No. _____

In The
Supreme Court of the United States

PRESBYTERIAN CHURCH (U.S.A.),

Petitioner,

v.

REVEREND ERIC HOEY,

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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May 15, 2019

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QUESTION PRESENTED

Rev. Hoey, an ordained Presbyterian minister, was called by the denomination to be its Director of Evangelism and Church Growth. During his ministry, Rev. Hoey was involved in the improper redirection of substantial Church funds to a separate religious organization. Church leaders determined that his misconduct violated the Church's ecclesiastical ethics doctrine, which required him to exercise the "highest degree of stewardship" regarding all Church resources which are "entrusted to the [Church] by God." He sued the Church for defamation in the Kentucky courts for stating to the Presbyterian community, as required by its Constitution, that he had committed "ethical violations."

All three levels of Kentucky's judiciary refused, under procedures common in many states, to dismiss Rev. Hoey's case under the First Amendment's ecclesiastical abstention or church autonomy doctrine. Thus, the question presented is:

> Whether, under the Supremacy Clause, the First Amendment requires state courts, despite their own procedures, to dismiss suits immediately upon a showing that the claim turns upon the interpretation or application of religious doctrine or discipline?

PARTIES TO THE PROCEEDING

The Presbyterian Church (U.S.A.) is petitioner here and was defendant in the trial court below. Reverend Eric Hoey is respondent here and was plaintiff in the trial court below. The Church was the writ petitioner in the Kentucky Court of Appeals and the appellant in the Kentucky Supreme Court. Reverend Hoey was the writ respondent in the Kentucky Court of Appeals and the appellee in the Kentucky Supreme Court.

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OPINIONS BELOW

The opinion of the Kentucky Supreme Court is reported at *Presbyterian Church U.S.A. v. Edwards*, 566 S.W.3d 175 (Ky. 2018) and reproduced at App. 1-19. The opinion of the Kentucky Court of Appeals is unreported and reproduced at App. 22-26. The opinion of the Jefferson County, Kentucky, Circuit Court is unreported and reproduced at App. 27.

JURISDICTION

The Kentucky Supreme Court issued a 4-3 opinion on September 27, 2018. The Court denied the Church's petition for rehearing of that decision on February 14, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-84 (1975).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Factual background

1. Ecclesiastical governance structure of the Church

Petitioner, the Presbyterian Church (U.S.A.) (the "Church"), is the largest Presbyterian denomination in the United States with almost 1.7 million members, more than 23,000 ordained ministers of the Word and Sacrament ("teaching elders"), and about 9,900 congregations. The General Assembly is the Church's highest ecclesial body. Six General Assembly "agencies"—including the Presbyterian Mission Agency (the "PMA")—help carry out General Assembly initiatives. The PMA is the mission and ministry arm of the Church. The PMA's mission work and evangelism range from aiding in disaster relief abroad to domestic church planting in urban areas.

2. Rev. Hoey's ministerial role within the Church

In April 2007, Respondent Reverend (Rev.) Eric Hoey was hired by the PMA as its Director of Evangelism and Church Growth. *See* App. 2. In this role, Rev. Hoey oversaw a mission ministry that was established to "inspire individuals, congregations, and governing bodies to share their personal faith in Christ and to become connected to a community of faith." Rev. Hoey reported directly to Reverend (Rev.) Roger Dermody, who was then Deputy Executive Director for Mission

for the Church. Rev. Hoey's role required him to serve as an ambassador for the General Assembly in speaking to Presbyterian congregations across the country about strengthening current faith communities and growing new disciples of Christ. The Church chose Rev. Hoey for this position, among other reasons, because he is an ordained minister of the Presbyterian faith.

3. Rev. Hoey is involved in improperly transferring Church funds to an entity outside the Church in violation of the Church's ecclesiastical policies

During his time as a Director of Evangelism and Church Growth, Rev. Hoey discussed the possible incorporation of a new non-profit entity separate and apart from the Church—the Presbyterian Centers for New Church Innovation, Inc. ("PCNCI")—with two subordinates. Rev. Hoey's superior, Rev. Dermody, also knew of this initiative. Subsequently, Rev. Hoey participated in transferring funds from the Church to PCNCI. *See* App. 2. None of the individuals involved followed the Church's Incorporation Policy and Criteria (despite their awareness of the policy), which requires General Assembly approval for the incorporation of new entities. *See* App. 2.

