No. 23-732

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case presents the Court with a straightforward opportunity to bring clarity to a precise, consequential issue over which federal courts of appeals—and numerous State supreme courts—are split. At least two State supreme courts have explicitly stated that they await guidance from this Court to resolve the tension between *Watson v. Jones*, 80 U.S. 679 (1872), which used jurisdictional language to describe the doctrine of ecclesiastical abstention, and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), which held that ecclesiastical abstention's sister doctrine, the ministerial exception, is an affirmative defense, not a bar to subject-matter jurisdiction.

Respondent Skurla attempts to convince the Court that the circuit-against-circuit and State-against-State conflicts Fr. Plishka identifies in his petition are illusory. But his argument on this front, largely confined to simply discussing the varying facts of those cases, is unpersuasive. Respondent also argues that this case is "moot" because its outcome will have no impact on how Ohio courts adjudicate issues of subject-matter jurisdiction. But the question presented to this Court is whether the doctrine of ecclesiastical abstention is jurisdictional in the first place.

Respondent's BIO is also noteworthy for what is does *not* say. Respondent does not deny that the ecclesiastical-abstention issue has been properly preserved and is squarely before the Court. And he does not deny that, as a general matter, the issue is one of great practical importance.

The conflict over the doctrine of ecclesiastical abstention is obvious, the cause of the conflict clear, and the correct resolution evident and easily implemented. But only this Court can effect that resolution. Fr. Plishka respectfully urges the Court to seize the opportunity.

ARGUMENT[1]

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

A. Federal Courts of Appeals Are Split.

Respondent's argument that there is no meaningful conflict in the federal courts of appeals or State supreme courts on the ecclesiastical-abstention issue

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[1] The BIO includes a number of factual errors. Respondent asserts, for example, that "the jury . . . found for the Diocese on the Diocese's replevin claim, which was refiled when Fr. Plishka brought suit." BIO 5. But the Diocese did not raise a replevin claim in its reincarnated lawsuit. *See* Diocese Compl. 1-4 (raising only claims for monetary damages). And even on the relics claim the Diocese did raise, the jury awarded $0 in damages. Resp. App. 23. Respondent also asserts, regarding the parties' dueling motions in limine, that "[t]he trial court . . . incorporat[ed] into its [in limine] order the very language used by Fr. Plishka in his [in limine] motion." BIO 5. Respondent has it precisely backwards. In fact, the trial court adopted *the Diocese's* proposed in limine order verbatim. *Compare* Diocese July 13, 2021 Proposed Order *with* Resp. App. 21 (the bodies of these documents are identical). This reply does not discuss these or Respondent's other factual errors in greater detail, however, because, though the errors create a distorted factual picture, they are irrelevant to the issue before this Court: whether the ecclesiastical-abstention doctrine operates to deprive civil courts of subject-matter jurisdiction.

lacks merit. As documented in Fr. Plishka's petition, the Eighth Circuit has squarely held that the doctrine of ecclesiastical abstention operates to deprive courts of subject-matter jurisdiction. *E.g.*, *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993). At least two other circuits agree. *Rutland v. Nelson*, 857 F. App'x 627, 628 (11th Cir. 2021); *Hyung Jin Moon v. Hak Ja Han Moon*, 833 F. App'x 876, 880 (2d Cir. 2020). The Tenth Circuit, by contrast, has taken the opposite position, concluding that the doctrine operates as an affirmative defense, not 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 concluded 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). At least two other circuits have noted the uncertainty surrounding the doctrine's status 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); *Kelly v. Marcantonio*, 187 F.3d 192, 197 (1st Cir. 1999).

Despite this split, Respondent contends that there is in fact no conflict. But his argument consists, in its entirety, of a brief discussion of the facts and history of the *Bryce* and *Paul* cases that simply does not address the circuit-split issue. Respondent asserts that the Tenth Circuit's decision in *Bryce* "was decided in part upon the 'ministerial exception'" and therefore "does not represent a conflict." BIO 21. Indeed, the ministerial exception did play a role in *Bryce*, as this Court has previously acknowledged. *See Hosanna-Tabor*, 565 U.S. at 195 n.4. But that is neither here

nor there. It is a non sequitur to argue that, because the ministerial exception was also discussed in *Bryce*, the Tenth Circuit did not pick a side in the debate over the ecclesiastical-abstention doctrine. To the contrary, *Bryce* squarely held that the ecclesiastical-abstention doctrine is *not* properly raised in a motion to dismiss for lack of subject-matter jurisdiction but instead is akin to the "[affirmative] defense of qualified immunity." *Bryce*, 289 F.3d at 654. *See also Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1209 (D.N.M. 2018) (in *Bryce*, the "Tenth Circuit . . . held that the church autonomy doctrine [aka the ecclesiastical-abstention doctrine] is an affirmative defense"). Similarly, Respondent delves into the facts of *Paul* but cannot deny that there the Ninth Circuit, though determining the doctrine did not operate to bar that particular suit, concluded that the doctrine was properly characterized as a "limited abstention doctrine" rather than a jurisdictional bar. *Paul*, 819 F.2d at 878 n.1.

