (Pet. iv) is complete.

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## OVERVIEW

The Petition for Writ of Certiorari fails on both legal and factual grounds. Petitioners invent a split of legal authority from decisions that apply the same well-settled legal standard to different sets of facts. To manufacture that split, they mischaracterize the allegations in this case as an internal dispute over church governance, when, as the D.C. courts correctly found, Plaintiffs challenge the unauthorized, *ultra vires* misappropriation and waste of Church assets.

Petitioners ask this Court to revisit the standard for applying the ecclesiastical abstention doctrine. According to Petitioners, courts are divided as to whether to apply (i) a two-part test asking first whether a plaintiff's claims can be decided according to neutral principles of law without implicating religious doctrine, and then asking whether adjudication still would entangle the court in matters of church governance, or (ii) a one-part test that ignores the second prong, interference with church governance. In other words, Petitioners maintain that certiorari must be granted because the circuits and state courts of last resort allegedly disagree as to whether the ecclesiastical abstention doctrine prohibits adjudication of claims that intrude into matters of church governance.

This supposed divide is fictitious. This Court already has resolved the issue. In *Hosanna-Tabor v. E.E.O.C.*, this Court definitively held that the ecclesiastical abstention doctrine shields against entanglement with both ecclesiastical canon and church governance. Moreover, well before *Hosanna-Tabor*, the three purported "one-step" jurisdictions, including the District of Columbia,

recognized that the ecclesiastical abstention doctrine prohibits adjudication of claims that entangle courts in matters of church governance, even where doctrinal principles are not implicated. Conversely, the purported "two-step" jurisdictions cited by Petitioners apply the same "neutral principles of law" test that the D.C. Court of Appeals applies; they simply did so in contexts that, on the facts, involved church governance considerations. In other words, Petitioners dress up case-specific factual differences to create the false appearance of conflicting legal standards. No schism exists here. Far from presenting questions affecting "millions of Americans," Pet. 32, the D.C. Court of Appeals rendered an unexceptional decision that applies settled law to claims alleging pilfering and waste of church property.

The purported split on the second issue presented is equally fanciful. According to Petitioners, D.C. and Puerto Rico law prohibit courts from considering whether a complaint's requested remedies unconstitutionally interfere with church affairs. But Petitioners' *only* cited cases are the case below, which is an unreported per curiam decision that makes no broad pronouncement about remedies, and a single Puerto Rico decision, which apparently failed to "concentrate" sufficiently on remedies to satisfy Petitioners. *See* Pet. 28-30. These case-specific quibbles fall far short of a "significant split," Pet. 28, warranting this Court's review.

Because there is no issue, let alone a circuit split, as to whether claims implicating church governance are covered under the ecclesiastical abstention doctrine, and likewise, no genuine question whether requested remedies can be considered as part of the trial court's analysis, Petitioners have raised no legitimate issue for review.

Petitioners' presentation of the facts supporting their manufactured split of authority, is equally divorced from reality. This case does *not* challenge any duly authorized actions of the Church and its leaders. As the lower courts recognized, it seeks to redress *rogue, unauthorized, ultra vires* actions of two church officials, Petitioners Dr. Marcus Turner, Sr. and Russell Moore, Jr., who surreptitiously misappropriated, wasted, and misused Church property for years, frequently using an affiliated *secular* nonprofit corporation, Petitioner Beulah Community Improvement Corporation ("BCIC"), as their vehicle. Adjudication of Respondents' claims requires *zero* reliance on religious doctrine and *no* interference with church operations; instead, the claims merely require application of well-settled, neutral common law principles that forbid conversion and obligate fiduciaries to refrain from taking self-interested, injurious, and unauthorized actions with organizational assets. Respondents do not seek to impose "secular control or manipulation" of Beulah through litigation." (Pet. 2). Rather, they seek to restore the assets that Turner, Moore, and BCIC have compromised and to put a stop to the fleecing of the Church.

Petitioners conspicuously ignore the disturbing allegations of their financial impropriety and fail to cite a *single* federal or state case that prohibits a court from adjudicating claims seeking recovery of misappropriated and wasted assets on the ground that they intrude into church affairs. In other words, Petitioners raise no unsettled question of law that addresses the core allegations in the case—and indeed cannot do so given the many cases holding such allegations of malfeasance to be justiciable.

Beyond the absence of a viable disputed issue of law, several complicating facts make this case unfit for a grant of certiorari. *First*, contrary to Petitioners' portrayal, the principal remedies sought in this case, including an accounting and damages, are for the recovery of funds and are not confined to prospective relief that would curtail the ability of the two individual Petitioners to control the Church's finances. Because those principal remedies do not intrude on church governance and do not make this case non-justiciable, the propriety of this secondary remedy must await the resolution of liability. *Second*, Petitioners ignore the fact that many of the complaint's claims involve the misconduct and misuse of Petitioner BCIC, a secular corporation that was created for the express purpose of obtaining and utilizing government funds that the First Amendment renders unavailable to the Church itself. It is far from clear that BCIC enjoys First Amendment protection, and so the First Amendment issue here is not as clean or uncomplicated as Petitioners suggest. *Third*, Petitioners and their amici question Respondents' standing to bring suit. The D.C. Court of Appeals expressly deferred ruling on the standing issue due to the limited pre-discovery record, and the trial court recently has decided to resolve that issue before proceeding any further with the litigation. Accordingly, not only is there no litigated issue (or developed record) for this Court to review, it is possible that the lower court might ultimately dismiss the case for a reason having nothing to do with the First Amendment.

