No. _____

In The
Supreme Court of the United States

RICHARD PLISHKA,

Petitioner,

v.

THE BYZANTINE CATHOLIC DIOCESE OF PARMA, INC., AND WILLIAM SKURLA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment doctrine of ecclesiastical abstention operates to deprive civil courts of subject-matter jurisdiction.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Plishka v. Skurla et al.*, No. 2023-358, Supreme Court of Ohio (August 1, 2023) (denying motion for reconsideration);

- *Plishka v. Skurla et al.*, No. 2023-358, Supreme Court of Ohio (May 23, 2023) (declining to accept jurisdiction by a four-to-three vote);

- *Plishka v. Skurla et al.*, No. 111122, Ohio Eighth District Court of Appeals (January 30, 2023) (denying motion for reconsideration);

- *Plishka v. Skurla et al.*, No. 111122, Ohio Eighth District Court of Appeals (December 29, 2023) ("reversing" directed verdict in defendants' favor and holding trial court lacked subject-matter jurisdiction to consider claim); and

- *Plishka v. Skurla et al.*, No. CV-18-891709, Cuyahoga County, Ohio Court of Common Pleas (November 15, 2021) (journal entry granting defendants' motion for directed verdict).

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PETITION FOR A WRIT OF CERTIORARI

The doctrine of ecclesiastical abstention, sometimes referred to as the doctrine of church autonomy, derives from the Religion Clauses of the First Amendment. The doctrine bars civil courts from adjudicating matters of internal church governance. As this Court stated in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), the doctrine provides that, "where resolution of [a] dispute[] cannot be made without extensive inquiry by civil courts into religious law and policy, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."

The doctrine recognizes that, "'[t]o permit civil courts to probe deeply enough into the allocation of power within a hierarchical church so as to decide religious law governing church polity would violate the First Amendment[.]'" *Id.* at 709 (quoting *Maryland & Va. Eldership of Churches of God v. Church of God, Inc.*, 396 U.S. 367, 369 (1970)) (cleaned up). It thus provides religious institutions with "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." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). As such, the doctrine is fundamental to protecting religious liberty.

This Court first articulated a nascent version of the ecclesiastical-abstention doctrine in *Watson v. Jones*, 80 U.S. 679 (1872). In the intervening 151 years, the Court has discussed the doctrine only a handful of times, most notably in *Milivojevich* and *Kedroff*. As a result, the task of fleshing out the precise contours of the doctrine—including its procedural status—has been left to state courts and the lower federal courts.

Regarding that procedural status, state courts of last resort as well as inferior federal courts have been, and remain, all over the map, some squarely holding that the doctrine does not operate to deprive civil courts of subject-matter jurisdiction and nearly as many others holding precisely the opposite. There is little to recommend the latter position, and, indeed, most courts holding that the doctrine is jurisdictional have simply relied upon their own past precedent or upon "jurisdictional" language from *Watson* without trying to justify their position as a matter of logic or sound jurisprudence.

On the other side of the ledger, this Court, addressing a similar split in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), determined that the doctrine's First Amendment sibling, the so-called ministerial exception, is *not* jurisdictional but, rather, operates as an affirmative defense. There is no principled reason why this same rule should not apply to the ecclesiastical-abstention doctrine. Some courts interpreting *Hosanna-Tabor* have concluded as much and thereby determined that the ecclesiastical-abstention doctrine, like the ministerial exception, is *not* jurisdictional. But

others have held that, because *Hosanna-Tabor* is only persuasive authority with respect to the procedural character of the ecclesiastical-abstention doctrine, they are bound by precedent to the notion that the doctrine is jurisdictional. At least two state supreme courts in this latter camp have stated that, while they continue to hold this position, they await further guidance from this Court.

The split at issue here is thus an enduring one. And the question over which the lower courts are split is laden with practical significance, as whether or not the ecclesiastical-abstention doctrine is jurisdictional affects, among other things, when it can be raised, what materials can be considered in deciding if it applies, and who bears the burden of proof. Only this Court can provide a definitive answer to this important question—a question squarely presented by this case.

OPINIONS BELOW

The Supreme Court of Ohio's four-to-three decision declining to accept jurisdiction is published at 209 N.E.3d 720. That court's denial of reconsideration is published at 213 N.E.3d 720. The Ohio Eighth District Court of Appeals's opinion is published at 204 N.E.3d 1250. Its decision denying reconsideration is unpublished. Pet. App. 50. The Cuyahoga County, Ohio Court of Common Pleas entry granting defendants' motion for a directed verdict is unpublished. Pet. App. 47.

