No. 18-500

In the
Supreme Court of the United States

THE FIRST PRESBYTERIAN CHURCH U.S.A. OF TULSA, OKLAHOMA, and JAMES D. MILLER

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

REPLY BRIEF

The decision below holds that the religious autonomy doctrine turns not on whether a secular court is asked to resolve a matter of faith or religious doctrine, but on whether the plaintiff is a "member" of the religious organization who "consented" to have the organization, rather than civil courts, resolve such issues. That radical reconceptualization of the religious autonomy doctrine as a species of forum-selection law cannot be reconciled with centuries of this Court's precedent or with decisions from myriad other courts. The Oklahoma Supreme Court's cramped conception of the religious autonomy doctrine invites, rather than avoids, free exercise and entanglement concerns, as it forces courts to resolve sensitive questions of church membership or consent, discriminates in favor of religions with defined notions of membership, and invites courts into precisely the kinds of disputes that the doctrine is supposed to foreclose them from resolving.

It is little surprise, then, that respondent devotes the bulk of his opposition brief to manufacturing purported jurisdictional bars, rather than to defending the decision below. Those efforts are unavailing. The Oklahoma Supreme Court's conclusion that petitioners' motion to dismiss should have been treated as a motion for summary judgment because it required resolution of "factual disputes" is anything but "independent" of its holding that the religious autonomy doctrine turns on consent and is not jurisdictional. And the decision plainly falls within one of the well-recognized finality exceptions for cases in which proceedings on remand may

preclude the Court from protecting against the erosion of a profoundly important federal policy.

Doe's various quibbles with the framing of the questions presented fall equally flat. Doe contends that the first question is "academic." But the source of the religious autonomy doctrine—First Amendment versus consent-via-membership—is "academic" only in the sense that Doe refuses to defend the Oklahoma Supreme Court's consent-based view and yet claims he should prevail anyway. In reality, the Oklahoma Supreme Court could not have made clearer that its decision rested entirely on its view that the religious autonomy doctrine is confined to disputes with church members and thus inapplicable here. And once it is conceded that the doctrine stems from the First Amendment, there is no reason a church should face civil litigation or liability for its sincere belief that its rite of baptism is inherently public. The court below likewise made clear that its decision to remand for further factual development despite the undisputed view of the Church concerning the public nature of its baptism rite was inherently intertwined with its mistaken view that the religious autonomy doctrine is not jurisdictional.

Nor can Doe deny the broader threat posed by the decision below. As multiple amici have attested, the Oklahoma Supreme Court's cramped conception of the religious autonomy doctrine conflicts with other decisions and stands as a threat to many religious organizations. In short, both questions presented are important and ripe for review. The Court should grant the petition in full.

I. There Is No Jurisdictional Bar To This Court's Review.

Doe devotes the bulk of his brief in opposition to arguing that this Court lacks jurisdiction because the decision below purportedly both rests on independent and adequate state-law grounds, BIO.11-13, and is not final for purposes of 28 U.S.C. §1257(a), BIO.13-19. Doe is wrong on both counts.

A. The Decision Below Does Not Rest on An Independent and Adequate State Law Ground.

Under the independent-and-adequate-state-law doctrine, "[t]his Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). It is well established, however, that "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [exercise of] jurisdiction is not precluded.'" *Id.* at 1746 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). That is precisely the case here.

The Oklahoma Supreme Court concluded that the trial court erred by granting petitioners' motion to dismiss for lack of subject matter jurisdiction instead of converting it into a motion for summary judgment because, in the court's view, there were "*disputed material facts*" in need of resolution. Pet.App.10-11. But those purported factual disputes—disputes over

"the governing church body's policies regarding the sacramental nature of baptism," and over whether Doe "understood fully the requirements of baptism," Pet.App.10-11 (emphasis omitted)—are precisely the kinds of disputes that petitioners maintain civil courts lack jurisdiction to resolve. Thus, here, as in *Foster*, the state court's procedural ruling plainly "was not independent of the merits of [the] federal constitutional" issue. *Foster*, 136 S. Ct. at 1746. Indeed, there would have been no need for the Oklahoma Supreme Court to decide through which procedural mechanism these "factual disputes" should be resolved had the majority recognized (as the trial court corrected did) that the Oklahoma courts should not be resolving them at all.

Doe's argument makes even less sense as to petitioners' second question presented, which asks whether the religious autonomy doctrine is a threshold jurisdictional issue or an affirmative defense. The Oklahoma Supreme Court's conclusion that petitioners' motion to dismiss for want of jurisdiction should be converted into a motion for summary judgment and sent back to the trial court to resolve disputed factual issues concerning what the Oklahoma courts now deem an affirmative defense is a direct manifestation of its mistaken view that the doctrine is non-jurisdictional. *See* Pet.App.28-30. The Oklahoma Supreme Court's invocation of a state procedural rule "therefore poses no impediment" to the Court's review. *Foster*, 136 S. Ct. at 1747.