For all of these reasons, the Petition does not merit serious consideration by this Court.

## STATEMENT OF THE CASE

### A. Facts.

Founded in 1909, the Church is a pillar of D.C.'s Deanwood Heights community. (App. 72). Turner has served as its pastor since 1999. *Id.* Moore is a former chair of the church's board of trustees and a BCIC board member. (App. 77). At all pertinent times, the Church was governed by a constitution adopted in 1997 (the "1997 Constitution"). (App. 79). That constitution designated the pastor as the Church's spiritual leader but vested decision-making power over the Church's financial and administrative affairs in a "Trustee Board," which had responsibility for, *inter alia*, reviewing and approving contracts and legal documents; determining and paying staff salaries, including Turner's compensation; paying the Church's debts; hiring non-cleric staff; providing an annual audit of financial records; and acquiring, maintaining, repairing, and replacing all Church property. *Id.* Two other official boards assisted the Church in its ministry. *Id.* The three official boards were required to meet monthly as a "Joint Board" to share information on the Church's condition, act on matters approved by the Church, and prepare recommendations to the Church for action; the pastor was required to attend meetings and provide recommendations. *Id.* All board members were elected by the Church membership, and Church members had the right to vote on all matters affecting the status of the Church. *Id.* Though Petitioners dispute that the pastor's authority was so constrained, *see* Pet. 12, the amended complaint's allegations on this point are clear and thus controlling.

With Moore's assistance, Turner depleted Church assets without the knowledge or required authorization of the Church membership, the Trustee Board, or the Joint Board. He used Church funds for his own personal benefit, including charging to the Church credit card his personal expenses such as meals, fuel for his personal car, dry cleaning, vacations, personal lawn care, and exorbitant cell-phone bills, which included home Internet and cable. (App. 80-83, 89-90, 98-99). Turner had the Church pay for his own continuing education, his wife's education, and his son's tuition, including $14,000 in tuition payments. (App. 81-82). Turner also had the Church cover his personal tax liabilities, including $3,000 in 2008, and premiums for life insurance policies for both himself and his wife. *Id.* At least twice, he used Church funds to pay his wife $500 for delivering speeches to the congregation. *Id.* None of these payments was disclosed to or authorized by the Trustee Board, and funds were surreptitiously diverted from other accounts to pay for them. *Id.*

In 2008, Turner was experiencing financial difficulties. (App. 82). With the aid of Moore, he obtained payments totaling $75,000 as "consulting fees" for purportedly serving as a real estate "consultant" for the Church and BCIC in securing government grants to acquire property for BCIC. *Id.* Moore subsequently helped Turner receive a $35,000 bonus, purportedly for helping the Church save money. (App. 83). None of these payments was authorized by the Trustee Board, the Joint Board, or the membership. (App. 82-83).

In addition to depleting liquid assets, Turner misused vital real-property assets without authorization. Since 1976, the Church had owned free-and-clear the lot

on which its main building was located (the "Church Property"). (App. 83). Again with Moore's assistance, Turner had the Church purchase at least seven properties in Deanwood Heights and enter into a series of successive agreements encumbering the Church Property, the most recent of which was for a loan of $3,250,000 to the Turner-run nonprofit affiliate, BCIC. Not only did Turner violate the 1997 Constitution by failing to consult or seek approval for any of these transactions, but he concealed them from the congregation and the Church boards and instead consistently represented that the Church Property remained debt-free and that he never would place the Property at risk. (App. 83-84, 87). Moreover, to assign the Church Property as collateral, Turner directed the Church's financial secretary to execute the deed, guarantee, and other papers on behalf of the Church (Turner signed on behalf of BCIC), although she had no authority to do so. (App. 85-86). At his behest, and also without authority, she similarly signed documents that secretly disposed of a valuable adjacent lot, which was transferred to BCIC for free, and another valuable lot, which was transferred to another Turner-controlled entity. (App. 86-87, 94-95). All of these transactions were kept secret until years later, when, in 2014, a *Washington Post* notice disclosed that the Church Property would be auctioned in a foreclosure sale. *Id.*

By using the Church Property as collateral for the BCIC loan, Turner compromised the Church's most vital asset, which proved disastrous. Under Turner's control, BCIC repeatedly defaulted on the loan, leading to a series of foreclosure notices and subsequent forbearance agreements, ultimately culminating in the 2014 auction notice. (App. 94-95). Other Church properties, including

the two valuable lots, were sold to fend off foreclosure. (App. 95).