4. In accordance with ecclesiastical procedures outlined in the Church's Constitution, the Church issues a warning to Rev. Hoey and his Presbytery that Rev. Hoey has violated the Church's ecclesiastical ethics policies

After the Church learned of the transfer of funds to PCNCI, the Church issued a warning to Rev. Hoey, which included findings that he: (1) failed to manage ministers properly under his supervision; (2) failed to timely inform his superiors he and his staff had incorporated PCNCI without authorization; and (3) contributed to a culture of noncompliance with Church policies. *See* App. 2. The Church issued a similar warning to Rev. Dermody. The Church further determined Rev. Hoey violated its Ethics Policy, which provides that funds received by the PMA "are entrusted to the organization by God through the faithful financial support of PCUSA members" and, therefore, the "highest degree of stewardship and fiduciary responsibility is expected of all employees."

In accordance with its ecclesiastical procedures—namely, the Book of Order[1]—the Church reported the disciplinary action involving Rev. Hoey to his Presbytery on October 10, 2014. *See* App. 2. The notification stated that the PMA Board's Audit Committee found that Rev. Hoey knew about PCNCI's creation and approved a transfer of Church grant money to the entity

[1] Aside from the Holy Scripture, the Church's major governing document is its two-part Constitution—the Book of Confessions (Part I) and the Book of Order (Part II).

but did not take steps to ensure compliance with the Church's incorporation criteria.[2] The Church did not provide any information to third parties outside the denomination. The Church later terminated Rev. Hoey's and Rev. Dermody's employment. App. 2.

B. Proceedings below

1. Rev. Dermody, Rev. Hoey's direct superior, files a defamation complaint that is quickly dismissed by the trial court on ecclesiastical-abstention grounds without any discovery being taken and the dismissal is affirmed by the Kentucky Court of Appeals

Rev. Dermody filed a complaint in the Jefferson County, Kentucky, Circuit Court alleging the Church had defamed him by publishing that he had engaged in "unethical" conduct while an employee. The Church sought to have the case dismissed on the grounds that the Court would be unable to adjudicate Rev. Dermody's case because his claims are entangled with and would require examination of the Church's faith, religious doctrine, and ecclesiastical governance. The trial court dismissed Rev. Dermody's claims without any discovery having been taken, holding that the Church was immune from litigation under the ecclesiastical-abstention doctrine. Rev. Dermody appealed the case to the Kentucky Court of Appeals.

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[2] Likewise, the Church reported the disciplinary action against Rev. Dermody to his Presbytery that same day.

In a unanimous opinion, the Kentucky Court of Appeals affirmed the trial court. *See Dermody v. Presbyterian Church U.S.A.*, 530 S.W.3d 467 (Ky. App. 2017). The Court of Appeals' opinion notes that truth is a complete defense to defamation. *Id.* at 473. The opinion states that Rev. Dermody's defamation claim (like Rev. Hoey's claim) is based on the Church allegedly publicizing that Rev. Dermody committed ethical violations. Further, the opinion finds that the Church internally determined that Rev. Dermody did, in fact, violate its ethical policies. *Id.* at 472. Thus, the only way for Rev. Dermody to disprove the truth of the Church's statements would be for the Court to interpret the Church's doctrine and ethical policies. However, the ecclesiastical-abstention doctrine precluded the Kentucky civil courts from doing so. *Id.* at 475.

2. Rev. Hoey files a complaint nearly identical to Rev. Dermody's in which he alleges defamation arising from the exact same statements at issue in Dermody's complaint, but the trial court refuses to dismiss the case on ecclesiastical-abstention grounds

On June 26, 2015, Rev. Hoey filed his complaint—a nearly verbatim replica of Rev. Dermody's—in the Jefferson County, Kentucky, Circuit Court against the Church for defamation arising out of alleged harm he sustained by the Church's reporting that he had "committed ethical violations." *See* App. 23. As it did in the *Dermody* case, the Church sought dismissal of Rev.

Hoey's claims on ecclesiastical-abstention and ministerial-exception grounds, among other defenses.

Rather than responding to the Church's pending dispositive motion, Rev. Hoey served written discovery requests on the Church. *See* App. 3. The Church objected to the requests on the grounds that Rev. Hoey was not entitled to prosecute the action further, including taking any discovery, until the Court ruled on its threshold ecclesiastical-abstention and ministerial-exception defenses. Notwithstanding the Church's objections, the trial court did not circumscribe Rev. Hoey's actions in any way so that the Church's religious immunity defenses could be considered. Instead, the court ordered the Church to respond to Rev. Hoey's broad merits-based discovery requests and ruled that Rev. Hoey could otherwise continue to "prosecute the action." *See* App. 27.