JURISDICTION

On May 23, 2023, the Supreme Court of Ohio declined to accept jurisdiction over Fr. Plishka's timely direct appeal by a four-to-three vote. Pet. App. 2. That court denied Fr. Plishka's timely motion for reconsideration on August 1, 2023. Pet. App. 49. On October 4, 2023, Justice Kavanaugh granted Fr. Plishka's application to extend the time to file a petition for a writ of certiorari until December 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution prohibits any law "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

STATEMENT OF THE CASE

A. Facts

Father Richard Plishka is a priest within the Byzantine Catholic Diocese of Parma. In 2011, the Diocese's then-Bishop, John Kudrick, appointed Fr. Plishka administrator of the Byzantine Catholic Cultural Center ("Cultural Center"). Trial Tr. at 815, 819. The Cultural Center—previously only a concept project—had been Bp. Kudrick's brainchild. *Id.* at 815-16. Its purpose was to educate the faithful and the general public alike on the history and traditions of the Byzantine Catholic Church. *Id.* at 843-45, 890, 1891. At Fr. Plishka's urging, the Cultural Center was to be expanded and transformed into a standalone ministry center. *Id.* at 815-19.

Under Fr. Plishka's leadership, more and more people were drawn to the Cultural Center's programming and worship services. *Id.* at 823, 1124-25, 1572, 1876. The Cultural Center held men's and women's retreats, sponsored camps for children, participated in community activities, and held vibrant worship services. *Id.* at 816, 823. Its success and unique model attracted the attention of significant donors. *Id.* at 1009-10, 1119.

The Cultural Center also attracted less desirable attention—that of parish priests who begrudged the Center's success. They grumbled that Diocesan funds directed to the Cultural Center should instead be allocated to their parishes. *Id.* at 1413, 1426-27, 1528-29 (Proffer). They took umbrage at the Cultural Center's exemption from the rule requiring parishes to pay ten percent of their income to the Diocese. *Id.* at 1413, 1688-89. And they worried that the appeal of the Cultural Center's programs would draw parishioners to the Center and away from their parishes. *Id.* at 844, 1417.

Bishop Kudrick—the Cultural Center's creator and defender—retired in 2016. *Id.* at 648-49. Having previously rebuffed calls to close the standalone Cultural Center, he ultimately acquiesced to the ever-increasing pressure shortly before his retirement. *Id.* at 1884. Recognizing that this would mean a difficult transition for Fr. Plishka, Bp. Kudrick recommended that Fr. Plishka take a six-month paid leave of absence from active ministry, beginning in February 2016. Plishka Depo. at 141; Kudrick Depo. at 126.

But once Bp. Kudrick retired, the knives were out for Fr. Plishka. Pope Francis appointed Abp. Skurla "apostolic administrator" (essentially, temporary bishop) of the Diocese. Trial Tr. at 506. Abp. Skurla acceded to that post in May 2016. Skurla Depo. at 16; Trial Tr. at 354, 416, 798. Fr. Plishka's six-month paid leave expired in August 2016.

Abp. Skurla had a "vendetta" against Fr. Plishka resulting from the struggle over the Cultural Center's closure. Trial Tr. at 1845-46 (Kudrick Proffer). He accused Fr. Plishka of taking furniture belonging to the Diocese when he moved out of the Cultural Center rectory and also asserted that Fr. Plishka had taken the "relics of . . . three Ruthenian Hierarchs." Trial Tr. at 670. In an October 2016 letter to his superior, Cardinal Leonardo Sandri, Abp. Skurla informed the Cardinal that he intended to "schedule[]" "[a] canonical hearing to investigate whether [Fr. Plishka's] priestly faculties will be suspended." Skurla Depo. at 102; May 1, 2020 Plishka MSJ Ex. C at 2. Canon law typically requires such a hearing before a priest can be suspended. Skurla Depo. at 183; Plishka Depo. at 490; Trial Tr. at 806-07 (Proffer). At a canonical hearing, Fr. Plishka would have had the right to be present, to defend himself, to be represented by an advocate, to present evidence, to cross-examine witnesses sworn to tell the truth, and to have the matter decided by an impartial adjudicator rather than by Abp. Skurla. Skurla Depo. at 102-03; Plishka Depo. at 490-91.