There was more. In 2011, Turner, again aided by Moore, entered into yet another secret, unauthorized loan agreement (this time for $900,000) encumbering the Church Property. (App. 89-90). Although it ostensibly was obtained to renovate the Church's kitchen and other facilities, the contracts for that work totaled only $380,000, of which Turner paid the contractor only $162,500, telling the contractor that the Church lacked additional funds. *Id.* He also persuaded the contractor to loan an additional $105,000, stating that the Church and BCIC needed funds to pay the debt on the Church Property. Subsequently, however, Turner refused to pay the contractor anything more and claimed that the $105,000 loan was a "donation." (App. 90, 95-96). Eventually, the contractor sued the Church, BCIC, and Turner, and the Church had to settle and incur legal fees in the process. *Id.*

In 2009, even before learning of Turner's secretive machinations with the Church Property, the Church membership became alarmed when they discovered Turner's profligate personal spending and the Church's financial distress. As a result, they asserted stricter controls over Turner, including taking away his credit card, strictly defining and limiting his compensation, and requiring regular financial reports; they also replaced Moore as chair of the Trustee Board. (App. 87-88). The financial condition of the Church improved, but Turner, chafing under these limits, harassed and drove out the reform leaders, regained *de facto* control of the Church's affairs, and restored Moore as Trustee Board chair. (App. 88). Moreover, with the assistance of Moore, their wives,

and several allies, Turner drafted new bylaws abolishing the Trustee Board and Joint Board and formally giving him virtually unfettered authority to control the Church, both directly and through a new Board of Elders comprised of himself and two hand-picked appointees, one of which was Moore. (App. 92-93). The new bylaws were adopted in 2012 without following required procedures. (App. 92).

Thereafter, Turner halted disclosure of financial information to the congregation. (App. 93-94). Nevertheless, it is evident that the Church remains in financial distress. It no longer provides many of the supplies and services it once did, *e.g.,* basic repair and maintenance of Church facilities, full funding for positions like sexton, scholarships for graduating seniors, a sufficient number of Bibles and hymnals, Sunday school books and snacks, and tuition for Vacation Bible School. (App. 96).

**B. Proceedings Below.**

In March 2015, following prior litigation by church members against Turner and others, and by Turner against those members and their counsel, Respondents—eighteen members of the Church—filed a complaint in the Superior Court of the District of Columbia (the "superior court") against Turner, Moore, BCIC, and Columbia Bank, (which had accepted the financial secretary's signature on the collateral documents that encumbered the Property). A first amended complaint filed in June 2015 provides the operative allegations at issue. (App. 68-107). It asserted claims for breach of fiduciary duty, conversion, and unjust enrichment against Turner and Moore; conspiracy against Turner, Moore, and BCIC; negligence against the bank; an accounting of finances against Turner, Moore, and

BCIC; and a declaratory judgment that the Church's obligations under the 2008 loan are void and unenforceable. Respondents' prayers for relief seek a declaration that the loan obligations are void; an injunction prohibiting Turner and Moore from making decisions regarding Church assets; a full accounting of Petitioners' financial records; a declaration that the Church's current bylaws are null because they were not adopted in accordance with the terms of the 1997 Constitution; and damages for the Church's benefit. (App. 107-108).

Petitioners moved to dismiss for lack of subject matter jurisdiction, arguing that, under the First Amendment's ecclesiastical abstention doctrine, the court could not adjudicate the claims. Initially, on September 4, 2015, the superior court granted the motion, ruling principally that the complaint failed to demonstrate that the alleged financial misdeeds violated standards universally applicable to all religious institutions. (App. 61-65). It also found that the First Amendment did not allow for relief regarding Turner's and Moore's duties or the status of the church constitution. (App. 60). On November 19, 2015, the superior court denied Petitioners' motion for reconsideration or for leave to amend. (App. 41-46). The claims against the bank survived.

One month later, the District of Columbia Court of Appeals issued an opinion addressing similar claims regarding another church (the "*Moon* decision"). The superior court *sua sponte* called for briefing as to whether it should reconsider and reverse its decision. (App. 29-30). On February 16, 2016, the superior court did reverse its prior order, ruling that, under the *Moon* decision, the claims against Moore and BCIC could proceed because

they could be adjudicated under neutral principles of law without intruding into areas prohibited by the First Amendment. (App. 33-36). The superior court also ruled that the claims against Turner were barred by *res judicata* (App. 38-39), but Turner nonetheless is participating in this appeal.

On January 16, 2019, the D.C. Court of Appeals affirmed in a per curiam, unreported, non-precedential opinion. (App. 3-17). The decision is not publicly available on Westlaw. Contrary to the core premise of the Petition, the decision expressly acknowledges that the ecclesiastical abstention doctrine applies both to reliance on dogma *and* to interference with church governance: "the First Amendment requires civil courts to abstain from disputes over 'matters of church government as well as those of faith and doctrine.'" (App. 12) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186 (2012) (in turn quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 116 (1952)). Applying the well-recognized rule that the ecclesiastical abstention doctrine does not apply where claims can be decided under neutral principles of law without encroaching on areas protected by the First Amendment, the court held that Respondents' claims were standard common-law vehicles for recovering misappropriated funds or remedying breaches of fiduciary duty. (App. 14). Moreover, because the Church had formally adopted the 1997 Constitution as its governing document, courts could apply its provisions without violating the First Amendment. (App. 14-16). The court thus affirmed the superior court's decision and subsequently denied Petitioners' requests for rehearing. (App. 1-2, 17).

## REASONS FOR DENYING THE WRIT

Petitioners have plundered and wasted Church assets, bypassing the provisions of the Church constitution that prohibit such unilateral, unauthorized, and surreptitious conduct. Their actions are textbook examples of common-law breaches of fiduciary duty, conversion, and unjust enrichment. Securing restitution for these wrongful acts does not implicate church dogma or governance. It merely requires Petitioners to compensate the Church for what they purloined or squandered without authorization.

