No. 24-781

In the Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,
v.
MATTHEW PLATKIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, including in this Court.

The Becket Fund frequently represents religious institutions seeking to preserve their autonomy to make internal management decisions essential to their religious missions. In this Court alone, Becket has served as counsel of record in three merits cases raising such church autonomy questions. See, *e.g.*, *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238 (2025); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012). Becket has also served as counsel of record for a religious institution seeking emergency relief against a state's intrusion into internal religious governance. See *Yeshiva Univ.* v. *YU Pride All.*, 143 S. Ct. 1 (2022).

Nationwide, Becket also represents many religious institutions in cases where affirmative judicial relief is required to protect internal religious governance decisions from state interference or civil discovery demands. See, *e.g.*, *Seattle Pac. Univ.* v. *Ferguson*, 104 F.4th 50 (9th Cir. 2024); *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) (en banc);

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Whole Woman's Health v. *Smith*, 896 F.3d 362 (5th Cir. 2018), cert. denied, 585 U.S. 1145 (2019); *General Conf. of Seventh-day Adventist Church* v. *Horton*, No. 25-1735 (4th Cir. appeal filed June 25, 2025); *O'Connell* v. *USCCB*, No. 23-7173 (D.C. Cir. en banc petition filed May 27, 2025); *Lutheran Church—Missouri Synod* v. *Concordia Univ.*, No. 25-50130 (5th Cir. appeal filed Feb. 21, 2025); *Etienne* v. *Ferguson*, No. 3:25-cv-5461, 2025 WL 2022101 (W.D. Wash. July 18, 2025); *Sisters of Life* v. *McDonald*, No. 1:22-cv-7529 (S.D.N.Y. settlement entered Nov. 8, 2023); *Hyman* v. *Rosenbaum Yeshiva of N. Jersey*, 317 A.3d 1260 (N.J. 2024).

Becket submits this brief to explain why church autonomy preserves access to a federal judicial forum when a religious institution is threatened with a state subpoena—without any formal complaint or charges—that would interfere with the religious organization's internal religious governance.

INTRODUCTION AND SUMMARY OF ARGUMENT

First Choice's rights to speech and association are not the only First Amendment rights at stake here. Rather, as its executive director verified, New Jersey's subpoena "greatly jeopardizes the Ministry's ability to carry out its religious mission" free from state interference. Pet.App.131a., 147a. The subpoena demands, among other things, First Choice's *internal* religious communications, policies, and guidance documents—private, deliberative materials that instruct its own staff and volunteers on how to "guide their interactions" with clients and donors consistent with First Choice's religious ministry to pregnant women. Pet.App.108a. These intrusive demands would allow

New Jersey to probe and pressure how First Choice implements its Christian beliefs and pursues its core religious mission to "serve women and the unborn as the Bible instructs." Pet.App.186a.

This Court has long barred government agencies from prying into less intrusive matters, such as how often a religious high school holds liturgies. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979). And it has warned that inquiring into the relationship between a religious body's beliefs, mission, and exercise is fraught with entanglement risks. *Carson* v. *Makin*, 596 U.S. 767, 787 (2022).

Thus, the deep intrusion demanded here by a state attorney general does more than chill First Choice's speech and assembly rights—though it certainly does that too, as Petitioner has ably demonstrated. Another, more foundational First Amendment guarantee is also at stake: First Choice's "independence" from state intrusion "in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 747 (2020). That pressure on First Choice's internal religious decision-making is at odds with "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012).

And yet, New Jersey's intrusion into internal religious decision-making is no outlier. Instead of respecting this Court's church autonomy cases—and the underlying history and tradition of church-state relations—some courts and government officials are trampling the independence of religious bodies. They do this, for instance, by reducing church autonomy to the

"narrowest reasonable reading" of state statutory protections, by denigrating the ministerial exception as a "license to discriminate," and by restricting religious hiring practices based on whether they are "reasonably necessary" under state law. These reductions create inevitable First Amendment conflicts. And they stem from the same claim of power here: that government officials can scrutinize internal religious decision-making. That power "would undermine not only the autonomy of many religious organizations but also their continued viability." *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., statement respecting denial of certiorari).

Where, in the absence of a formal complaint or charges, a religious body faces a subpoena that demands state intrusion into its internal religious governance, then the First Amendment allows that religious body to both challenge the subpoena before it is enforced and to bring that challenge in federal court. That rule upholds this Court's precedent, which understands church autonomy as part of "[t]he structure of our government," *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 730 (1872), and also bars "[s]tate interference" into the "sphere" of religious self-governance, *Our Lady*, 591 U.S. at 746. Such interference includes "the very process" of coercive government "inquiry" into internal religious decisions. *Catholic Bishop*, 440 U.S. at 502. Because New Jersey's subpoena poses precisely that threat, First Choice is entitled to access federal court.

ARGUMENT

I. Church autonomy protects internal religious governance from state interference.

Because First Choice is a religious ministry, its "First Amendment rights," Pet.i, do not rest on the freedoms of expression and association alone. Rather, the First Amendment also guarantees First Choice's independence in matters of faith, doctrine, and internal governance. This church autonomy is implicated here because it prohibits "the very process of inquiry" that intrudes into internal religious governance. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979).[2]

A. The First Amendment guarantees religious bodies independent authority in matters of internal government.

The Religion Clauses guarantee religious bodies the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This "independent authority" in "matters of internal government," *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 747 (2020), flows from "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran*

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[2] "Church autonomy" is a legal term of art that extends to all religious traditions, as well as to a wide variety of religious bodies—"religious schools, and religious organizations engaged in charitable practices, like operating homeless shelters, hospitals, soup kitchens, and religious legal-aid clinics * * * among many others." *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., statement respecting denial of certiorari).