But Respondents—Abp. Skurla and the Diocese—saw a way to avoid a canonical hearing. Abp. Skurla believed that, if civil litigation were pending against

Fr. Plishka, canon law would allow him to summarily suspend Fr. Plishka without a hearing. Trial Tr. at 803-04 (Proffer) (Q: "And that [*i.e.*, summary suspension] could only be done if Richard was involved in civil litigation, correct?" Abp. Skurla: "That's what the canon says, that you're able to do that. Yes."); *id.* at 806 (Proffer) (Q: "Was filing a lawsuit, sir, a prerequisite to pursuing the suspension [without a canonical hearing]?" Abp. Skurla: "According to the canons of the church, yes."); Skurla Depo. at 179-80 (Q: "The lawsuit . . . permitted you to suspend Father Plishka without conducting the canonical hearing that you referenced in your letter to Cardinal Sandri of October 18th, 2016?" A: "Yes[.]"). So Respondents seized the opportunity. On May 31, 2017, Abp. Skurla caused the Diocese to file a civil suit against Fr. Plishka in Cuyahoga County, Ohio Common Pleas Court, alleging that Fr. Plishka had taken used furnishings, DVDs, and relics belonging to the Diocese with him when he moved out of the Cultural Center rectory. Complaint, Cuyahoga County, Ohio Common Pleas Case No. CV-17-881086. The Diocese had never before sued anyone. Trial Tr. at 447, 1018.

Then, on July 20, 2017—his last day as apostolic administrator—Abp. Skurla used the pendency of the civil lawsuit as the basis to summarily suspend Fr. Plishka. Trial Tr. at 809 (Proffer). That day, ABp. Skurla issued a "Decree of Suspension" suspending Fr. Plishka "from the exercise of his priestly ministries" effective immediately. Decree of Suspension, Plishka MSJ Ex. E, at 1. As justification for this suspension-without-hearing, the Decree stated that "civil lawsuits[] have been lodged in the civil court of the United States against [Fr.] Plishka." *Id.* Days later,

the Diocese published news that Fr. Plishka had been summarily suspended. Trial Tr. at 810 (Proffer); Skurla Depo. at 180-81.

After Abp. Skurla issued the decree of suspension, the civil lawsuit lingered on the trial court's docket for another 49 days. Then, on September 7, 2017, the Diocese abruptly dismissed the civil case without obtaining the supposedly crucial misappropriated property. Trial Tr. at 1376 (Proffer). Though it had been filed as a case to recover property, the Diocese had repurposed the civil lawsuit to achieve Fr. Plishka's summary suspension from priestly duties. Having obtained that suspension, the Diocese had no more use for the lawsuit. Thus, the dismissal.

B. Procedural History

Fr. Plishka sought to hold Respondents accountable not for his suspension (all agree that, right or wrong, the suspension itself is unreviewable in the civil courts[1]) but, rather, for their decision to commandeer the civil courts for the purpose of effecting extra-judicial relief that the civil courts could not provide. So he filed the instant case, raising only a single claim—abuse of process. His complaint alleged, among other things, that the Diocese and Abp. Skurla damaged him when they "misused, and misapplied, the [civil] lawsuit to accomplish an end other than that which it was purportedly designed to accomplish," to wit, "to summarily and unilaterally suspend

[1] Fr. Plishka challenged the validity of the suspension via canonical proceedings and ultimately prevailed, securing the suspension's rescission. *See* Plishka Depo. at 525, 527, 548.

[Fr. Plishka] and harm his credibility and reputation[.]" Compl. ¶¶ 16, 8.

Three months after Fr. Plishka filed his complaint, the Diocese—aware that its abrupt abandonment of its civil lawsuit had only served to underscore the ulterior purpose of that suit—revived its previously dismissed claims. Complaint, Cuyahoga County, Ohio Common Pleas Case No. CV-18-896359. Shortly thereafter, the trial court granted the Diocese's motion to consolidate Fr. Plishka's abuse-of-process case with the Diocese's own resurrected suit.

Many months of discovery followed. The case went to trial in October 2021. Via a series of erroneous evidentiary rulings, the trial court barred Fr. Plishka from presenting evidence in support of his abuse-of-process claim. In light of this evidentiary embargo, the trial court granted a directed verdict in Respondents' favor on the claim.