3. The Kentucky Court of Appeals refuses to dismiss Rev. Hoey's case on ecclesiastical-abstention grounds

Because the Church would be irreparably harmed if forced to engage in discovery prior to a ruling on its immunity defenses, it petitioned the Kentucky Court of Appeals for a writ of mandamus and/or prohibition. *See* App. 3. In its petition, the Church argued that the trial court had effectively abrogated its immunity by forcing it to participate in discovery without a threshold immunity determination having been made. Further, the Church explained that there would be no

utility in allowing discovery because Rev. Hoey's complaint failed to plead facts alleging a claim outside the Church's immunity. Further, because the issue of the Church's threshold religious immunity was squarely before the Court as a matter of law, the Church requested that the Court of Appeals direct the trial court to dismiss the underlying case on the basis of the Church's religious immunity defenses. The Court of Appeals held that the trial court "clearly exceeded the scope of ecclesiastical immunity because the discovery [requested by Rev. Hoey] pertains to the merits of the underlying case." *See* App. 25. Nonetheless, the Court of Appeals entered an order allowing for limited discovery on the issue of immunity. The Court denied, without explanation, that portion of the Church's writ petition seeking a determination of the Church's immunity by the Court of Appeals. *See* App. 22-23.

4. Citing procedures common in many states, the Kentucky Supreme Court refuses to dismiss Rev. Hoey's case on ecclesiastical-abstention grounds

Following the Court of Appeals' decision, the Church appealed to the Kentucky Supreme Court, which affirmed the Court of Appeals' order allowing additional discovery in the trial court by a 4-3 vote. *See* App. 1-19. In its decision, the narrow Kentucky Supreme Court majority noted that it treats the ecclesiastical-abstention defense "like other affirmative defenses recognized by this Commonwealth." *See* App.

6. Accordingly, the Court declined to prohibit additional discovery in the trial court upon remand. The Court held that even if the trial court erroneously allows further discovery before a threshold immunity determination is reached, such a ruling would not result in a substantial miscarriage of justice. *See* App. 7.

The three dissenting justices would have dismissed Rev. Hoey's claim as barred by the ecclesiastical-abstention doctrine. In their view, even "accepting as fact that Church officials said [Rev. Hoey] had violated Church ethical policies, the trial court can adjudicate Rev. Hoey's claim of defamation *only* by evaluating those policies and determining if the Church officials' statements are true." *See* App. 13 (emphasis in original). Because it is "immediately apparent from the fact of Hoey's complaint that his claim can be sustained only by second-guessing the decision of the Church's governing body that Hoey violated the Church's ethical policies," the dissent maintained that any additional discovery into the matter would tread over the Church's First Amendment rights. *See* App. 13-14. Put another way, the dissent would have found that any additional discovery whatever would violate the Church's constitutional rights because the "applicability of the [ecclesiastical-abstention] doctrine is evident on the face of the complaint." *See* App. 19. The dissenting justices further noted the absurdity of allowing further discovery in this case where "in a companion lawsuit on this very same claim [the *Dermody* case], the Court of Appeals has already determined that such an

inquiry by a trial court violates the Ecclesiastical Abstention Doctrine." *See* App. 13.

The Church filed a petition for rehearing of the Kentucky Supreme Court's opinion, which was denied on February 14, 2019.[3]

REASONS TO GRANT THE PETITION

The reasons for granting the petition are straightforward and compelling. The ecclesiastical-abstention doctrine serves to prevent secular courts from becoming excessively entangled in religious affairs. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181 (2012). One way it achieves this end is by requiring that the question of a religious defendant's immunity be resolved at the earliest possible opportunity. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 n.1 (10th Cir. 2002) ("By

[3] Although the Kentucky Supreme Court remanded the case to the trial court for further proceedings based on its refusal to find Rev. Hoey's claims barred by the ecclesiastical-abstention doctrine, this Court has jurisdiction under 28 U.S.C. § 1257. The federal issue has been "finally decided by the highest court in the State." And, "refusal immediately to review the state court decision might seriously erode federal policy," because the remand proceedings could be resolved in a way that precludes the Church from vindicating its First Amendment rights in later proceedings. *See Cox*, 420 U.S. at 480, 483. Moreover, "reversal of the state court on the federal issue" of the Church's ecclesiastical-abstention immunity "would be preclusive of any further litigation" in this case. *Id.* at 482-83. Indeed, the ecclesiastical-abstention doctrine is meant to prevent claims like these from being litigated at all.

resolving the question of the [ecclesiastical-abstention] doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters."). Yet here, the Kentucky Supreme Court has remanded the case to the trial court in order to allow additional discovery relating to claims that are patently barred by the ecclesiastical-abstention doctrine even if the allegations pled in Rev. Hoey's complaint are taken as true.