The courts have long accepted and exercised their obligation to ensure that church leaders obey secular laws governing property rights, torts, contracts, and criminal conduct. Even Petitioners do not suggest that the First Amendment shields religious leaders from liability for their violations of valid neutral laws. Yet, under the guise of a contrived split of authority regarding the proper First Amendment test for applying those laws, Petitioners seek the extraordinary relief of immunizing church leaders from civil liability for misappropriating and misusing Church assets. In holding that Petitioners enjoy no such blanket immunity, the D.C. Court of Appeals applied the standard test fully consonant with this Court's precedent. As one state court aptly put it, "Plaintiffs have not presented a religious or doctrinal question for the civil court to resolve; instead, Plaintiffs have alleged a simple claim of misappropriation of funds, which is proscribed by valid neutral laws." *Griffin v. Cudjoe*, 276 P.3d 1064, 1069 (Okla. Ct. App. 2012).

Because the courts undoubtedly enjoy subject matter jurisdiction to redress clear misconduct involving church

property, Petitioners offer a strained argument that the lower courts are split as to the proper test for applying the ecclesiastical abstention doctrine. As shown below, no such split exists. The courts utilize the same test and apply it consistently. Petitioners thus posit a hole in the law that simply does not exist. There is no circuit split, no unresolved question by this Court regarding the standard for applying the ecclesiastical abstention doctrine, and no departure by the D.C. Court of Appeals from settled norms. This case does not present any issue warranting a grant of certiorari.

## I. No Split of Authority Exists as to the Standards for Applying the Ecclesiastical Abstention Doctrine.

Petitioners argue that certiorari is required to resolve "a deep and irreconcilable split" concerning whether the ecclesiastical abstention doctrine preempts claims that intrude "into church governance" where the claims may be resolved by neutral principles of law without resort to religious doctrine. (Pet. 16). No such split exists. Both this Court's precedents and the purportedly divergent authority cited by Petitioners establish that excessive intrusion into church governance is preempted regardless of whether religious doctrine is implicated.

### A. *Hosanna-Tabor* Already Decided this Question.

In *Hosanna-Tabor*, this Court squarely confirmed that the ecclesiastical abstention doctrine prohibits claims that unduly interfere with church governance. Holding that the First Amendment shields a church from liability for employment discrimination against a religious employee, the Court explained:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

*Hosanna-Tabor* 565 U.S. at 186. It thus is settled law that ecclesiastical abstention requires courts to abstain from adjudicating claims that interfere with church governance where religious doctrine is not implicated. Indeed, it was settled law long before *Hosanna-Tabor.* As *Hosanna-Tabor* noted, the Court's 1952 decision in *Kedroff* had observed that its 1872 decision in *Watson v. Jones,* 13 Wall. 679 (1872), established that the First Amendment precludes judicial intervention in *both* church governance *and* religious doctrine. *Kedroff* stated that *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine*." *Hosanna-Tabor,* 565 U.S. at 185-86 (citing *Kedroff,* 344 U.S. at 116 (emphasis added)). Though Petitioners strain mightily to contend that *Hosanna-Tabor* left the issue open, *see* Pet. 33-36, they fail to identify any particular basis for further dispute.

### B. The District of Columbia, the Circuits, and the Other States All follow *Hosanna-Tabor.*

Petitioners assert that the District of Columbia (particularly in the decision below), the Second Circuit, and New Jersey limit the ecclesiastical abstention doctrine

to claims that implicate church doctrine. Petitioners call this a "one-part test." To create the impression of a circuit split, Petitioners then contend that the Fifth and D.C. Circuits and Texas, Mississippi, and North Carolina apply a different "two-part" test, which supposedly examines first whether a claim can be adjudicated under "neutral principles of law" and, second, whether it implicates church governance. Close analysis of the cited cases demonstrates that Petitioners' claimed divide is fictitious. The supposed "one-part" and "two-part" tests are the same; the law in D.C., the Second Circuit, and New Jersey is no different than that in the five cited jurisdictions. The purported disparity merely reflects factual differences in cases where church autonomy was, or was not, at issue.

To put it bluntly, Petitioners' "deep and irreconcilable split" is made of whole cloth. They do not cite a single case or secondary authority that recognizes the division. Nor do they explain how such a split could exist in light of *Hosanna-Tabor*'s definitive holding. Petitioners rely on only three cases (the non-precedential per curiam decision below, one Second Circuit case, and one New Jersey case) for their alleged "deep and irreconcilable split," and even those cases do not support their theory. If the rift were real, there would be better evidence than this.