Fr. Plishka appealed, raising two issues: first, that the trial court's erroneous evidentiary rulings prevented him from proving his case at trial and, second, that the trial court should have granted his motion for summary judgment on the liability prongs of his abuse-of-process claim, given that the parties were in agreement that Respondents' initial civil lawsuit against Fr. Plishka had been properly instituted and given Abp. Skurla's unequivocal deposition testimony that Respondents had used the civil lawsuit to obtain Fr. Plishka's summary suspension and then dismissed the civil case. *Cf. Robb v. Chagrin Lagoons Yacht Club*, 662 N.E.2d 9, 14 (Ohio 1996) (an abuse-of-process claim requires proof "that a legal

proceeding has been set in motion in proper form and with probable cause" and that the process abuser "attempt[ed] to achieve through use of the court that which the court is itself powerless to order").

Respondents cross-appealed the trial court's denial of their earlier motion to dismiss Fr. Plishka's abuse-of-process claim for lack of subject-matter jurisdiction. Specifically, Respondents contended that application of the ecclesiastical-abstention doctrine meant that "the trial court never had subject matter jurisdiction over Fr. Plishka's claim, and it should have been dismissed as a matter of law." Diocese Opening Ct. App. Br. at 33 (June 21, 2022). *See also* Skurla Opening Ct. App. Br. at 48 (June 21, 2022) ("The trial court lacked subject matter jurisdiction over Fr. Plishka's abuse of process claim due to the ecclesiastical abstention doctrine[.]" (capitalization altered)). Because, in Respondents' view, the issue was one of subject-matter jurisdiction, they asserted that Fr. Plishka "b[ore] the burden of affirmatively establishing facts that demonstrate that the [trial] court ha[d] jurisdiction" and that the trial court's failure to apply this standard "doomed its analysis of the jurisdictional issue in this case." Diocese Opening Ct. App. Br. at 39, 40.

In opposing the cross appeal, Fr. Plishka argued that "the doctrine of ecclesiastical abstention does *not* operate to deprive a civil court of subject-matter jurisdiction, and thus Cross-Appellants' motion [to dismiss for lack of subject-matter jurisdiction] does not fit

within the parameters of [Ohio Civil] Rule 12(B)(1)."[2] Plishka Opp. to Cross Appeal at 6 (Aug. 10, 2022) (emphasis *sic*). But the Ohio Court of Appeals sided with Respondents. It acknowledged Fr. Plishka's argument "that the ecclesiastical abstention doctrine does not deprive the trial court of subject-matter jurisdiction" but, "[a]fter careful consideration, . . . decline[d] to divert from the controlling precedent of th[at] court" stating that the doctrine of ecclesiastical abstention *does* deprive civil courts of subject-matter jurisdiction. Pet. App. at 38-39 n.5. Placing upon Fr. Plishka the burden of establishing the trial court's

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[2] Fr. Plishka successfully opposed Respondents' motion to dismiss for lack of subject-matter jurisdiction in the trial court, though he did not raise in that court the argument that the ecclesiastical-abstention doctrine does not operate to deprive civil courts of subject-matter jurisdiction. But that did not prevent him from raising—and did not prevent the court of appeals from considering—the jurisdictional argument on appeal. In Ohio, not only the issue of subject-matter jurisdiction's absence, but also the issue of its *presence*, is non-waivable. *See Proctor v. Giles*, 400 N.E.2d 393, 395 & n.1 (Ohio 1980) (court of appeals erred in concluding argument in favor of subject-matter jurisdiction had been waived; "issues pertaining to subject matter jurisdiction are non-waivable"); *VR, Inc. v. City of Centerville,* 71 N.E.3d 745, 749 (Ohio Ct. App. 2016) ("Although most cases addressing this issue deal with an alleged *lack* of subject matter jurisdiction, where[] [a party] . . . asserts the existence of subject matter jurisdiction, we apply the doctrine of waiver equally to both sides of an argument."). Further, on appeal, Fr. Plishka was defending the trial court's denial of the motion to dismiss for lack of subject-matter jurisdiction, and "an advocate may employ new legal arguments on appeal to justify a ruling by the trial court." *State v. Pickett*, 2001-Ohio-4022, 2001 Ohio App. LEXIS 5549, *12. *See also In re Estate of Workman*, 2008 Ohio App. LEXIS 2854, *16 n. 2 (An "appellee may defend the [decision] below by raising arguments for its correctness for the first time on appeal.").

jurisdiction vis-à-vis the ecclesiastical-abstention doctrine, the court of appeals went on to erroneously hold that the case never should have proceeded past the motion-to-dismiss stage, concluding that the doctrine of ecclesiastical abstention barred the trial court from exercising subject-matter jurisdiction from the start. *Id.* at 45. Given this conclusion, the court of appeals never reached the merits of Fr. Plishka's appeal. Fr. Plishka asked the court of appeals to reconsider its decision, but the court denied his request. *Id.* at 50.