The Kentucky Supreme Court's decision is erroneously based on its application of the ecclesiastical-abstention doctrine as a traditional affirmative defense to be addressed only at the summary-judgment stage after discovery has been taken. According to the Kentucky Supreme Court, no irreparable harm will result to the Church if additional, unnecessary discovery is conducted before the Church secures a decision regarding its religious immunity at the summary-judgment stage of the proceedings. But, the decision below will necessarily result in the entanglement of the secular courts in religious affairs in cases in which the plaintiffs' claims are facially barred by religious immunity; it ignores irreparable constitutional harm to the Church. This Court should grant review to give careful scrutiny to the question of whether a religious defendant is entitled to an immediate determination of its religious immunity at the earliest possible opportunity during the proceedings.

I. The Court should grant certiorari to determine whether the ecclesiastical-abstention doctrine requires courts to dismiss suits immediately upon a showing that the claim turns upon the interpretation or application of religious doctrine or discipline.

A. The opinion below unconstitutionally requires further litigation even after a religious defendant has shown that the controversy turns on matters of religious doctrine.

The Religion Clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause—work in tandem to protect religious autonomy and avoid excessive entanglement of the government in religious affairs. *See Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)) ("[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). In fidelity to the First Amendment's aim of preventing entanglement of the secular and the religious spheres, state and federal courts have long refrained from interfering with or re-adjudicating the internal decisions of religious organizations.

In the seminal case of *Watson v. Jones*, 80 U.S. 679, 680 (1879), this Court explained that when resolving a case depends on "doctrine, discipline, ecclesiastical law, rule, or custom, or Church [or a religious organization's] government," the ecclesiastical-abstention doctrine requires a court to abstain from hearing a

plaintiff's claims. Further, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. More recently, this Court has explained that the First Amendment guarantees to "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." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

Thus, the First Amendment, through the ecclesiastical-abstention doctrine, "mark[s] a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). This boundary prevents excessive entanglement of secular courts in religious affairs and promotes free religious exercise. *Hosanna-Tabor*, 565 U.S. at 181. The ecclesiastical-abstention doctrine preserves this boundary between the secular and the religious by acting as a "structural limitation imposed on the government" that prohibits courts from becoming "impermissibly entangle[d] . . . in religious governance and doctrine," by "categorically prohibit[ing] federal and state governments from becoming involved in religious . . . disputes." *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 900 F.3d 113, 118 n.4, 121 (3d Cir. 2018) (quoting *Conlon v. Intervarsity Christian*

Fellowship/USA, 777 F.3d 829, 836 (6th Cir. 2015)); *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when [religious disputes are] made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

Stated differently, "the First Amendment severely circumscribes the role that civil courts may play in resolving church . . . disputes." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (quoting *Presbyterian Church*, 393 U.S. at 449); *see Presbyterian Church*, 393 U.S. at 449 ("If civil courts undertake to resolve such controversies . . . , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

The Kentucky Supreme Court's 4-3 opinion in this case severely undermines these fundamental First Amendment principles. The Court's opinion would allow Rev. Hoey to engage in unnecessary discovery relating to claims against the Church even though Rev. Hoey has pleaded a claim that patently falls within the Church's religious immunity. Worse still, the Kentucky Supreme Court's opinion would permit Rev. Hoey to conduct this discovery despite the existence of a binding decision by the Kentucky Court of Appeals finding the Church immune in a companion case involving identical factual and legal circumstances. In *Dermody*, the Kentucky Court of Appeals unanimously held that Rev. Hoey's former direct superior's defamation claims

based on the exact same allegedly defamatory statements at issue in this case are barred by the ecclesiastical-abstention doctrine. 530 S.W.3d at 470.

In the Kentucky Supreme Court's view, additional discovery conducted by Rev. Hoey before a threshold determination has been made regarding the Church's immunity (even if such discovery is unnecessary and futile) will not result in harm to the Church sufficient to constitute a "substantial miscarriage of justice." *See* App. 7. But, this logic—that any harm caused by additional, unnecessary discovery into the inner workings of the Church will not cause irreparable harm—ignores the excessive entanglement of the secular courts in religious affairs that the constitutional ecclesiastical-abstention doctrine exists to prevent.

Contrary to the lenient view toward discovery of religious matters expressed in the Kentucky Supreme Court's opinion, the ecclesiastical-abstention doctrine requires courts to resist *any* unnecessary discovery and resolve religious-immunity questions "early in litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Indeed, permitting a case to proceed unnecessarily against an immune religious organization violates the structural separation of secular courts and religious entities required by the First Amendment, rendering "the discovery and trial process itself a [F]irst [A]mendment violation." *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011).

