No. 24-530

In the Supreme Court of the United States

BETHESDA UNIVERSITY, ET AL.,

Petitioners,

V.

SEUNGJE CHO, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Pentecostal founders of Bethesda University stand to lose their school because California courts have declared that Presbyterians on the Cho Board "subscribe to the theology consistent with Bethesda University as is required of all Board members pursuant to the Bylaws." App. 37a. Because that question is one of religious adherence, the courts below lacked subject matter jurisdiction to second-guess the Kim Board's contrary determination. As this Court's precedent and the ten amicus briefs filed in support of certiorari confirm, Bethesda's ability to place religious conditions on Board membership strikes at the heart of church autonomy. See Religious Colleges Amicus Br. 8.

Respondents seek to avoid this Court's review with a blizzard of meritless vehicle challenges and a merits argument that "corporation law" cannot possibly implicate ecclesiastical abstention. Opp. 23. Their frequent references to corporate law and corporate documents—nearly 100, by Petitioners' count—attempt to obscure the basic issue in this case: "personnel *is* policy." *McRaney* v. *N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1067 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing). However sterile "corporation law" might sound, there is nothing neutral about the selection of a religious organization's leadership. Here, Bethesda's Board decides whom to hire, what to teach, and how to form the young people in their university in accordance with their religious doctrine and convictions. There is nothing neutral about that work.

The California courts' willingness to decide the question of Board membership reflects a mistakenly expansive view of the "neutral principles" exception.

This Court and others have cabined that exception to property cases. Pet. 19–28. Respondents would extend it to corporate governance, either outright or because religious organizations own property. Opp. 22–23. That position might make for interesting merits briefing, but it does not resolve the division among lower courts and State supreme courts. If anything, Respondents offer further confusion by introducing another alternative—no ecclesiastical abstention where board members lead an organization that in turn owns property. *Id.*

Nor do Respondents explain away the split among lower courts regarding whether ecclesiastical abstention extends to non-hierarchical churches. Pet. 28–35. They address almost none of the cases Petitioners cite but rely instead on the fact that "hierarchical" does not appear in the decision below. Opp. 26. That, of course, does not prevent the Court from ordering abstention in this case and thereby resolving the uncertainty created by precedents focused on hierarchical churches. See, *e.g., Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724 (1976) ("the First and Fourteenth Amendments permit hierarchical religious organizations" autonomy over their "government").

Perhaps mindful that they cannot hide the divisions over ecclesiastical abstention, Respondents focus on vehicle challenges. They open their brief with a strange objection to the caption, which comes verbatim from the decision on appeal. App. 1a. They then assert that Petitioners "brought this dispute" to the civil courts, when in reality Petitioners filed counterclaims in Respondents' lawsuit. Opp. 15. And they pin their hopes on the fact that the decision below is unpublished, Opp. 18, even as that classification does nothing to restrict this Court from deciding the

question presented. These vehicle arguments appear designed to spook the Court into overlooking a recognized circuit split and a lower-court decision that offends both Religion Clauses. It is time for the Court to revitalize ecclesiastical abstention.

ARGUMENT

I. The Circuit Courts and State Supreme Courts Are Divided on the Scope of Ecclesiastical Abstention.

A. Respondents Do Not Refute the Circuit Split Over the Property Exception but Suggest Adding Corporate Law as an Additional Exception.

Although Respondents attempt to wave away lower-court division over whether the "neutral principles" exception applies in non-property cases, they fail to engage with many of the cases Petitioners cited. As more fully recounted in the Petition, in the half century since this Court's most recent cases exploring this issue, many circuit courts and State supreme courts have fallen on different sides of whether the neutral principles exception applies outside of the context of property disputes. Pet. 19–28.