Fr. Plishka appealed to the Supreme Court of Ohio, urging that court to accept jurisdiction over the following proposition of law: "The doctrine of ecclesiastical abstention does not operate to deprive common pleas courts of subject-matter jurisdiction." Plishka Memo. in Support of Juris. at 8 (Mar. 13, 2023). That court, by a vote of four to three, declined to review the case on the merits. Pet. App. at 2. The court denied Fr. Plishka's motion for reconsideration as well. *Id.* at 49.

REASONS FOR GRANTING THE PETITION

State supreme courts across the country, as well as federal circuit courts, are split over whether the First Amendment doctrine of ecclesiastical abstention operates to deprive civil courts of subject-matter jurisdiction. The split is deep and pervasive and has, if anything, become only more intractable since this Court's decision in *Hosanna-Tabor*. Moreover, how a court answers this question has profound practical consequences for litigants, as the answer determines, among other things, when the ecclesiastical-abstention doctrine can be raised and who bears the burden

of proof. Only this Court can resolve this state-against-state and circuit-against-circuit conflict, and only this Court can clarify the import of its precedents in this area. The Court should grant review and reverse.

I. STATE SUPREME COURTS AND FEDERAL CIRCUIT COURTS ARE SPLIT ON THIS IMPORTANT ISSUE.

A. Federal Courts of Appeals Are Split.

1. Among the federal courts of appeals, the Eighth Circuit has concluded that the doctrine of ecclesiastical abstention operates to deprive civil courts of subject-matter jurisdiction. *E.g.*, *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) (holding that "the district court lack[ed] subject matter jurisdiction to hear" the plaintiff's claim in light of the ecclesiastical-abstention doctrine). At least two other circuits agree, though they have done so only in passing. *Rutland v. Nelson*, 857 F. App'x 627, 628 (11th Cir. 2021) ("The district court correctly determined it lacked jurisdiction to entertain [the] complaint" in light of the ecclesiastical-abstention doctrine); *Hyung Jin Moon v. Hak Ja Han Moon*, 833 F. App'x 876, 880 (2d Cir. 2020) ("[W]e lack jurisdiction to adjudicate the[] remaining claims on ecclesiastical abstention grounds.")

2. The Tenth Circuit, on the other hand, has concluded that the doctrine of ecclesiastical jurisdiction operates as an affirmative defense rather than a jurisdictional bar. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002). And

the Ninth Circuit has taken a third view, concluding that the doctrine is properly characterized as a "limited abstention doctrine." *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 878 n.1 (9th Cir. 1987). Moreover, at least two other circuits have noted the uncertainty surrounding the procedural status of the doctrine of ecclesiastical abstention but have declined to weigh in. *See McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 348 n.1 (5th Cir. 2020) (observing that "it is somewhat unclear whether the ecclesiastical abstention doctrine serves as a jurisdictional bar . . . or an affirmative defense" but declining to "resolve this uncertainty because dismissal was improper, regardless" on the facts of that case); *Kelly v. Marcantonio*, 187 F.3d 192, 197 (1st Cir. 1999) (whether a motion to dismiss premised on the ecclesiastical-abstention doctrine "involves subject matter jurisdiction at all is a debatable point").

B. State Supreme Courts Are Split.

1. The split in State courts of last resort is even more pronounced. In recent years, at least five State supreme courts have held that the doctrine of ecclesiastical abstention does *not* deprive civil courts of subject-matter jurisdiction. *Winkler v. Marist Fathers of Detroit, Inc.*, 901 N.W.2d 566, 572-73 (Mich. 2017) ("the ecclesiastical abstention doctrine informs how civil courts must adjudicate claims involving ecclesiastical questions; it does not deprive those courts of subject matter jurisdiction over such claims"); *Doe v. First Presbyterian Church U.S.A.*, 421 P.3d 284, 290 (Okla. 2017) ("the church autonomy doctrine is an affirmative defense and does not deprive

the court of subject matter jurisdiction." (capitalization altered)), overruled in part by *Oklahoma Annual Conf. of the United Methodist Church v. Timmons*, 2023 OK 101, 538 P.3d 163 (Okla. 2023); *Pfeil v. St. Matthews Evangelical Lutheran Church,* 877 N.W.2d 528, 535 (Minn. 2016) ("the ecclesiastical abstention doctrine is not a jurisdictional bar"); *St. Joseph Catholic Orphan Soc. v. Edwards,* 449 S.W.3d 727, 736-37 (Ky. 2014) ("We . . . conclude that ecclesiastical abstention does not divest Kentucky courts of subject-matter jurisdiction because it does not render our courts unable to hear *types* of cases . . . ." (emphasis *sic*)); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.,* 796 N.E.2d 286, 290 (Ind. 2003) ("A court with general authority to hear matters like employment disputes is not ousted of subject matter . . . jurisdiction because the defendant pleads a religious defense.").