Significantly, the Kentucky Supreme Court's erroneous decision to allow additional discovery into the Church's affairs—in a case in which Rev. Hoey has patently failed to state a claim that could fall outside the Church's religious immunity—is based on its determination that the ecclesiastical-abstention doctrine operates as a traditional affirmative defense. This holding, in turn, is rooted in this Court's decision in *Hosanna-Tabor*. Notably, *Hosanna-Tabor* did not involve or consider the ecclesiastical-abstention doctrine at all, but instead addressed the far narrower ministerial exception to statutory Title VII claims. The *Hosanna-Tabor* Court, without similarly classifying the ecclesiastical-abstention doctrine, concluded that the ministerial exception is an affirmative defense, rather than a jurisdictional bar. Nonetheless, since *Hosanna-Tabor*, the Kentucky Supreme Court has joined the small minority of courts that view the ecclesiastical-abstention doctrine as an affirmative defense, rather than as a jurisdictional bar. *See Doe v. Presbyterian Church U.S.A.*, 421 P.3d 284, 291 (Okla. 2017) (deciding on rehearing by 5-4 vote that ecclesiastical-abstention doctrine is affirmative defense, after having decided it was jurisdictional, by 5-3 vote, several months earlier).[4]

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[4] Because *Hosanna-Tabor* did not address or purport to alter the parameters of the ecclesiastical-abstention doctrine, the majority of courts (including state courts of last resort) have continued to treat the doctrine as a jurisdictional bar since *Hosanna-Tabor*. *See, e.g.*, *Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.*, 531 S.W.3d 146, 157 (Tenn. 2017); *Taylor v. Paradise Missionary Baptist Church*, 242 So. 3d 979 (Ala. 2017); *Greater Fairview Missionary Baptist Church v. Hollins*,

The principal problem with the Kentucky Supreme Court's treatment of the ecclesiastical-abstention doctrine as a traditional affirmative defense is its excessively cramped view of how such defenses must operate procedurally in the courts. The Kentucky Supreme Court views the ecclesiastical-abstention doctrine as a garden-variety affirmative defense, which must be pleaded in the answer and then resolved by a motion for summary judgment, after discovery, with the defendant bearing the burden of proof. *See* Fed. R. Civ. P. 8(c)(1); Fed. R. Civ. P. 56(a). Treating the ecclesiastical-abstention doctrine in this manner necessarily results in unnecessary discovery into a religious defendant's affairs because an immune religious defendant lacks procedural recourse to achieve dismissal of the case before discovery has been conducted.

But, there is no reason the ecclesiastical-abstention doctrine cannot and should not be applied earlier in cases where it is appropriate to do so. For example, in some cases, a court may be able to grant a religious defendant's motion to dismiss under Rule 12(b)(6) for failure to state a claim because of the application of the

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160 So. 3d 223, 229-33 (Miss. 2015); *Wipf v. Hutterville Hutterian Brethren, Inc.*, 808 N.W.2d 678, 682 (S.D. 2012); *Flynn v. Estevez*, 221 So. 3d 1241, 1247 (Fla. Dist. Ct. App. 2017); *In re St. Thomas High Sch.*, 495 S.W.3d 500, 509-14 (Tex. App. 2016); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 365 (N.C. Ct. App. 2015); *Church of God in Christ, Inc. v. Bd. of Trs.*, 280 P.3d 795, 802 (Kan. Ct. App. 2012); *Harrison v. Bishop*, 44 N.E.3d 350, 363 (Ohio Ct. App. 2015); *see also Kavanaugh v. Zwilling*, 997 F. Supp. 2d 241, 248 n.7 (S.D.N.Y. 2014) (most federal courts treat ecclesiastical abstention as jurisdictional bar).

ecclesiastical-abstention doctrine. This case presents that exact situation. In his Complaint, Rev. Hoey pled that the Church is a religious organization. He has also pled that he seeks to challenge the Church's conclusion that he committed "ethical violations"—a conclusion that was reached as a matter of ecclesial doctrine and discipline. Even assuming that all of Rev. Hoey's allegations are true, and therefore, accepting as fact that the Church published that he had violated the Church's ethical policies, the trial court could adjudicate Rev. Hoey's claims of defamation only by evaluating the Church's ecclesial policies and determining if the Church's statements are true. *See* App. 13. Such an inquiry would plainly violate the ecclesiastical-abstention doctrine. *Watson*, 80 U.S. at 680 (when resolving a case depends on "doctrine, discipline, ecclesiastical law, rule, or custom, or Church [or a religious organization's] government," the ecclesiastical-abstention doctrine requires a court to abstain from hearing a plaintiff's claims); *see also Dermody*, 530 S.W.3d at 470 (Rev. Hoey's former direct superior's defamation claims based on exact same allegedly defamatory statements at issue in this case barred by ecclesiastical-abstention doctrine). This case, and others like it, must be resolved at the threshold without the need for discovery.

B. Other state courts of last resort and federal courts require resolution of a religious defendant's immunity at the threshold.