Numerous circuits and State high courts have declined to expand the neutral principles exception and have aligned themselves with the Sixth Circuit's articulation that "[t]he 'neutral principles' exception to the usual rule . . . applies ***only*** to cases involving disputes over church property." *Hutchison* v. *Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (emphasis added); see, *e.g.*, *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 465–66 (D.C. Cir. 1996) (declining to apply the exception outside of the property context or to entangle the court "in questions of religious doctrine,

polity, and practice"); *Minker* v. *Balt. Ann. Conf. of United Methodist Church*, 894 F.2d 1354, 1358–59 (D.C. Cir. 1990) (same); *Dowd* v. *Soc'y of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988) (same); *Myhre* v. *Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 927–28 (11th Cir. 2018) (same); *Westbrook, Jr.* v. *Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (same); *El-Farra* v. *Sayyed*, 226 S.W.3d 792, 795–96 (Ark. 2006) (same); *Hiles* v. *Episcopal Diocese of Mass.*, 773 N.E.2d 929, 935–37 (Mass. 2002) (same); *Heard* v. *Johnson*, 810 A.2d 871, 880–82 (D.C. 2002) (same); *Cha* v. *Korean Presbyterian Church of Wash.*, 262 Va. 604, 615 (2001) (same); *Marshall* v. *Munro*, 845 P.2d 424, 428 (Alaska 1993) (same). Respondents try to distinguish the *Hutterville* cases and *Crowder* v. *S. Baptist Convention*, 828 F.2d 718 (11th Cir. 1987) by pointing to lower court comments and speculative dicta. Opp. 24–25. They otherwise make no attempts to grapple with this wall of authorities.

And as for the other side of the split, Respondents mention *Puri* v. *Khalsa*, 844 F.3d 1152 (9th Cir. 2017), and correctly recognize it as favoring an expansive view of "neutral principles." Opp. 25. But that is merely an endorsement of one side of the split, which is a merits argument, not a denial of the split or an attempt to explain it away. Respondents do not deny the fact that multiple circuit court and State high court decisions have disagreed with the limitation to property cases and rejected ecclesiastical abstention in favor of "neutral principles" to decide non-property disputes. See, *e.g.*, *McRaney*, 966 F.3d at 349; *Meshel* v. *Ohev Sholom Talmud Torah*, 869 A.2d 343, 357 (D.C. Ct. App. 2005); *Piletich* v. *Deretich*, 328 N.W.2d 696, 701 (Minn. 1982). The division among these

authorities persists entirely unrebutted by Respondents.

Deep in their brief, Respondents answer a straw-man version of this division. They insist that there is no split because no court "has held itself disabled from adjudicating ***any*** dispute involving the structure or governance of a religious corporation," and courts have not "***categorically*** refused" to resolve corporate-law issues involving religious organizations. Opp. 23 (emphases added). Of course not. Pure questions of corporate law are still possible. The division arises when a seemingly sterile question of corporate law implicates religious membership or adherence.

When not distracted by straw men, Respondents reiterate the division Petitioners and the ten Amici identified. For example, they note (Opp. 25) the Ninth Circuit case that views church governance as "quintessentially" suited to civil adjudication. *Puri*, 844 F.3d at 1167; accord Pet. 24. On the other hand, the Eighth Circuit and the South Dakota Supreme Court recognized in related cases that civil courts must abstain when "the governance issue is deeply intertwined with the religious dispute of who is properly a member of the true church and therefore also a member of the colony and a voting member." *Hutterville Hutterian Brethren, Inc.* v. *Sveen*, 776 F.3d 547, 556 (8th Cir. 2015); *Wipf* v. *Hutterville Hutterian Brethren, Inc.*, 2012 S.D. 4, ¶24; Pet. 21–22; Opp. 25. Respondents fail to appreciate that the *Hutterville* scenario mirrors this case, but with a different outcome on abstention.

Here, the issue is whether the Presbyterians on the Cho Board can satisfy the Constitution and Bylaws' requirement of a "Pentecostal Evangelical perspective" and adhere to Bethesda's 12-point

Statement of Faith. App 7a, 16a. The only way Respondents get to a sterile question of "arithmetic," Opp. 2, is by assuming that the Presbyterians were members of the Board and thus included in the computation of a quorum. But that begs the question. If they could not serve because they were not Pentecostal, then there was, in fact, a quorum of eligible Board members at the vote to revoke the Presbyterians' Board seats and terminate Respondent Cho as President.[1]

Respondents' merits argument that corporate governance is a neutral question typifies the error in numerous courts. It isolates a seemingly irreligious question from an interwoven question of faith (*e.g.*, the meaning of Bethesda's Statement of Faith). As Amici illustrate, that mistake might occur honestly, but avoiding it is the very reason for ecclesiastical abstention. See Manhattan Institute and Jewish Coalition for Religious Liberty Amicus Br. 6–7 (whether swordfish have scales). The correct course is for courts to abstain where a seemingly secular question is "deeply intertwined with the religious dispute." *Hutterville*, 776 F.3d at 556.

