No. 19-158

In the
Supreme Court of the United States

DR. MARCUS TURNER, SR., RUSSELL MOORE, JR., AND BEULAH COMMUNITY IMPROVEMENT CORP.,
Petitioners,

v.

ALVA C. HINES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

In spite of respondents' best efforts to deny it, there is an irreconcilable split among the lower courts concerning whether, under the First Amendment, courts are the appropriate judges of allegations that pastors or other church ministers have wasted or misappropriated assets of the church. Courts that follow a one-part "neutral principles of law" test, focusing solely on whether the case presents any religious doctrinal issues, hold that they can judge these cases. These courts include the District of Columbia Court of Appeals that decided this case below.

But other courts, like the Supreme Courts of Mississippi and North Carolina and the Fifth Circuit, apply a more restrained two-part test and hold that the First Amendment requires courts to defer to the judgment of the church in such matters. As this deferential approach has been most clearly articulated by the Fifth Circuit, a court must apply a two-step test. Under this two-step test, the court determines (1) whether the case requires the court to decide any religious "doctrinal" issues, and (2) whether the case "intrudes coercively" into the church's right of self-governance. The court can proceed only if the answer to both questions is "no."

This two-step deferential approach produces palpably different results than does the one-step test preferred by the D.C. Court of Appeals. Under the one-step approach, this Court's "intrusiveness" precedents—*Kedroff*, *Hosanna-Tabor*, and others—are subsumed into the court's inquiry as to whether the

court must decide any religious doctrinal issues. If there are no doctrinal issues, the court concludes that it has satisfied the requirement not to intrude too deeply into church affairs. But the two-step process treats the intrusiveness requirement as a separate issue that must be addressed separately.

Respondents erroneously contend that the petition challenges only two of the five forms of relief requested in the complaint. Opp'n.31. On the contrary, petitioners challenge *all* of the relief sought because respondents seek relief *solely on behalf of the church*, not on their behalf. Pet.1. Petitioners highlighted the requested injunctive relief only to clarify what is at stake, not to suggest that the other prayers for relief are consistent with the First Amendment.

Respondents further argue incorrectly that awarding damages would not offend the First Amendment. But both this Court and the lower courts have held that any claim for liability—including for damages—can threaten a church's ability to govern its internal affairs without interference from the courts. Any form of liability is a threat to the First Amendment.

Respondents fallaciously argue that petitioner BCIC, a nonprofit corporation created to assist the church in its work (App.4, 77), does not have standing to assert First Amendment rights. Opp'n.32. But this Court has consistently held that corporations, especially nonprofit corporations, have First Amendment rights. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J.,

concurring). And even if BCIC is not a proper petitioner, respondents do not and cannot challenge the rights of the two other petitioners, who are individual leaders in the church.

I. Lower courts split on whether to apply a one-part or two-part "neutral principles of law" test.

A. The sharpest split is whether courts or churches should judge misappropriation or waste claims involving church assets.

Respondents erroneously assert that the petition "fail[s] to cite a *single* federal or state case that prohibits a court from adjudicating claims seeking recover of misappropriated and wasted assets on the ground that they intrude into church affairs." Opp'n.3 (emphasis in original). Both *Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814 (Miss. 2009), and *Harris v. Matthews*, 643 S.E.2d 566 (N.C. 2007), do exactly that.

Schmidt approved only a narrow right for donors to sue where the church solicits funds for a specific purpose but spends the contributions on another, unauthorized purpose. 18 So.3d at 830. Under those circumstances, "the donors may reclaim their contributions." *Id.*

The court took a much different view of claims that the church's clergy had misused church funds. 18 So.3d at 829–30. The Mississippi Supreme Court declared that the trial court "*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." *Id.* (emphasis supplied). Citing *Harris*, the court proclaimed that such claims were unconstitutional because "civil courts may not second-guess church administrative or management decisions, or substitute their judgment in place of the church's."