Numerous federal circuit courts and state courts of last resort have held (contrary to the Kentucky Supreme Court's view) that, under appropriate circumstances, a religious defendant's claim of ecclesiastical-abstention immunity may be resolved at the threshold via Rule 12(b)(6), prior to the summary-judgment stage of the proceedings. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 302-03 (3d Cir. 2006) (ecclesiastical-abstention may be raised via Rule 12(b)(6) where plaintiff would not be able to prevail even if he were able to prove all of his allegations); *Bryce*, 289 F.3d at 654 (ecclesiastical-abstention may be raised via Rule 12(b)(6) if statements and materials on which plaintiffs have based their claims fail to state a claim for which relief may be granted); *Winkler v. Marist Fathers of Detroit, Inc.*, 901 N.W.2d 566, 576 (Mich. 2017) (defendant may seek dismissal under state equivalent to Rule 12(b)(6) on ecclesiastical-abstention grounds); *Brazauskas v. Fort Wayne South Bend Diocese, Inc.*, 796 N.E.2d 286, 290 (Ind. 2003) (same); *Celnik v. Congregation B'nai Israel*, 131 P.3d 102, 105-06 (N.M. Ct. App. 2006) (an order of dismissal under Rule 1-012(B)(6) on ecclesiastical-abstention grounds for failure to state a claim is appropriate when it appears plaintiff cannot recover on facts stated in complaint).

In other cases, a religious organization might file a motion to dismiss under Rule 12(b)(6) and support the motion by appending additional materials to

demonstrate the application of the ecclesiastical-abstention doctrine. In these cases, there is no reason that the Court and the parties should, nonetheless, engage in additional discovery and proceed to the summary-judgment stage simply because the trial court is inclined (or required) to treat the ecclesiastical-abstention doctrine as an affirmative defense procedurally.

The above examples demonstrate that there cannot be a monolithic approach to the question of when a religious organization's immunity is ripe for determination by the court. Regardless of whether the ecclesiastical-abstention doctrine is labeled an affirmative defense, a subject matter jurisdiction issue, or something else, it is imperative that the religious organization's immunity be resolved at the earliest possible stage of litigation to minimize the constitutional injury. *See Bryce*, 289 F.3d at 654 n.1 ("By resolving the question of the [ecclesiastical-abstention] doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters."). To hold otherwise is offensive to the Church's constitutional rights. It is axiomatic that even a slight infringement of constitutional rights constitutes injury sufficient to confer standing to seek redress. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (the "very process of inquiry" may otherwise "impinge on rights guaranteed by the Religion Clauses" where the inquiry probes internal church affairs).

This Court's approach to qualified governmental immunity is illustrative of the process by which a defense technically labeled an affirmative defense must be addressed as expeditiously as possible in litigation—prior to the summary-judgment stage of the proceedings. *See Bryce*, 289 F.3d at 654 (comparing ecclesiastical abstention to qualified immunity). Government officials enjoy a qualified immunity from suit for their official conduct provided that their conduct did not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has described the defense as "immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), that courts should resolve at the "earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

The Sixth Circuit has further explained that where, as here, a "plaintiff has failed to allege facts that are outside the scope of the defendant's immunity," such failure of pleading "precludes a plaintiff from proceeding further, even from engaging in discovery." *Kennedy v. Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986); *see also Mitchell*, 472 U.S. at 526 (in immunity cases, "even such pretrial matters as discovery are to be avoided if possible"). Cases like *Mitchell* and *Kennedy* eschew a rigid approach to immunity defenses that would otherwise require the defenses to be addressed at the summary-judgment stage with the defendant bearing the burden of proof.

In contrast to the approach to qualified immunity adopted by the federal appellate courts—including the Sixth Circuit—which would prevent any discovery whatever from being taken when a plaintiff fails to plead facts outside the defendant's immunity, the Kentucky Supreme Court's treatment of the ecclesiastical-abstention doctrine obliterates a religious defendant's opportunity to have a case dismissed early in the proceedings on immunity grounds. As noted above, the Kentucky Supreme Court views the ecclesiastical-abstention doctrine as an ordinary affirmative defense. Affirmative defenses typically are pled in the answer and then resolved by a motion for summary judgment after discovery. *See* Fed. R. Civ. P. 8(c)(1); Fed. R. Civ. P. 56(a). By treating the doctrine as a traditional affirmative defense, the Kentucky Supreme Court's holding precludes religious defendants from being able to prevail on the pleadings only. This will result in additional litigation and discovery (including discovery of ecclesiastical matters). Additionally, any factual dispute in the Rule 56 context will result in trial. *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013).[5] This contrasts markedly with the approaches of other state courts and federal courts that require resolution of religious immunity defenses as expeditiously as possible.