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[1] Here, for the record, is the "arithmetic:" the Kim Board voted to add six new seats, bringing the total to 17. App. 4a. Four of the seats were filled by Presbyterians. *Ibid.* Realizing their error, eight members of the Kim Board convened and invalidated the election of non-Pentecostal Board members. App. 5a–6a. The California courts found a lack of a quorum because eight is not a majority of 17. App. 5a. But if the four Presbyterians were ineligible to serve, then there were only 13 members, and eight is a quorum. Thus, the arithmetic depends wholly on the question of whether Presbyterians satisfy the religious prerequisites for Board membership.

B. This Case Typifies the Different Treatment of Hierarchical and Non-Hierarchical Churches.

A striking contradiction in the Brief in Opposition is its denial that this case implicates the split over non-hierarchical churches, Opp. 26, while simultaneously arguing that the case is a poor vehicle due to alleged uncertainty over the "ecclesiastical authority to which courts should defer," Opp. i. In fact, if Bethesda belonged to a hierarchical religion, the courts below could have deferred to a local bishop or church judicatory regarding whether Presbyterians satisfied the criteria for Board service. But because Bethesda was non-hierarchical, the California Court of Appeal hazarded an answer itself, declaring that "nothing in the Constitution and Bylaws prevents a 'Protestant' minister, or someone not of the Pentecostal faith, from serving on the Board." App. 14a. The Court of Appeal summarized Respondent Cho's testimony that "the key requirement for Board members was not the church they belonged to" but their commitment to "Pentecostal ideals"; the court concluded that its reading of the Bylaws "supported" this view. App. 17a; see also App. 4a (noting that the trial court "interpret[ed] the governing documents" and made "factual findings").

Indeed, the trial court's declaration that Bethesda's constitution and bylaws were "unworkable" because there was no way to resolve conflicts between competing factions reveals its assumption that no deference is due to non-hierarchical religious bodies. App. 25a. Contrary to this assumption, Bethesda ***had*** resolved the dispute before the court improperly intervened. To their credit, Respondents eventually recognize that "the University board stood as its own authority on

religious issues." Opp. 26. Petitioners agree and, on the merits, will argue that the decision of the Kim Board—the last Board whose legitimacy no one questions—is the decision to which courts should defer. That, of course, contrasts with the California courts' installation of the Cho Board on the premise that the Bylaws "supported" Cho's view that adherence to "Pentecostal ideals" was sufficient. App. 17a.

The ultimate answer to that question, however, is less important than clarifying that "[t]he distinction drawn in *Watson* [v. *Jones*, 80 U.S. 679, 724–725 (1871)] between the types of congregational and hierarchical church polities was relevant only to determining the ecclesiastical body to which the civil court must defer in determining rights to use of property." *Crowder* v. *S. Baptist Convention*, 828 F.2d 718, 726 n.20 (11th Cir. 1987). This concern also applies to minority religions with which courts are often unfamiliar. See Council on American-Islamic Relations Amicus Br. 8–12. Circuit courts and State supreme courts are far from uniform in their approach, see Pet. 29–34, and "there is a dearth of federal case law on whether civil courts should hear lawsuits in which a congregational church is a party." *Burgess* v. *Rock Creek Baptist Church*, 734 F. Supp. 30, 31 n.2 (D.D.C. 1990).

II. This Case Is an Ideal Vehicle for Clarifying the Scope of Ecclesiastical Abstention.

The bulk of the Brief in Opposition attempts to cast this case as a poor vehicle. Those attacks rest on incorrect factual assertions and legally meaningless arguments. Nothing in this case's posture or history—or the much-discussed unpublished decision steamrolling Bethesda's First Amendment rights—

prevents the Court from ordering abstention in this case and thereby resolving entrenched uncertainty in the lower courts.