1. *D.C.* Petitioners plainly err regarding District of Columbia law. The decision below explicitly recognized that the ecclesiastical abstention doctrine can prohibit claims that intrude into church governance without regard to religious doctrine. Prior D.C. precedent does as well.

a. Far from acknowledging *Hosanna-Tabor* and *Kedroff* "only in passing," Pet. 25, the first sentence

of the lower court's decision's discussion of this issue quoted the key language from those cases: "[Petitioners] claim to be immune from suit because, generally speaking, the First Amendment requires civil courts to abstain from disputes over '*matters of church government as well as* those of faith and doctrine.'" (App. 12) (emphasis added) (quoting *Hosanna-Tabor*. 565 U.S. at 186, and *Kedroff*, 344 U.S. at 116). The court then expressly ruled that governance issues were not presented by the facts of the case: "As set forth in the complaint, the main issues here appear to be entirely secular and to be governed entirely by neutral principles of law. They are not issues of religious doctrine, *church governance*, or the like[.]" (App 13) (emphasis added). It explained that "[t]hey are simply issues of the permissible use or disposition of Church property; they primarily boil down to whether Turner, with Moore's and BCIC's assistance, misappropriated the Church's money for his own use and encumbered or disposed of the Church's real estate without the authorization required by the Church Constitution." (App. 14). The court's holding removes all possible doubt:

> We therefore hold that the litigation may proceed, with the understanding that "going forward, if it becomes apparent to the trial court that this dispute does in fact turn on matters of doctrinal interpretation *or church governance*, the trial court may grant summary judgment to avoid 'excessive entanglement with religion.'"

(App. 17) (emphasis added) (citations omitted).

Petitioners' core premise thus is fundamentally wrong. The D.C. Court of Appeals applied the correct test and simply reached a conclusion that Petitioners do not like. It left the door open to revisit the issue as the case proceeds below.

b. Petitioners' characterization of the D.C. Court of Appeals' formulation of the ecclesiastical abstention doctrine as a "one-part" test also is incorrect. The decision expressly allows for consideration of (a) whether the case can be decided by neutral principles of law, *and* (b) whether that result infringes on interests protected by the First Amendment: "We further conclude that, at this early stage of the proceedings, the ecclesiastical abstention doctrine does not require dismissal of the suit, because it appears that appellants' liability may be adjudicated under neutral principles of tort law *without infringing on appellants' claimed First Amendment immunity*." (App. 4) (emphasis added). *See also* App. 16 ("Thus, at this early stage of the case, it would appear that this dispute is susceptible to resolution by 'neutral principles of law' *not requiring any forbidden inquiry into matters barred by the First Amendment*.") (internal quotation marks and citation omitted). The second element of the test articulated by the D.C. Court Appeals—whether deciding the case under "neutral principles" would still infringe on constitutionally protected interests—addresses Petitioners' concern about coercive judicial intrusion into church autonomy.

Tellingly, Petitioners cite no D.C. case ruling that non-doctrinal interference with church governance is *not* protected by the First Amendment, nor do they cite any D.C. case that refused to consider the impact of a non-doctrinal judicial decision on church governance. Their concern is purely conjectural.

c. Like the decision below, established D.C. precedent recognizes the rule that matters of church governance are non-justiciable. *See Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 818 (D.C. 2012) ("if it becomes apparent to the trial court that this dispute does in fact turn on matters of doctrinal interpretation *or church governance*, the trial court may grant summary judgment to avoid "excessive entanglement with religion") (emphasis added); *Steiner v. Am. Friends of Lubavitch*, 177 A.3d 1246, 1255 n.4 (D.C. 2018) (same); *Family Federation for World Peace v. Moon*, 129 A.3d 234, 253 n.26 (D.C. 2015) (same); *id.* at 248 ("The First Amendment seeks to preserve the autonomy of religious entities to decide for themselves, free from state interference, matters of *church government* as well as those of faith and doctrine.) (emphasis added) (internal quotation marks and citations omitted); *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990) ("[I]t is well established that a civil court may not interfere in *matters of church government*, as well as matters of faith and doctrine.") (emphasis added).

d. Petitioners' assertion that the D.C. Court of Appeals and the D.C. Circuit conflict, Pet. 22, also is wrong. The D.C. Court of Appeals consistently looks to the D.C. Circuit as a leading source for guidance on the ecclesiastical abstention doctrine. *See Prioleau*, 49 A.3d at 817 ("We find support for these conclusions in *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990)"); *Moon*, 129 A.3d at 253 (quoting *Minker* and *Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981)); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Washington, Inc.*, 875 A.2d 669, 672 (D.C. 2005) (citing *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (1996), for the standards and adopting

its holding). Petitioners never identify any case citing any point of disagreement, let alone any case identifying conflicting standards.

e. Ample authority supports the D.C. Court of Appeals' application of the "neutral principles of law" test to claims regarding church property. This Court has long recognized that trial courts may decide church property disputes, even where the claims would require the court to examine a church's governing documents on secular, non-doctrinal terms. *See Jones v. Wolf,* 443 U.S. 595, 603-604 (1979) (approving use of "neutral principles of law" test in property dispute involving church constitution); *see also Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U.S. 440, 449 (1969) ("not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment"); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (applying "neutral principles of law" standard to church property dispute).

2. *Second Circuit.* Petitioners' contention that the Second Circuit *excludes* consideration of whether Plaintiffs' claims might interfere with church autonomy rests upon one case, *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999), that does not even address the issue. *Martinelli* involved potential diocese liability for child sexual abuse by a parish priest based upon an alleged breach of fiduciary duty arising from the diocese's relationship to the priest. The Second Circuit held that the jury's consideration of religious teachings showing the nature of the diocese's

relationship to the priest did not violate the First Amendment. Petitioners complain that *Martinelli* did not consider whether the Second Circuit's analysis might damage the church's relationship with its clergy or interfere with internal church affairs. (Pet. 26). In other words, they conjecture that the Second Court *implicitly* applied a one-part "neutral principles" test, not that the court actually articulated any such test. Petitioners do not show that potential interference with clergy relationships or internal church affairs even was an issue in the case, let alone show that the Second Circuit's evasion of that issue was so egregious that it is fair to ascribe a rule of law to the decision's silence.