B. State Supreme Courts Are Deeply Split.

The conflict among State courts of last resort runs even deeper. As discussed at more length in Fr. Plishka's petition, 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. Petition 14-15. Likewise, at least four State supreme courts have held precisely the opposite. *Id.* at 15-16. The Oklahoma Supreme Court is properly included on both sides of this divide, in light of its 2017 "affirmative defense" decision and its late 2023 about-face. *Id.* at 16.

All told, then, at least eight State supreme courts are involved in this split, and, after Oklahoma's flip, they are evenly divided. Yet Respondent asserts that this four-to-four split "do[es] not create a conflict." BIO 23 (capitalization deleted). Respondent focuses his attention on four State-supreme-court decisions holding that the ecclesiastical-abstention doctrine does not operate to deprive courts of subject-matter jurisdiction. He provides brief summaries of the four cases but does not explain how the summaries support his no-conflict contention. *Id.* at 23-25. They do not. Respondent also insinuates that a four-to-four split is insufficient to establish a conflict. *See id.* at 25. To the contrary, the caselaw Fr. Plishka relies upon shows not just a direct conflict—a State court of last resort entering a holding on an issue in direct opposition to a sister court's holding on that very same issue—but a direct conflict *four times over*.

Finally, Respondent asserts that these State-supreme-court decisions do not establish a conflict because the "cases were decided under the laws of those states and each state has the inherent authority to determine procedurally how cases involving ecclesiastical disputes should be addressed as long as churches' First Amendment rights are protected." *Ibid.* But while the cases at issue may have involved varying state-law causes of action, all also involved application of the *federal* ecclesiastical-abstention doctrine, a vital component of the First Amendment. Further, while State procedures for prosecuting or defending civil litigation may vary, it is this Court that has the final say concerning the nature of the ecclesiastical-abstention doctrine.

In short, the BIO fails to move the needle with respect to this pervasive and abiding split between both federal courts of appeals and, especially, State courts of last resort.

C. Respondent Misapprehends *Hosanna-Tabor*'s Implications for this Case.

In *Hosanna-Tabor*, this 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." 565 U.S. at 195 n.4. The Court resolved the conflict by "conclud[ing] that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Ibid.* "That is because the issue presented by the [ministerial] 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).

That same reasoning should apply to the ecclesiastical-abstention doctrine as well. But as Fr. Plishka pointed out in his petition, post-*Hosanna-Tabor*, lower courts remain at odds on the issue. Some State supreme courts, relying on the close relationship between the ministerial exception and the doctrine of ecclesiastical abstention, as well as upon the applicability of *Hosanna-Tabor*'s reasoning to the ecclesiastical-abstention context, have determined that *Hosanna-Tabor* supports the conclusion that the doctrine of ecclesiastical abstention is *not* jurisdictional. *E.g.*, *Winkler v. Marist Fathers of Detroit, Inc.*, 901 N.W.2d 566, 575 n.6 (Mich. 2017); *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 535 (Minn. 2016). Other courts, including

Tennessee's supreme tribunal, have instead felt bound by *Watson*'s 150-year-old "descri[ption] [of] the ecclesiastical abstention doctrine in a manner that suggests it constitutes a subject matter jurisdictional bar[.]" *Church of God in Christ, Inc.*, 531 S.W.3d 146, 157 (Tenn. 2017). Given this *Watson* language, the Tennessee court said, it would continue to hold that "the ecclesiastical abstention doctrine . . . functions as a subject matter jurisdictional bar" "until and unless the United States Supreme Court declares otherwise[.]" *Id.* at 158-59.

Respondent's brief fails to grasp *Hosanna-Tabor*'s relationship to this case. He asserts that "the ministerial exception only applies to employment cases," BIO 15 (capitalization deleted), and that Fr. Plishka's purported reliance on the ministerial exception is therefore "misplaced because the instant matter is not an employment case," *id.* at 20.

Respondent is correct that this is not an employment case[2] and that the ministerial exception does not "appl[y]" here. Fr. Plishka has argued as much throughout this litigation. Indeed, if the ministerial exception applied here, there would be no need for this Court to review the case on a writ of certiorari, given that the Court has already held that the ministerial exception is not jurisdictional. Rather, Fr. Plishka's argument is that, just as clarification from this Court was necessary with regard to the proper categorization of the ministerial exception, so too

[2] Incidentally, the fact that this is not an employment case puts the lie to Respondent's assertion that the case is about Fr. Plishka's suspension rather than about Respondent and the Diocese's wrongful commandeering of the civil courts.

(indeed, even more so given the deep split among State supreme courts present here but absent in *Hosanna-Tabor*) is such clarification necessary with regard to the doctrine of ecclesiastical abstention.