B. There Is No Finality Bar.

The posture of this case also presents no impediment to this Court's jurisdiction. To the

contrary, this case falls squarely within (at least) one of the well-recognized exceptions to the final judgment rule.

As this Court explained in *Cox Broadcasting Corporation v. Cohn*, there are several circumstances in which "the Court has treated the decision on the federal issue as a final judgment for the purposes of [28 U.S.C. §1257(a)] and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. 469, 477 (1975). One of them is cases in which "the federal [claim] has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation," but "the party seeking review" also "might prevail on the merits on nonfederal grounds" in the proceedings below, "thus rendering unnecessary review of the federal issue by this Court." *Id.* at 482-83. In such circumstances, this Court has exercised jurisdiction, particularly when "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 481, 483-84; *cf. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

This is just such a case. Indeed, "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* (collecting cases). That reasoning applies *a fortiori* in this case, as it is the state-court judicial proceedings themselves, not just their ultimate outcome, that pose grave free exercise and entanglement concerns here. For precisely that reason, lower courts have frequently found religious

autonomy questions appropriate for interlocutory review. *See, e.g.*, *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018); *McCarthy v. Fuller*, 714 F.3d 971, 974-76 (7th Cir. 2013).

Doe makes the remarkable claim that "there is no risk of eroding any important, practical federal policy by allowing the proceedings below to conclude and reaching [the constitutional] question (if at all) after all of the relevant facts are aired and the finder of fact … renders its decision." BIO.18-19. That contention reflects a profound lack of regard for the constitutional concerns underlying the religious autonomy doctrine. It is the very nature of the remand—sending the case back to the trial court to resolve purportedly "contested issues of fact" about respondent's baptism—that risks running afoul of petitioners' free exercise rights and entangling the civil courts in matters of faith. Addressing the constitutional issue only after those entangling and inappropriate proceedings have concluded thus would not just undermine, but eviscerate, the constitutional safeguards that the religious autonomy doctrine was designed to ensure. This case thus falls squarely within the *Cox* exception for cases in which immediate review is the best way to protect against erosion of important federal policies—indeed, core constitutional protections.

II. The Court Should Grant Certiorari To Resolve Both Of The Exceptionally Important Questions Presented.

The decision below holds that the religious autonomy doctrine is nothing more than a species of forum-selection law, confined to disputes between a

church and "members" who have "consented" to its jurisdiction. As the petition explains, that radical reconceptualization of this constitutionally grounded doctrine is at odds with centuries of precedent from this Court and others. Doe never squarely defends the misguided consent-via-membership view of the doctrine that is now the law of Oklahoma, and his efforts to dissuade this Court from granting certiorari and bringing the Oklahoma courts' jurisprudence back into line fall flat.

1. Doe begins by attempting to characterize the first question presented as "academic," insisting that everyone agrees that the religious autonomy doctrine is grounded in the First Amendment. BIO.19. But while the parties may now agree that the doctrine is grounded in the First Amendment, the Oklahoma Supreme Court grounded the doctrine in concepts of membership and consent that fatally undermine the protection the doctrine should afford churches. Put simply, while there is no dispute that the Church views its own baptism rite as inherently public, there will be ongoing litigation over this dispute precisely because the Oklahoma Supreme Court views the religious autonomy doctrine as "wholly tied to consent by the individual to the church's judicature which arises ***solely from membership***." Pet.App.16. That fundamentally flawed conception of the religious autonomy doctrine is precisely what the petition squarely and repeatedly asks this Court to reject.

Doe insists that "[t]he Oklahoma Supreme Court held that the operative issue in these circumstances is *consent*, not membership per se." BIO.20. That is both wrong and beside the point. It is wrong because the

decision below repeatedly and unequivocally—in both bold and italics—states that, in the Oklahoma Supreme Court's view, "consent … arises ***solely from membership***." Pet.App.16.[1] As all of these statements make clear, membership may be important to the Oklahoma Supreme Court because it indicates consent, but what that court requires is membership, not merely consent.

There is thus no avoiding the conclusion that the decision below forces courts to decide who is and is not a member of a religion, an inquiry that is itself fraught with Free Exercise and Establishment Clause concerns. *See* Br. of Amici Curiae Becket Fund for Religious Liberty and Stewards Ministries 11-20. In all events, reframing that inquiry as based on "consent" rather than "membership" alone does nothing to solve the problem, as the religious autonomy doctrine, properly understood, flows from the First Amendment rights of churches and their members, and not just the consent of the members. The difference is critical both in this case and more

[1] *See, e.g.*, Pet.App.13 ("a church should be free from secular control and interference by state courts for claims against a church brought by a ***member who has agreed and consented to the ecclesiastical practices of the church***"); Pet.App.13-14 ("ecclesiastical protection for a church arises solely from ***membership*** and the consent by the person to be governed by the church"); *id.* ("The key to the defense raised by Appellees stems from an agreement that arises between the church and the individual who has ***freely chosen to join in membership and agree and consent*** to that church's ecclesiastical jurisdiction."); Pet.App.16 ("this defense is wholly tied to consent by the individual to the church's judicature which arises ***solely from membership***"); Pet.App.16 ("The foundational underpinning of ecclesiastical jurisdiction, ***membership***, is simply missing.").

generally. A church cannot preserve its autonomy to treat baptism as a public rite if civil authorities wade into disputes concerning whether someone who consented to baptism consented to all that baptism entails in that religion. More broadly, "First Amendment values are plainly jeopardized" *whenever* courts try to resolve "controversies over religious doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). The Oklahoma Supreme Court's refusal to recognize as much cannot be reconciled with decision from this Court or other courts. *See* Pet.18-24.