In reality, the Second Circuit uses the very test that Petitioners advocate. The Second Circuit's lead decision on ecclesiastical abstention unequivocally holds that "[t]he Free Exercise Clause protects a 'church's right to decide matters of governance and internal organization.'" *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006)). *Cote* discussed several rationales for why, "[s]ince at least the turn of the century, courts have declined to interfere [] with ecclesiastical hierarchies, church administration, and appointment of clergy." *Id.* at 204-205 (alteration in original, internal quotation marks omitted). As to the Second Circuit, therefore, Petitioners' claim of a conflict is wholly unfounded.

3. *New Jersey*. Petitioners' lone New Jersey case, *F.G. v. MacDonell*, 696 A.2d 697 (1997), allowed a claim for breach of fiduciary duty arising from a priest's seduction of a parishioner during pastoral counseling. According to Petitioners, *F.G.* implicitly applied a "one-part" test

because it did not discuss the impact that imposing such a duty would have on the church. (Pet. 26). As with *Martinelli*, Petitioners fail to demonstrate how such an omission establishes even an *implicit* rule of law and is not simply an innocuous consequence of specific facts that did not implicate church governance.

The lead New Jersey case on ecclesiastical abstention, *McKelvey v. Pierce*, 800 A.2d 840 (2002)—ignored by Petitioners—recognizes that matters of church governance are protected under the First Amendment. *See id.* at 851 ("The church autonomy doctrine is also based on 'a long line of Supreme Court cases that affirm[s] the fundamental right of churches to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."'") (quoting *Catholic Univ.*, 83 F.3d at 462 (in turn quoting *Kedroff*, 344 U.S. at 116)). *McKelvey* explains New Jersey's church-autonomy doctrine as follows:

> If, however, the dispute can be resolved by the application of purely neutral principles of law *and without impermissible government intrusion* (e.g., where the church offers no religious-based justification for its actions *and points to no internal governance rights that would actually be affected*), there is no First Amendment shield to litigation.

*Id.* at 856 (emphasis added). This is precisely the test that Petitioners insist is *not* applied in New Jersey, and it predates *Hosanna-Tabor* by a decade. *See also Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218, 223 (1992) (citing "the threat of regulatory entanglement"

and "the primarily-doctrinal nature of the underlying dispute" as separate factors that "mandate[] abstention").

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D.C., the Second Circuit, and New Jersey do not depart from how other jurisdictions apply the ecclesiastical abstention doctrine. The purportedly "deep and irreconcilable split" that Petitioners suggest simply does not exist.

4. The five jurisdictions that, according to Petitioners, apply a different test than the District of Columbia in fact apply the same test—that is, the test reinforced in *Hosanna-Tabor* and articulated long ago in *Kedroff*. Petitioners' distinctions draw from discussions of the *facts* of those cases, not any articulation of law that creates a *bona fide* conflict.

a. *Fifth Circuit*. Petitioners cite *Combs v. Cen. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), as the lead authority for the two-part test. *Combs* held that courts may not probe into the employment relationship between church and minister as "that would be inherently coercive even if the alleged discrimination were purely nondoctrinal" and would require the court to intrude into "the internal management of a church," in violation of the First Amendment. *Id* at 350. As discussed above, this black-letter analysis, later validated conclusively by *Hosanna-Tabor*, is consonant with D.C. law. The difference is factual: in *Combs*, church governance was at issue; here, it is not.

b. *D.C. Circuit*. As discussed above, the leading D.C. Circuit cases—*Catholic University, Minker, and Costello*—comport with, and indeed are cited frequently by, the D.C. Court of Appeals. Petitioners point to *Catholic University* as establishing a conflict, but there, too, they confuse factual differences for legal distinctions. Like *Combs*, *Catholic University* is a straightforward ministerial employment case. It challenged the denial of a religious instructor's tenure by a department of canonical law under pontifical control. The trial court stopped the case when it was asked to determine the qualifications of an expert in canon law, realizing that it was getting close to entanglement. Again, the facts at issue posed a clear question of interference in internal church affairs.

D.C. Circuit authority also is consistent with—not contrary to—the ruling below that the superior court may construe and apply the Church's constitution to determine whether Turner and Moore had authority to engage in their improprieties and whether the constitution was improperly amended. *See* Pet. 9. In *Minker,* the D.C. Circuit explained:

> It is true that not *all* provisions of a religious constitution are immune from civil court interpretation. In *Jones v. Wolf*, the Court adopted the neutral principles test which permits a court to interpret provisions of religious documents involving property rights and other nondoctrinal matters as long as the analysis can be done in purely secular terms. In doing so, the Court cited with approval a state court's application of the Book of Discipline to a property dispute between a church and its congregation.