These claims did *not* turn on standing, as respondents suggest. Opp'n.24–26. The standing issue arose only with respect to the first claim in *Schmidt*, a claim concerning the clergy's right to dispose of the church's real property. *Id.* at 823, ¶ 19 and 823–26 (describing claim and analyzing real estate chain of title). Contrary to the opposition, the first claim did *not* involve "misused church funds," Opp'n.24, but title to real property.

The claims for misuse of church funds were limited to the second and third claims. The court's reliance on *Harris* is most instructive. The court quoted the following passage from *Harris* to support its conclusion that the First Amendment bars individual congregants from suing clergy over the management of church funds:

> 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 829 (quoting *Harris*, 643 S.E.2d at 571).

In *Harris*, as here, members of a missionary Baptist church sued the pastor and other church leaders for using a separate non-profit organization to purportedly misappropriate church funds. The members sought relief entirely on behalf of the church, not for any injury to themselves. *Id*. at 567–68. The Supreme Court of North Carolina explicitly held that the First Amendment barred their claims for conversion of the church's funds, breach of fiduciary duty, and civil conspiracy.

The opposition inaccurately argues that the complaint in this case is different because it alleges that the pastor acted *ultra vires*. Opp'n.26. The *Harris* plaintiffs alleged that the pastor "usurped the governmental authority of the church's internal governing body." *Harris*, 643 S.E.2d at 571.

Nor does the *ultra vires* argument bear any relationship to how the D.C. Court of Appeals decided this case. Even before this case, that court held that civil courts may hear any claims that "rely upon doctrines basic to our legal system" that are grounded in "ancient and well-developed legal area[s] with deep

roots in Anglo-American law." *Family Fed'n for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 249 (D.C. 2015). The D.C. Court of Appeals applied that test and concluded that claims for unjust enrichment, breach of fiduciary duty, and civil conspiracy all rely on "doctrines basic to our legal system...." App.14. The court never mentioned *ultra vires*, and its decision rests on the trial court's ability to entertain claims also present in *Harris*.

The conflict exits because in jurisdictions like Mississippi and North Carolina, courts defer more readily to a church's authority. In *Harris*, the claims asserted by the church's members were submitted *to the church's* Council of Ministry. The Council had "considered some of the expenditures challenged by [the members], taken action, and declared the matter closed." *Id.* at 571. Likewise, the Mississippi Supreme Court requires trial courts to defer matters concerning a church's management or administration to the church. *See Greater Fairview Missionary Baptist Church*, 160 So.3d 223, 232–33 (Miss. 2015).

Here, the D.C. Court of Appeals took exactly the opposite course and remanded the case *to the trial court* for resolution. Unlike the Supreme Courts of Mississippi and North Carolina, the D.C. Court of Appeals based its decision entirely on whether it was required to decide a religious doctrinal dispute. Because claims for conversion, breach of fiduciary duty, and civil conspiracy can be determined (at least facially) by "neutral principles of law," the D.C. court looked no further to determine whether the dispute

required it to "intrude coercively" into the church's internal affairs.

B. Other courts confirm the depth and the breadth of the split.

1. *Fifth Circuit and Texas*. Courts in other circuits have defined and deepened this split. The Fifth Circuit explicitly rejected the one-part test used by the D.C. Court of Appeals. In *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (CA5 1999), the Fifth Circuit held that a court must also consider a second factor: whether the case would require it "necessarily [to] intrude into church governance in a manner that would be inherently coercive." Similarly, the D.C. Circuit held that courts must engage in this second inquiry "even if the alleged [issues] were purely nondoctrinal." *Id*.