2. But over the last dozen years, three other State supreme courts have squarely held the opposite. *In re Diocese of Lubbock*, 624 S.W.3d 506, 512 n.1 (Tex. 2021) (the "matters that the ecclesiastical abstention doctrine covers . . . relate to a court's jurisdiction to hear a case"); *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 158-59 (Tenn. 2017) ("We . . . hold that, *until and unless the United States Supreme Court declares otherwise*, the ecclesiastical abstention doctrine, where it applies, functions as a subject matter jurisdictional bar . . . ." (emphasis added)); *Wipf v. Hutterville Hutterian Brethren, Inc.*, 808 N.W.2d 678, 682 (N.D. 2011) ("Secular courts lack subject matter jurisdiction over lawsuits involving 'theological controversy, church discipline, ecclesiastical government, or the conformity of the

members of the church to the standard of morals required of them.'" (quoting *Milivojevich*, 426 U.S. at 714)). A fourth court—Oklahoma's supreme tribunal—recently flip-flopped and is now properly included on this side of the split as well. As indicated above, in 2017, the Supreme Court of Oklahoma held that "the church autonomy doctrine is an affirmative defense and does not deprive the court of subject matter jurisdiction." *Doe*, 421 P.3d at 290 (capitalization deleted). But just two months ago, that court reversed itself, "return[ed] to [its] settled jurisprudence, and reaffirm[ed] that church autonomy is a bar to subject matter jurisdiction." *Oklahoma Annual Conf. of the United Methodist Church*, 2023 OK 101, 538 P.3d 163, ¶ 18.

3. Moreover, most of the State supreme courts that have held that the ecclesiastical-abstention doctrine does not operate to deprive civil courts of subject-matter jurisdiction have concluded that the doctrine instead functions as an affirmative defense. But there is even nascent disagreement on this point. In *Pfeil*, for example, the Minnesota Supreme Court "le[ft] for another time the question of whether the doctrine is best viewed as an affirmative defense on the merits or a form of abstention" but intimated a preference for the latter conclusion, noting that it had "previously suggested that" abstention might be the proper characterization. *Pfeil*, 877 N.W.2d at 535. *See also Winkler*, 901 N.W.2d at 575 n.6 ("A number of . . . jurisdictions" rejecting the contention that the ecclesiastical-abstention doctrine operates to deprive civil courts of subject-matter jurisdiction "have further clarified that the doctrine operates as an affirmative defense"; "[w]e need not decide here whether we

agree with this particular characterization of the doctrine").

C. *Hosanna-Tabor* Has Not Aided in Resolving the Split, and the Lower Courts Look to this Court for Resolution.

1. The ongoing deep divisions between the federal circuit courts—and, particularly, between the State supreme courts—persist at least in part because of disagreements over the proper reading of this Court's decision in *Hosanna-Tabor*. *See, e.g.*, *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1209 (D.N.M. 2018) ("*Hosanna-Tabor* . . . does nothing to clarify the matter" of the ecclesiastical-abstention doctrine's proper classification). *Hosanna-Tabor* centered on the ecclesiastical-abstention doctrine's First Amendment sibling, the so-called ministerial exception. In *Hosanna-Tabor*, the Court noted that "[a] conflict has arisen in the Courts of Appeals over whether the ministerial exception is a jurisdictional bar or a defense on the merits." *Hosanna-Tabor*, 565 U.S. at 195 n.4. This Court resolved the conflict by "conclud[ing] that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Id.*