Doe fares no better with his efforts to suggest that the decision below turned on "'unique,' case-specific reasons" that would not apply in other contexts. BIO.21. In reality, the decision below is just the latest case in which the Oklahoma Supreme Court reaffirmed an unduly narrow view of the religious autonomy doctrine as one that applies only to disputes involving church members. *See* Br. of Amicus Curiae Okla. Wesleyan Univ. ("OKWU Br.") 7-15 (discussing the *Guinn-Hadnot-Doe* trilogy of Oklahoma Supreme Court cases limiting religious autonomy doctrine). It is that members-only view of the doctrine, not anything unique to this case, that is indisputably the law of Oklahoma (and indisputably out of step with this Court's decisions).

Doe is thus profoundly wrong to insist that this case "would [not] have come out differently in any other court." BIO.23. In reality, it would not even have come out the same way if it were brought in a federal, rather than a state, court in Oklahoma, as the

Tenth Circuit has squarely rejected the members-only variant of the doctrine, instead explaining that "[t]he applicability of the [religious autonomy] doctrine does not focus upon the relationship between the church and" the plaintiff. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). That only underscores the need for this Court's review, as the protection of Oklahoma religious organizations presently turns on the plaintiff's choice of forum. *See* OKWU Br.4.

Doe's efforts to mischaracterize petitioners' position on the merits fall just as flat as his efforts to mischaracterize the question presented and the decision below. No one is suggesting that religious organizations are "'above the law.'" BIO.24 (quoting *Bryce*, 289 F.3d at 657). But as the very case upon which Doe relies makes clear, before civil courts may insert themselves into disputes involving religious organizations, the "threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'" *Bryce*, 289 F.3d at 657.

Doe thus gets nowhere by emphasizing that "the religious autonomy doctrine is 'not applicable to purely secular disputes between third parties and … a religious affiliated organization.'" BIO.24-25 (quoting *Gen. Council of Fin. & Admin. of the United Methodist Church v. Sup. Ct. of Cal., Cty. of San Diego*, 439 U.S. 1355, 1373 (1978)). The problem is that the dispute in this case is anything but "wholly secular," as Doe ultimately claims that he consented only to a baptism that would be inconsistent with the Church's own understanding of the public nature of its baptism rite. There is nothing remotely "radical," BIO.26, about the

proposition that such inherently religious disputes are not for the secular courts to resolve.

2. Doe devotes little attention to the second question presented. He does not and cannot deny that courts are divided over whether the religious autonomy doctrine is jurisdictional or an affirmative defense. *See* Pet.24-31. Instead, he dismisses cases on the other side of the split as "unthinking[]" and "most[ly] … from intermediate appellate courts." BIO.29-30. In fact, as the petition explains, this question has divided courts at *all* levels, and has continued to do so long after this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Doe insists that whether the religious autonomy doctrine is jurisdictional "makes no difference to the nature of the proceedings that will take place on remand." BIO.28. The Oklahoma Supreme Court begs to differ. It is precisely because the court thought that the doctrine is not jurisdictional that it decided that "contested issues of fact" arising out of Doe's baptism "must be resolved by the trier of fact in an adversarial hearing below." Pet.App.18. Simply put, if the religious autonomy doctrine precludes courts from exercising jurisdiction over disputes with religious institutions over matters of faith, then there will be no remand proceedings at all. This case thus presents an excellent opportunity for this Court to resolve this issue on which the lower courts are squarely divided.

3. Finally, Doe's remarkable claim that the questions presented "have *zero* practical importance," BIO.19, blinks reality. As multiple amici have all

attested, the religious freedom questions presented are profoundly important to all religious organizations. *See, e.g.*, Br. of Amici Curiae Becket Fund for Religious Liberty and Stewards Ministries 11-20; OKWU Br.18-25. If the religious autonomy doctrine really is confined to disputes between churches and their members, then it is not even clear which religious organizations may invoke the doctrine, let alone which disputes it will or will not cover. And if the doctrine really does turn on a "membership" inquiry that is itself fraught with religious sensitivity, then it can no longer serve its intended function of protecting both religious organizations *and the courts* from entanglement. Simply put, the decision below is fundamentally incompatible with the Religion Clauses of the First Amendment and with this Court's decisions faithfully applying them. This Court should grant review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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