The opposition calls *Combs* "a straightforward ministerial employment case." Opp'n.23. Respondents argue that *Combs* is factually distinguishable because "church governance was at issue" while it is not purportedly an issue in this case. Opp'n.22. But the Texas Supreme Court adopted *Combs*'s two-step test to analyze claims of a pastor's breach of his duties as a professional counselor to his congregant—hardly a ministerial employment case. *Westbrook v. Penley*, 231 S.W.3d 389, 401–02 (Tex. 2007). *Westbrook* explicitly rejected the assertion, accepted by the D.C. Court of Appeals, that the First Amendment permits civil courts to decide any case that does not turn on a question of religious doctrine: "**[W]hile the elements of [a] professional-negligence claim can be *defined* by neutral principles without regard to religion, the**

***application* of those principles to impose liability on [the pastor] would impinge upon [the church's] ability to manage its internal affairs....**" *Id*. at 400 (italics in original).

2. *Second Circuit and New Jersey*. Respondents argue unconvincingly that the Second Circuit and New Jersey, which, like the D.C. Court of Appeals apply a one-part test, actually apply the same legal standards as the Fifth Circuit and the Supreme Courts of Texas, Mississippi, and North Carolina. Opp'n.19-22. In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (CA2 1999), the Second Circuit held that a claim for breach of fiduciary duty could be fashioned from the religious teachings of a church. *Id*. at 431. The issue in that case, as the Second Circuit described it, was "whether, as a matter of fact, [the plaintiff's] following of the teachings and belief in the tenets [of the church] gave rise to a fiduciary relationship between [the plaintiff] and the church." *Id*. The church, the Second Circuit declared, "points to no disputed religious issue which the jury or the district judge in this case was asked to resolve." That, the Second Circuit held, was sufficient; no need to further consider whether the case intruded coercively into church affairs.

Respondents argue that the Second Circuit changed course in *Rweyemamu v. Cote*, 520 F.3d 198 (CA2 2008). Opp'n.20. But *Rweyemamu* is a ministerial-exception case that does not cite or harmonize *Martinelli*. The opposition does not point to any Second Circuit case applying a two-part test, or anything like

it, outside the ministerial-exception context the way *Westbrook* extends the principle in *Combs*.

The New Jersey Supreme Court's opinion in *F.G. v. MacDonell*, 696 A.2d 697, 700 (N.J. 1997) illustrates how far courts can go when they conclude that they can adjudicate claims that do not turn on religious doctrine. In *F.G.*, a congregant sued a cleric for breach of fiduciary duty for disclosing, in his sermons, her sexual relationship with another clergyman. *Id.* at 701, 705. The question, the court held, was whether the congregant could use the cleric's sermons to build her case for civil liability. *Id.* at 705. The court concluded that she could. *Id.* Respondents make much of *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002), in which the New Jersey Supreme Court permitted a Catholic seminarian to sue his diocese for alleged abuse the seminarian suffered in the seminary. *McKelvey* cites *F.G.* favorably, *id.* at 855, and *F.G.* remains the law in New Jersey.

Both *Martinelli* and *F.G.* applied the "neutral principles of law test" and both interpreted that test as requiring only that a court determine whether the case turns on a question of "religious doctrine." Neither *Martinelli* nor *F.G.* considered whether the case otherwise would "intrude coercively" into the governance of a church. Yet one allowed a plaintiff to build a case on church doctrine, and the other approved claims based on a preacher's sermon notes. And both are still good law in their respective jurisdictions.

C. Lower courts do not uniformly apply *Hosanna-Tabor* or *Kedroff*.

Respondents (unremarkably) observe that all lower courts follow this Court's decisions in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North Am.*, 344 U.S. 94 (1952), and *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 199 (2012). Of course they do. But they split on how to apply those cases.

One-step jurisdictions treat *Kedroff* and *Hosanna-Tabor* as being subsumed into the "religious doctrine" test those courts apply, while two-step jurisdictions treat it as a separate step. *Combs* exemplifies the latter position; this case exemplifies the former. Here, the D.C. Court of Appeals cited *Hosanna-Tabor* and *Kedroff* only once. App.7 n.15. It then immediately concluded that courts could comply with *Hosanna-Tabor* and *Kedroff* "as long as [they] employ neutral principles of law and their decisions are not premised upon their consideration of doctrinal matters…." App.16.