2. Some courts have reasoned that, given the similarities between the ecclesiastical-abstention doctrine and the ministerial exception, and given the fact that both are premised on the Religion Clauses of the First Amendment, *Hosanna-Tabor* supports the proposition that the ecclesiastical-abstention doctrine, like the ministerial exception, does not operate to deprive civil courts of subject-matter jurisdiction. After all,

this Court's reasoning in *Hosanna-Tabor* as to why the ministerial exception is not jurisdictional applies just as readily to the doctrine of ecclesiastical abstention: The ministerial exception is an affirmative defense "because the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case." *Id.* (cleaned up). So in *Pfeil*, for example, the Minnesota Supreme Court characterized the ministerial exception as "a derivative of the ecclesiastical abstention doctrine" and thus reasoned that this Court's conclusion that the ministerial exception does not operate to deprive civil courts of subject-matter jurisdiction should likewise apply to the operation of the ecclesiastical-abstention doctrine. *Pfeil*, 877 N.W.2d at 534, 535. *See also Winkler*, 901 N.W.2d at 575 n.6.

3. Other State supreme courts, while acknowledging the close relationship between the ecclesiastical-abstention doctrine and the ministerial exception, have emphasized that they are distinct concepts and that, while *Hosanna-Tabor* may inform the issue of the proper procedural understanding of the ecclesiastical-abstention doctrine, it does not control it. In *Church of God in Christ*, the Tennessee Supreme Court emphasized that, "[a]lthough both [the ecclesiastical-abstention doctrine and the ministerial exception] derive from the First Amendment, the ecclesiastical abstention doctrine predates the ministerial exception by almost a century" and found it "[n]otabl[e]" that this Court did not specifically "address the ecclesiastical abstention doctrine in *Hosanna-Tabor*." *Church of God in Christ, Inc.*, 531 S.W.3d at 157. The Tennessee court concluded that this Court had, in its

1870 *Watson* decision, "described the ecclesiastical abstention doctrine in a manner that suggest[ed] it constitutes a subject matter jurisdictional bar[.]" *Id.* at 157. Because, in its view, "[n]o language in *Hosanna-Tabor* alters th[is] . . . principle," the Tennessee Supreme Court held that "until and unless the United States Supreme Court declares otherwise," it would continue to hold that "the ecclesiastical abstention doctrine . . . functions as a subject matter jurisdictional bar[.]" *Id.* at 158-59.

The Supreme Court of Texas has reached the same conclusion by means of the same analysis. That court, like the Tennessee Supreme Court, has noted that the ministerial exception is "a doctrine that is independent of but related to [the ecclesiastical-]abstention" doctrine and has found language from *Watson* suggesting that the ecclesiastical-abstention doctrine "relate[s] to a court's jurisdiction" controlling. *In re Diocese of Lubbock*, 624 S.W.2d at 512 n.1. Accordingly, the Supreme Court of Texas, like its counterpart in Tennessee, decided that it would continue to treat the doctrine of ecclesiastical abstention as an issue of subject-matter jurisdiction "until [this] Court says otherwise." *Id.*

Hosanna-Tabor, therefore, has, at best, failed to aid in resolving the disagreement over the proper role of the doctrine of ecclesiastical abstention and, at worst, exacerbated the split and concomitant uncertainty. The Supreme Court of Oklahoma provides perhaps the best illustration of the persisting uncertainty and need for post-*Hosanna-Tabor* guidance from this Court. In *Doe v. First Presbyterian Church U.S.A.*, that court relied on *Hosanna-Tabor* as the

primary support for its holding that the doctrine of ecclesiastical abstention operates as an affirmative defense rather than as a bar to subject-matter jurisdiction. *Doe*, 421 P.3d at 291. But several weeks ago—just six years after deciding *Doe*—the court reversed course, adopted the subject-matter-jurisdiction view of the ecclesiastical-abstention doctrine, and faulted the *Doe* majority for "misappl[ying] . . . *Hosanna-Tabor*." *Oklahoma Annual Conf. of the United Methodist Church*, 2023 OK 101, 538 P.3d 163, ¶ 17.

II. THE QUESTION PRESENTED IS IMPORTANT AND SQUARELY BEFORE THE COURT.

The split in the lower courts on the ecclesiastical-abstention issue is thus undeniable and is especially pronounced in the State supreme courts. This should be particularly concerning to this Court, given that the lion's share of cases in which the doctrine is implicated are litigated in State courts, and thus, the likelihood of disparate results without intervention from this Court is much higher than it would be were the split confined to the federal courts alone. As the Supreme Courts of Tennessee and Texas have explicitly recognized, only this Court can put an end to the discord.