Respondent also makes a peculiar argument in his attempt to explain away this Court's holding in *Hosanna-Tabor* that the ministerial exception is an affirmative defense, not a bar to subject-matter jurisdiction. The Court reached that conclusion, Respondent says, because it "had to weigh the federal courts' inherent jurisdiction to interpret acts of Congress against the ecclesiastical abstention doctrine's prohibition against jurisdiction over ecclesiastical matters. The decision to treat the 'ministerial exception' . . . as an affirmative defense enabled federal courts to exercise jurisdiction over claims arising from acts of Congress while still prohibiting civil courts from reviewing ecclesiastical disputes." BIO 17. There are a host of problems with this theory. First among them, it is divorced from the text of the opinion it purports to interpret. *Hosanna-Tabor* says nothing about this logically and historically bankrupt rationale.

Instead, *Hosanna-Tabor* reasoned that the ministerial exception is an affirmative defense, not a bar to subject-matter jurisdiction, "because the issue presented by the [ministerial] exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case." 565 U.S. at 195 n.4 (cleaned up). This straight-forward logic applies squarely to the ecclesiastical-abstention doctrine as well. Properly analyzed, the doctrine operates as an affirmative defense, not a bar to subject-matter jurisdiction, because the question it

presents is "whether the allegations the plaintiff makes entitle him to relief, not whether the court has the power to hear the case." *Ibid.*

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

Respondent leaves unanswered most of Fr. Plishka's arguments regarding the importance of the question presented and the suitability of this case as a vehicle for bringing that question before the Court. He does not dispute the fact that two State courts of last resort have explicitly declared that they await direction from this Court on the question. He does not deny that the issue has been properly preserved and is squarely before the Court. Nor does he deny the practical significance of the issue writ large, given that "[c]haracterizing a rule as jurisdictional renders it unique in our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). As discussed in Fr. Plishka's petition, whether the doctrine of ecclesiastical abstention operates as a jurisdictional bar directly affects, among other things, when the issue can be raised, whether it can be waived, what evidence or record materials can be used to adjudicate the issue, and which party bears the burden of proof.

Respondent contests none of this. Yet still he asserts that, for two reasons, the Court should not review this case. First, he argues that the case is "moot" because, "[r]egardless of what this Court may rule . . . , any party who contests subject matter jurisdiction in Ohio's courts must do so pursuant to

[Ohio] Civ.R. 12(B)(1)[,] and such contestation will be analyzed in the same manner it was in the instant matter." BIO 30. Put another way, Respondent says, "[t]he State of Ohio has an established procedure for addressing challenges to the courts' subject matter jurisdiction, which will not be impacted by a decision of this Court in this matter." *Id.* at 28. True enough. But the question presented is not whether Ohio's procedures for dealing with a challenge to subject-matter jurisdiction are proper or whether the outcome of this case would change those procedures (it would not, of course). Rather, the question is whether the doctrine of ecclesiastical abstention is an issue of subject-matter jurisdiction in the first place.

Second, Respondent argues that, regardless of whether the doctrine of ecclesiastical abstention is a bar to subject-matter jurisdiction or, instead, an affirmative defense, "[t]he results [would be] the same [in this case] . . . because this is an ecclesiastical dispute concerning the propriety of Fr. Plishka's suspension." BIO 33. In other words, Respondent argues that civil-court adjudication of Fr. Plishka's claim would have violated the doctrine of ecclesiastical-abstention regardless of whether the doctrine is jurisdictional or, instead, an affirmative defense because Fr. Plishka's claim involves an ecclesiastical dispute in violation of the doctrine of ecclesiastical abstention. This circular argument will not do.

Indeed, Respondent sang a different tune in the court of appeals, where he repeatedly emphasized the importance of categorizing the ecclesiastical-abstention doctrine as jurisdictional. Skurla Opening Ct. App. Br. 48-57; Skurla Ct. App. Reply 2-5. His co-

defendant—who opted not to file a brief in opposition to Fr. Plishka's petition—put the defense position most succinctly in its brief before the court of appeals: because the ecclesiastical-abstention doctrine was, in the defense 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 defense said, that "from the outset doomed [the trial court's] analysis of the jurisdictional issue in this case" and thus demanded the court of appeals's intervention on the ecclesiastical-abstention issue. *Id.* at 40.

Respondent's argument in favor of evading this Court's review is flawed for another reason. Even if, counterfactually, application of the correct standard would not have changed the outcome on these facts, still it is the task of the lower courts to conduct that analysis in the first instance. The issue before this Court is the proper categorization of the ecclesiastical-abstention doctrine and, thus, the proper standard for assessing a party's attempt to invoke the doctrine. Were this Court to hold that the doctrine must be assessed as an affirmative defense, then presumably it would remand the case to the Ohio court of appeals to conduct that assessment. That is, rather than claiming for itself the prerogative to make that assessment in the first instance, this Court would likely "follow [its] ordinary practice of remanding for a determination" based on "the right standard." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 195 (2015). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,

333 (2007) (Alito, J., concurring in the judgment) ("agree[ing]" with the majority "that the case should be remanded to allow the lower courts to decide in the first instance whether the allegations survive under the correct standard"); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018) (remanding for application of the correct standard even though the petitioner might "not . . . ultimately [be] entitled to relief or even a new trial").

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated therein and above.

Respectfully submitted,

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