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[5] In contrast, federal courts are permitted to make factual findings in order to determine their own subject matter jurisdiction. *See*, *e.g.*, *Global Tech, Inc. v. Yubei Power Steering Sys. Co.*, 807 F.3d 806, 810, 814-15 (6th Cir. 2015).

C. The Kentucky Supreme Court's opinion directly conflicts with Sixth Circuit law established in *Conlon v. Intervarsity Christian Fellowship/USA*.

The Kentucky Supreme Court's rigid treatment of the ecclesiastical-abstention doctrine as an affirmative defense presents a straightforward conflict with the Sixth Circuit's treatment of religious-immunity defenses. To begin with, in *Conlon v. Intervarsity Christian Fellowship/USA*, the Sixth Circuit held that a religious defendant's claim of ministerial-exception immunity (a subset of the ecclesiastical-abstention doctrine) may be resolved at the threshold via Rule 12(b)(6), prior to the summary-judgment stage of the proceedings. 777 F.3d at 833 ("The ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)."). Thus, where, as here, a plaintiff pleads claims in his complaint that patently fail to state a claim outside the religious defendant's immunity, the Sixth Circuit would hold that the case should be dismissed pursuant to Rule 12(b)(6) prior to discovery being conducted.

Further, the Sixth Circuit expressly determined that the ministerial exception is a structural limitation that "categorically prohibits federal *and state governments* from being involved in religious leadership disputes." *Id.* at 836 (emphasis added). For this reason, *Conlon* holds that, although it is labeled an affirmative defense, the ministerial exception can never be waived. *Id.* The ordinary rule is that a defendant waives an

affirmative defense if it fails to raise it at a sufficiently early point in the litigation. *See* Fed. R. Civ. P. 8(c). However, recognizing that such an approach would invite secular-court interference with the internal governance of the church by prolonging courts' involvement in lawsuits concerning ecclesiastical matters, *Conlon* held that the Constitution does not permit parties to waive the First Amendment's religious defenses. *Id*.

The Sixth Circuit's flexible approach to religious immunity—aimed at avoiding any and all unnecessary government interference with internal religious affairs—contrasts markedly with the approach adopted by the Kentucky Supreme Court. The Kentucky Supreme Court's rigid application of the ecclesiastical-abstention doctrine as an ordinary affirmative defense ignores the important structural role religious defenses play in preventing the government from becoming involved in religious disputes. By requiring discovery and litigation through at least the summary-judgment stage of the proceedings in cases alleging claims that patently fall within the religious defendant's immunity, the Kentucky Supreme Court ignores the structural barrier between government and religious entities and guarantees constitutional injury to the Church.

Kentucky cases that, under *Conlon*'s approach, would be dismissed in their infancy because they patently involve matters of ecclesiastical concern on the face of the plaintiff's complaint will now routinely proceed through protracted litigation that will lead to far greater judicial entanglement in the religious

defendant's ecclesiastical affairs. The Kentucky Supreme Court's approach to the ecclesiastical-abstention doctrine as an ordinary affirmative defense to be resolved at summary judgment, after discovery, with the defendant bearing the burden of proof conflicts with the approach of the Sixth Circuit and those other federal and state courts that allow religious defendants to seek dismissal on the basis of religious immunity as expeditiously as possible. To the extent that the ecclesiastical-abstention doctrine may be treated as an affirmative defense (if at all), the application of the doctrine must occur in such a way as to minimize the secular courts' entanglement in ecclesiastical matters. The Court should grant certiorari to address this issue, which is exceptionally important to the countless religious groups with a presence in Kentucky and the other 49 states.

II. The question presented is exceptionally important, and this case is the ideal vehicle for addressing it.

The question of the proper application of the ecclesiastical-abstention doctrine is a "question of magnitude every way," as the answer "determines the relations of the church to the state in this country." *Watson*, 80 U.S. at 702-03. When the ecclesiastical-abstention doctrine functions as intended, it prevents excessive entanglement of the secular courts in religious affairs and promotes the free exercise of religion. *See Hosanna-Tabor*, 565 U.S. at 181. The decision

below threatens the structural separation between church and state that the doctrine seeks to preserve.

The Kentucky Supreme Court's narrow 4-3 opinion allows the trial court to determine whether further discovery is necessary in a case where a minister is challenging the Church's ecclesial determination that he committed "ethical violations." To resolve that dispute, a secular court will need to determine whether Rev. Hoey did, in fact, commit "ethical violations" under Presbyterian doctrine. Even more, the trial court would need to disregard the Church's own adjudication of Rev. Hoey in reaching this conclusion. This, no court can do. *Watson*, 80 U.S. at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.").