A. The Split Has Weighty Practical Ramifications.

Addressing this split is important given that the doctrine of ecclesiastical abstention's procedural status is an issue of great practical consequence. "Characterizing a rule as jurisdictional renders it unique in

our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Whether the ecclesiastical-abstention doctrine does or does not operate to deprive civil courts of subject-matter jurisdiction determines, among other things, when the doctrine can be raised and whether it can be waived. *See id.* ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."); Fed. R. Civ. P. 8(c) ("In responding to a pleading, a party must affirmatively state any . . . affirmative defense[.]").

Whether or not the ecclesiastical-abstention doctrine is jurisdictional also determines what evidence and other materials a court may consult in assessing its application in a given case. *E.g.*, *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (2016) ("In considering a motion to dismiss for lack of subject matter jurisdiction, courts are required to accept as true all of the factual allegations contained in the complaint. Nonetheless, we may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." (internal citations and quotation marks omitted)). And it determines which party bears the burden of proof with respect to the doctrine's applicability. *Compare St. Joseph Catholic Orphan Soc'y*, 449 S.W.3d at 737 (holding that the doctrine of ecclesiastical abstention is an affirmative defense and that, therefore, "the party asserting the ecclesiastical-abstention defense bears the burden of proving its applicability") *with Hale v. Morgan Stanley Smith Barney LLC*, 982 F.3d 996, 997 (6th Cir. 2020) ("The party asserting subject-matter jurisdiction bears the burden of establishing that such

jurisdiction exists.").

B. The Question Is Squarely Before the Court.

It is this burden-of-proof issue that loomed largest in this case. On appeal before the Ohio Court of Appeals, Respondent Diocese urged that court to reverse the trial court's decision denying Respondents' motion to dismiss for lack of subject-matter jurisdiction, arguing that, because the ecclesiastical-abstention doctrine was, in their view, jurisdictional, Fr. Plishka "b[ore] the burden of affirmatively establishing facts that demonstrate that the [trial] court ha[d] jurisdiction." Diocese Opening Ct. App. Br. at 39. It was the trial court's "failure" to place this burden on Fr. Plishka, the Diocese argued, that "doomed [the trial court's] analysis of the jurisdictional issue in this case" and thus demanded the court of appeals's intervention. *Id.* at 40.

The court of appeals sided with Respondents, rejecting Fr. Plishka's argument that the doctrine of ecclesiastical abstention in fact does *not* operate to deprive civil courts of subject-matter jurisdiction. Pet. App. at 39 n.5, 45. Fr. Plishka asked the Supreme Court of Ohio to review that very issue. That court declined to do so by a one-vote margin, and thus the issue is now squarely before this Court. *Id.* at 2.

C. Addressing the Split Would Answer the Call of the Lower Courts and Would Allow the Court to Easily Bring Order to an Important Area of the Law.

This Court has "'tried in recent cases to bring some

discipline to the use' of the term 'jurisdiction.'" *Sebelius*, 568 U.S. at 153 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). This case presents the Court with an excellent opportunity to further advance that mission. While several State supreme courts and federal circuit courts have already concluded that the ecclesiastical-abstention doctrine is *not* jurisdictional, nearly as many have concluded the opposite. Three of the four State supreme courts in the latter group have relied primarily, sometimes exclusively, upon this Court's *Watson* decision as justification for their position. And two of these three have stated that they await clarification on the issue from this Court. *See Church of God in Christ*, 531 S.W.3d at 158-59; *In re Diocese of Lubbock*, 624 S.W.2d at 512 n.1.

Indeed, none of the State supreme courts or federal circuit courts on the ecclesiastical-abstention-is-jurisdictional side of the divide has offered up a full-throated defense of that position. Besides simply relying on *Watson*'s use of the word "jurisdiction," there really is no such defense to be made. "[B]ecause the issue presented by the [ecclesiastical-abstention doctrine] is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case," the doctrine is *not* jurisdictional. *Hosanna-Tabor*, 565 U.S. at 195 n.4 (cleaned up). This Court's reasoning from *Hosanna-Tabor* should apply with just as much force in the ecclesiastical-abstention context as it did in the context of the ministerial exception. Understood this way, the solution to the split is straightforward, but it requires action from this Court.

As this Court recognized in *Watson* itself, "There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application." *Watson*, 80 U.S. at 732. The term does not properly apply to the ecclesiastical-abstention doctrine which, rightly understood, does not operate to deprive civil courts of subject-matter jurisdiction.

* * *

This Court should intervene now to resolve this consequential disagreement between both State courts of last resort and federal circuit courts. Application of an important First Amendment protection should not vary based on the whims of geography.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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