*Minker*, 894 F.2d at 1358-59 (emphasis in original) (citing *Jones*, 443 U.S. at 603); *see also Md. & Va. Eldership*, 396 U.S. at 368 (per curiam). It is difficult to square *Minker*'s clear analysis that courts may construe non-doctrinal provisions in religious documents to resolve secular disputes with Petitioners' view that the D.C. Circuit and the D.C. Court of Appeals apply conflicting standards.

c. *Texas*. Petitioners cite *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007), which addressed a question of church discipline. A congregant sued a pastor for violating counseling confidentiality by disclosing revelations about an extramarital affair. Although disclosure breached the pastor's professional obligations as a licensed counselor, he was required to disclose the communication to the church pursuant to church tenets that the plaintiff had accepted. *Westbrook* held that, because the pastor acted in a dual capacity, "parsing those roles … would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline." *Id.* at 392. Here, too, the distinctions with this case are factual, not legal.

d. *Mississippi*. Petitioners' contention that *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814 (Miss. 2009), considered "exactly the same circumstances as this case and reached the exact opposite result," Pet. 19, is wrong. Plaintiff in *Schmidt* brought three claims. The first claim, seeking to establish a trust for misused church funds, was dismissed due to lack of standing because the church in question had dissolved. *See id.* at 828 ("Because such church or parish no longer exists, Plaintiffs have no standing to assert a claim for any interest they may or may not have had in church property."). Contrary to the

Petition, this claim was *not* dismissed due to the First Amendment. *Schmidt* next held that the two other claims involving misuse of funds (breach of fiduciary duties and intentional misrepresentation) *could* proceed under the "neutral principles of laws" test. In arguing otherwise, Petitioners omit key text (highlighted below) and ignore the court's actual holding:

> *Generally*, civil courts may not second-guess church administrative or management decisions or substitute their judgment in place of the church's. … We find that the chancellor correctly determined that our courts may not consider whether Church Defendants' management or administrative decisions were fiscally irresponsible, or whether those decisions were in the best interests of parishioners. *But, for the reasons set forth below,* ***we find that the chancellor erred in dismissing Plaintiffs' claim(s) that Church Defendants improperly diverted designated funds***.
>
> *While churches have large, almost-unfettered discretion in their administrative decisions-making*, ***they are not entitled to violate recognized duties or standards of conduct***. Morrison *recognizes* ***a church or religious organization's potential liability for diverting funds which have been solicited and accepted for a particular purpose, toward an unauthorized purpose***.

*Id.* at 829-830 (emphasis added, internal citation omitted). *See also id.* at 831 ("We simply find that a religious entity

is not exempt from these types of suits in a court of law."). Rather than conflicting with the decision below, *Schmidt* validates it. Petitioners' argument that this ruling in *Schmidt* is immaterial because plaintiff's recovery was limited to earmarked donations is erroneous. The recovery was limited due to the lack of standing, not the ecclesiastical abstention doctrine.

e. *North Carolina*. Finally, Petitioners' contention that *Harris v. Matthews*, 643 S.E.2d 566 (N.C. 2007), directly supports their position because it rejected claims involving misuse of church funds is clearly wrong. Unlike the facts here, plaintiffs did not argue that the challenged actions were *ultra vires* because the defendants lacked authority under the governing church constitution or bylaws. Instead, plaintiffs challenged the church officials' roles and exercise of judgment, which necessarily implicated questions of church governance and religious doctrine:

> Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church's pastor, secretary, and chairman of the Board of Trustees were proper *requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management.* Because a church's religious doctrine and

> practice affect its understanding of each of these concepts, seeking a court's review of the matters presented here is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. *None of these issues can be addressed using neutral principles of law.*

*Id.* at 571 (emphasis added). Thus, the court applied the "neutral principles" test and reached the opposite conclusion of the court below because the facts were different than those here. *Harris* is fully consistent with D.C. law.

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Petitioners do not show any true conflict among the lower courts. To the contrary, the test is settled, the analyses are remarkably uniform, and the results relatively consistent when accounting for material factual differences. The D.C. Court of Appeals' test for applying the ecclesiastical abstention doctrine is no different than the test applied in other jurisdictions.

## II. No Split of Authority Exists as to Whether Courts May Consider Remedies When Applying the Ministerial Exception.

Petitioners' second issue for review warrants only abbreviated consideration. No split, let alone a "dramatic split," Pet. 28, exists as to whether courts may look at remedies when considering whether subject matter

jurisdiction exists under the ministerial exception. Courts may consider remedies as part of the overall determination of whether a plaintiff's claims would interfere with church autonomy, but the failure to address remedies in detail does not constitute a fatal flaw.

To concoct a split, Petitioners contend that D.C. and Puerto Rico courts "analyze liability only," not remedies, whereas the D.C. Circuit and Mississippi courts examine both. (Pet. 28). They cite but one case from each jurisdiction, none of which discusses any definitive legal test about how remedies should be handled.

For D.C., the only case cited is the decision below. Petitioners complain that the decision did not address remedies directly, and, from that silence, contend that the D.C. Court of Appeals "concentrates" on liability to the exclusion of remedies. (Pet. 28). Inferring such a broad principle of law from mere silence in an unreported per curiam non-precedential decision is dubious, to the say the least. But here Petitioners do not even try to show that this is the rule in D.C. courts. In *Samuel v. Lakew*, 116 A.3d 1252 (D.C. 2015), the D.C. Court of Appeals applied ecclesiastical abstention because a requested remedy showed that the plaintiff did not seek to enforce "a provision of the 'corporate charter or the constitution of the general church ... [specifying] ... that the [local] church property is held in trust for the general church," but instead sought to control property based on arguments that required the court to resolve theological issues. *Id.* at 1260. The requested remedy was pivotal to the decision. No D.C. case states that remedies may not be considered.