A. Bethesda Was Not the Plaintiff, and Party Alignment Is Immaterial.

Bethesda University and the Kim Board did not bring this case, and party alignment is immaterial to the question of subject matter jurisdiction.

Respondents argue that Bethesda University "insisted on obtaining the precise judicial ruling they now claim the courts could not make" and that "[i]t was petitioners who brought this dispute." Opp. 15. This is false. At trial, "[t]he complaint was filed by the 'Cho Board.'" App. 30a. "The Cross-complaint was filed by the 'Kim Board.'" *Id.* Respondents are disingenuous to state that Petitioners sought to bring this case before the civil courts. Opp. 15.

Curiously, the first line of Respondents' brief is: "Petitioners are not 'Bethesda University.'" Opp. 1. But the caption comes verbatim from the decision on appeal. App. 1a. And the reason the California courts listed Bethesda University both "as plaintiff and as cross-complainant" is that both parties purport to act on behalf of Bethesda. App. 30a. In any event, the caption is not an obstacle to review. Respondents' focus on this non-issue only underscores the weakness of their other arguments.

Most importantly, Respondents never argue that the question presented is waived or estopped. Objections to subject-matter jurisdiction may be raised at any time. "Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction . . . even if the party had previously acknowledged the trial court's

jurisdiction." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434–35 (2011) (internal citations removed). Petitioners argued on appeal that "the superior court did not have subject matter jurisdiction to decide Bethesda's religious leadership." App. 55a. Whatever the party alignment or arguments presented below, this Court may review lower courts' unconstitutional exercise of jurisdiction.

Respondents' argument that the judgment below has independent state grounds also falls short. Opp. 17–18. The First Amendment divests California courts of jurisdiction over claims that depend on the composition of a board with religious criteria. See n.1 *supra*; *Hutterville*, 776 F.3d at 556.

B. Non-Publication by a State Court Is No Barrier to Certiorari.

Respondents also complain that the opinion below was unpublished. Opp. 18. That classification might matter for California procedure, but it does not restrain this Court. The Court regularly reviews unpublished opinions. See, *e.g.*, *Molina-Martinez* v. *United States*, 578 U.S. 189 (2023); *Lynce* v. *Mathis*, 519 U.S. 433 (1997); *Old Chief* v. *United States*, 519 U.S. 172 (1997); Hon. Donna S. Stroud, Unpublished Opinions, 37 Campbell L. Rev. 333, 340 n.20 (2015) ("[T]he Supreme Court has granted review of a number of unpublished opinions, so the unpublished status of a case certainly does not always protect an opinion from review."). In fact, when lower courts violate constitutional rights in an unpublished decision, that is a "reason to grant review." *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari). "Nonpublication must not be a convenient means to

prevent review." *Smith* v. *United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting).

C. This Is an Ideal Vehicle Implicating a Non-Hierarchical Religious Institution and a Non-Property Issue.

The Court has recently reinforced one form of ecclesiastical abstention, namely the ministerial exception. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171 (2012). But the lower courts' unconstitutional broadening of "neutral principles" undermines the broader doctrine in cases involving ecclesiastical matters like religious board positions, *Puri*, 844 F.3d at 1162, and church governance, *McRaney*, 980 F.3d at 1069.

Here, the trial court *sua sponte* entered an injunction not only installing non-Pentecostal Board members to govern Bethesda but also ordering those Board members to redraft the University's constitution and bylaws. App. 23a–25a. That is an affront to both the Free Exercise and Establishment Clauses of the First Amendment. It also makes this case an ideal vehicle for confirming that "neutral principles" is a limited exception for property cases, not an invitation to remake religious institutions into more "neutral" corporate entities.

The First Amendment protects sincere believers like those who founded Bethesda and enshrined religious criteria in its foundational documents. The California courts' willingness to interpret those criteria for themselves, water them down, and order that the documents be rewritten strikes at the core of the Religion Clauses. This Court should take the occasion to restore the ecclesiastical abstention

doctrine to its central place under the First Amendment.

CONCLUSION

The Court should grant the Petition.

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