There is simply no way a court could resolve this case in Rev. Hoey's favor without second-guessing the decision of the Church's governing body that Rev. Hoey violated the Church's ethical policies—a matter of "faith, or ecclesiastical rule, custom, or law" that secular courts are constitutionally prohibited from reviewing. *See id.* This will be the result for every religious defendant if the ecclesiastical-abstention doctrine cannot be raised via a Rule 12(b)(6) motion, but is instead an affirmative defense that may be invoked only after discovery at the summary-judgment stage with the religious defendant bearing the burden of proof. Even if,

as here, a plaintiff pleads facts conclusively establishing his claim cannot survive a religious organization's immunity, discovery will proceed. Excessive entanglement of the secular courts in religious affairs will inevitably result from these unnecessarily protracted proceedings.

This is an ideal case in which to resolve whether the proper application of the ecclesiastical-abstention doctrine requires the question of the religious defendant's immunity to be resolved early in litigation. The Kentucky Supreme Court's decision to allow further discovery in this case rests on its conclusion that the doctrine operates as a garden-variety affirmative defense to be addressed only at the summary-judgment stage of the proceedings. And the proceedings below thoroughly explored whether the doctrine should be addressed immediately by the courts at the earliest possible opportunity. The Kentucky Supreme Court rendered a close 4-3 opinion on this critical constitutional issue. Moreover, the Court held that the case should be remanded to the trial court for a determination of what additional discovery will be allowed. Thus, a failure to grant review now will result in further proceedings in the trial court that will compromise the federal interests served by a federal constitutional doctrine. *See Cox*, 420 U.S. at 482-84; *Dayner*, 23 A.3d at 1200 (permitting case to proceed unnecessarily against immune religious organization renders "the discovery and trial process itself a [F]irst [A]mendment violation").

Moreover, review by this Court is the only avenue by which the constitutional conflict between Kentucky's and the federal courts' ecclesiastical-abstention jurisprudence can possibly be resolved. The overwhelming majority of the states (and the District of Columbia) have ruled that their courts need not follow the constitutional decisions of corresponding federal appellate courts.[6] All four states in the Sixth Circuit, including Kentucky, do not consider themselves bound by Sixth Circuit law. *See Cooke v. Popplewell*, 394 S.W.3d 323, 346 (Ky. 2011); *People v. Gillam*, 734 N.W.2d 585, 590 (Mich. 2007); *State v. Burnett*, 755 N.E.2d 857, 862 (Ohio 2001); *Strough v. State*, 999 S.W.2d 759, 765 (Tenn. 1999). Without this Court's review, the Kentucky Supreme Court's decision will be entrenched because "the state court's federal law determination [cannot] be overturned" by the state electorate or legislature. Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340, 343-44 (1978) (reviewing Laurence H. Tribe, American Constitutional Law (1978)).

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[6] At least 48 state courts and the District of Columbia have adopted the position that federal circuit precedent is not binding upon them. *See* Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 Notre Dame L. Rev. 235, 280-81 (Nov. 2014) (identifying 46 states and the District of Columbia as holding that federal circuit precedent is non-binding upon states); *Bennett v. Bigelow*, 387 P.3d 1016, 1030 n.65 (Utah 2017) (Utah Supreme Court is "not bound to follow precedent from the circuit courts of appeal on questions of federal constitutional law"); *Saunders v. Commonwealth*, 753 S.E.2d 602, 608 (Va. Ct. App. 2014) (Fourth Circuit precedent is "merely persuasive and does not bind this Court").

The Kentucky Supreme Court's treatment of the ecclesiastical-abstention doctrine as an ordinary affirmative defense that need not be addressed expeditiously by the courts is contrary to the fundamental purposes of the doctrine. To serve its intended function, the ecclesiastical-abstention doctrine must be addressed at the earliest identifiable time it is appropriate. Its application cannot be delayed in every case only until after discovery has been conducted or concluded. Such an approach encourages the excessive entanglement of secular courts in religious affairs the doctrine seeks to avoid. The decision below is incompatible with the First Amendment and the decisions of numerous federal and state courts applying the ecclesiastical-abstention doctrine. This Court is the only institution with the authority to resolve the untenable conflict between the Kentucky Supreme Court and the federal courts, thereby ensuring that federal constitutional law is applied uniformly. *See Danforth v. Minnesota*, 552 U.S. 264, 302 (2008) (Roberts, C.J., dissenting) (federal rights must be "applied equally" in "every one of the several States") (quoting Sandra Day O' Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 4 (1984) (internal quotation marks omitted)); *see also* Justices in Their Own Words: Granting Certiorari (C-SPAN television broadcast June 19, 2009), https://www.c-span.org/video/?286078-1/supreme-court-chief-justice-roberts (last visited May 7, 2019) (Chief Justice John Roberts) ("Our main job is to try to make sure federal

law is uniform across the country."). This Court should grant plenary review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 15, 2019