Petitioners' lone Puerto Rico case, *Feliciano v. Roman Catholic and Apostolic Church*, 200 DPR 458 (P.R. 2018), cert. pet. pending, No. 19-921, also is inapposite. That case involves secular contract disputes between the church and hundreds of teachers and employees of Catholic schools and academies over termination of their pension plans and lost retirement benefits. Petitioners complain that the court ordered substantial relief (garnishment of church assets) without considering the impact on church operations, but, there too, the issue of constitutionally permissible remedies simply was not addressed. No legal principle can be derived from a single decision's failure to consider a problem that was not raised.

Petitioners' reliance on *Costello Pub. Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981), demonstrates the weakness of this argument. In *Costello,* the D.C. Circuit merely cautioned in a footnote that, when considering potential remedies, the district court should be sure to balance antitrust interests against the First Amendment interests of any religious organizations involved. *Id*. at 1050 n.31. This is a far cry from a holding that, *at the pleading stage*, on a motion to dismiss, courts must consider remedies and must dismiss a complaint if any possible relief might intrude upon church autonomy. Indeed, *Costello* actually undermines Petitioners' position, as it observes that this "difficult constitutional question should be deferred until [liability] questions are resolved." *Id.* at 1050. In other words, the "tail" of potential remedies should not wag the "dog" of whether to apply the ecclesiastical abstention doctrine at the pleading stage. Rather, where, as here, certain remedies plainly will not infringe on First Amendment principles, the question of whether another remedy might do so does not divest a court of subject

matter jurisdiction and must instead await resolution of liability.

Petitioners' final case, *Greater Fairview Missionary Baptist Church v. Hollins*, 160 So. 3d 223 (Miss. 2015), merely addressed a straightforward employment dispute where a pastor sought to enjoin a church vote to remove him from his position. The court declined to get involved in that ministerial termination decision based on well-established First Amendment precedent, not because the requested remedy was too intrusive.

These cases do not demonstrate any conflict warranting this Court's review.

Finally, Petitioners' factual discussion of the remedies is badly flawed. They complain that the D.C. Court of Appeals never considered "whether the case intruded coercively into the church's right to self-governance," and complain that it should have considered whether the "broad equitable relief sought by the complaint" could "deprive the church of its right to choose its pastor." (Pet. 25). But the complaint does not seek relief directly affecting the pastor's responsibilities beyond an order precluding his control over financial assets. The gravamen of the complaint is restitution for the assets that Petitioners pilfered or wasted—which does not implicate church autonomy. To the extent Petitioners chide the lower courts for failing to consider the potential impact of remedies that are not at issue (*i.e.*, the church's choice of pastor), Petitioners underscore the substantial gap between the actual issues in the case and their fictive portrayal of it.

### C. This Case Does Not Cleanly Present the First Amendment Issues.

In addition to the absence of a legitimate split of authority, this case includes facts that either complicate or could moot Petitioners' First Amendment issues.

1. To the extent Petitioners rely on the remedies sought in the complaint to suggest a split of authority, that argument is premature. They complain that two of the five requested remedies arguably touch upon church governance: an injunction against Turner and Moore's control over financial assets, and a declaratory judgment as to whether the 1997 Constitution was properly amended according to its terms and replaced by the current bylaws. But even if so—and as explained *supra*, the question about the validity of the new bylaws is justiciable under *Jones v. Wolf*—the superior court can address the propriety of those remedies in subsequent proceedings following a determination of liability. Much of this case is about obtaining damages resulting from Petitioners' misappropriation and waste of Church assets. No case cited by Petitioners holds that courts lack subject matter jurisdiction over a complaint seeking restitution merely because a secondary requested remedy might implicate church governance, and at least one case they cite—the D.C. Circuit's decision in *Costello*—says the opposite.

2. Petitioners' and amici's concerns about standing also show that this case is inappropriate for certiorari. The decision below expressly reserved on the question of standing because "there remains a genuine factual dispute" on standing. *See* App. 11 & n.11. Petitioners do not seek review of that determination, but their Petition

nonetheless weaves standing into their narrative to create an appearance of an issue warranting review. Amici seize on that narrative and raise standing directly. But the factual development that the D.C. Court of Appeals ruled was necessary is now occurring in the superior court, which recently decided to resolve the standing issue before proceeding further with the litigation. This litigation over standing means not only that that issue is unripe for certiorari, but also that the Petition is a weak candidate for certiorari, as the case might be dismissed on other grounds.

3. BCIC's secular status as a corporation created to receive funding from government agencies that the Church cannot receive because of its religious status (App. 77-78) makes this case *sui generis*. BCIC was formed as a secular nonprofit precisely to *avoid* the First Amendment's proscriptions on government funding of religious organizations, *id.*, but it now claims to be a religious organization in order to *benefit* from the First Amendment's protections. Here, too, factual development is needed before a determination can be made that its role in the alleged misconduct was not secular.

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully Submitted,

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