Moreover, many lower courts treat *Hosanna-Tabor* as a ministerial-exception case limited to that context. *See*, *e.g.*, *Puri v. Khalsa*, 844 F.3d 1152, 1164 (CA9 2017) (relying on *Hosanna-Tabor* to analyze only the ministerial exception, and holding the ecclesiastical abstention doctrine to be narrower).

II. Lower courts split over the need to consider whether the scope and nature of remedies comports with the First Amendment.

Respondents incorrectly argue that damages, unlike injunctive relief, do not threaten petitioners' First Amendment rights; that it is premature for this Court to address that issue; and that there is no split. They are wrong on all counts.

First, this Court and others have consistently held that damages do threaten a church's First Amendment rights. *Hosanna-Tabor*, at 194. *See also Westbrook*, at 400; *Harris*, at 568; *United Methodist Church v. White*, 571 A.2d 790, 791, 794 (D.C. 1990).

Second, it is not premature to consider damages at the pleadings stage when, as here, all of the relief sought would infringe the First Amendment. Under those circumstances, the judicial inquiry itself would infringe church's First Amendment rights and should be halted before trial, not after. *Cf. NLRB*.

Third, a split of authority exists. The D.C. Circuit and the North Carolina Supreme Court hold that courts must consider the issue of damages early in the case and take appropriate measures to address any First Amendment issues. *See Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035, 1050 n.31 and accompanying text (CADC 1981); *Greater Fairview Missionary Baptist Church v. Hollins*, 160 So.3d 223 (Miss. 2015). The D.C. Court of Appeals and the Supreme Court of Puerto Rico based their First Amendment analysis solely on issues of liability and never considered whether the

scope or nature of the remedies sought implicated the First Amendment. *See Turner v. Hines*, No. 16-CV-444 (D.C. Jan. 16, 2019); *Feliciano v. Roman Catholic and Apostolic Church*, 200 DPR 458 (P.R. 2018). *Feliciano* is particularly remarkable because in that case, the court did not consider the effect of the remedies sought even at the remedies stage. This Court should resolve that split.

III. The lower court proceedings place petitioners' First Amendment rights in immediate jeopardy and this court should act now to preserve those rights.

Although respondents argue that the lower courts could still resolve the dispute on grounds other than the First Amendment, those very proceedings are what potentially offend the First Amendment. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("the very process of inquiry" can infringe the church's First Amendment rights). This Court should grant certiorari to prevent the loss of that right. *See National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977).

Respondents do not contest this Court's jurisdiction, which, as the petition demonstrated, is based on the need to address these issues *before* the church loses its First Amendment rights. Pet.14-16. But if any further reason were needed to grant certiorari, this case gives this Court the opportunity to affirm clearly and forcefully that this Court and lower courts have jurisdiction over ecclesiastical abstention doctrine interlocutory appeals.

IV. This case, which does not implicate the Incorporation Doctrine, is an excellent vehicle for resolving extremely important First Amendment issues.

As petitioners have shown, lower court decisions display not only significant splits, but also significant confusion concerning this Court's ecclesiastical abstention jurisprudence. It has been 40 years since this Court's last decision in this area; it is an opportune time to clarify this area of the law.

This case presents only the issues that the petition asks this Court to resolve and does not involve extraneous matters, such as the rights of third parties not associated with the church. It is an internal church dispute that does not involve title to real property, and thus presents a narrow, important constitutional issue that this Court has never previously addressed.

Because it emanates from the District of Columbia, this case does not implicate the Incorporation Doctrine. It is a clean vehicle.

CONCLUSION

The Court should grant the petition or hold it in abeyance pending the Court's decision in *Archdiocese of San Juan v. Feliciano*, O.T. 2018, No. 921.

Respectfully submitted,

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