Church & Sch. v. *EEOC*, 565 U.S. 171, 189 (2012). And the text derives from the enduring principle that "church and state are 'two rightful authorities,' each supreme in its own sphere." *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 257 (2025) (Thomas, J., concurring) (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1496-1497 (1990) ("*Origins*")).

1. The concept of Church and State as "two rightful authorities" has "deep roots in the history of Western civilization," *Catholic Charities Bureau*, 605 U.S. at 257 (Thomas, J., concurring), dating back at least to Jesus' famous command to "[r]ender * * * unto Caesar the things which are Caesar's; and unto God the things that are God's," *Matthew* 22:21. Western law institutionalized this command into a dual-authority framework in which "church and state are distinct," and "each has a legitimate claim to authority within its sphere." *Catholic Charities Bureau*, 605 U.S. at 258 (Thomas, J., concurring) (citing *Huntsman* v. *Corporation of President of The Church of Jesus Christ of Latter-day Saints*, 127 F.4th 784, 803-804 (9th Cir. 2025) (en banc) (Bumatay, J., concurring in judgment)); see Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. Ky. L. Rev. 67, 68-84 (2008) (tracing the historical development of "[t]he doctrine of separate spheres of authority for church and state").

This "differentiation of religious and political authorities" is how "our tradition of constitutionalism was made possible." Richard W. Garnett, "*The Free-*

dom of the Church": (Towards) an Exposition, Translation, and Defense, 21 J. Contemp. Legal Issues 33, 39 (2013). "[T]he possibilities for human freedom" were "greatly enhanced" as a result. Brian Tierney, *The Crisis of Church and State 1050-1300* 1-2 (1964); see also Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 9, 553 (1983) (discussing how "the church in the form of a state" brought "[l]egal pluralism" into Western law). Indeed, "the belief that God has divided life into spiritual and temporal domains and has assigned different authorities to each domain" was the fundamental "premise that gave rise to the whole debate and tradition" of religious freedom in Western law. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 Harv. L. Rev. 1869, 1882 (2009).

The "line" prohibiting intrusion on "ecclesiastical matters" is thus an "ancient one" with lasting effects on Western law. *McRaney* v. *North Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1077 (5th Cir. 2020) (Oldham, J., dissenting from the denial of rehearing en banc). In Anglo-American law, this framework endured until "Henry VIII and Parliament rejected that ancient tradition." *Huntsman*, 127 F.4th at 803 (Bumatay, J., concurring).

2. "[T]he First Amendment was adopted" "against this background." *Hosanna-Tabor*, 565 U.S. at 183 (tracing the Religion Clauses' development back to *Magna Carta*). As this Court explained in *Hosanna-Tabor* and again in *Our Lady*, "the founding generation sought to prevent a repetition of the[] practices" that in 16th-century Britain "had given the Crown the power to fill high 'religious offices' and to control the exercise of religion in other ways." *Our Lady*, 591 U.S.

at 748; see also John Witte, Jr., *That Serpentine Wall of Separation*, 101 Mich. L. Rev. 1869, 1881 (2003) (explaining that the Founders revived the dual-authority framework while "adding new accents and applications").

James Madison—the "leading architect of the religion clauses," *Hosanna-Tabor*, 565 U.S. at 184—sought to avoid recent English practices by creating a "division between religion and government based on the demands of religion." McConnell, *Origins,* 103 Harv. L. Rev. at 1453. Man's "duty to the Creator," he observed, "is 'precedent both in order of time and degree of obligation, to the claims of Civil Society.'" *Ibid.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 The Writings of James Madison 183, 188 (G. Hunt. ed., 1901)).

Madison's framework "best reflect[s]" the Religion Clauses' original public meaning. McConnell, *Origins*, 103 Harv. L. Rev. at 1512. Indeed, this division was apparent throughout the early Republic. In one instance, then-Secretary of State Madison advised President Thomas Jefferson not to provide an opinion on "who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase." *Hosanna-Tabor*, 565 U.S. at 184. Madison explained "that the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Ibid.*

As President, Madison invoked this same structural framework to explain the flaws in an act that would have incorporated the Episcopal Church of Alexandria, Virginia. *Hosanna-Tabor*, 565 U.S. at 184-185. Madison vetoed the bill, explaining that it would

have given the civil government control over "the organization and polity of the church," violating the "essential distinction between civil and religious functions" and thus "exceed[ing] the rightful authority to which Governments are limited." 22 Annals of Cong. 982-983 (1811). "In this, Madison's most 'separationist' pronouncement as President," his objections "dealt not with any governmental acknowledgment of religion, but with governmental *involvement* in the promulgation and enforcement of church regulations." *ACLU* v. *Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 295 (6th Cir. 2001) (en banc) (emphasis added).

Notably, President Jefferson embraced the same division of authority in a letter to the Ursuline Nuns of New Orleans, who founded North America's first orphanage. The Ursulines were concerned that the United States' territorial expansion might mean that their property was now under the civil government's control. Jefferson reassured them that "the principles of the constitution" are a "sure guarantee" that their order "will be permitted to govern itself according to it's [sic] own voluntary rules, without interference from the civil authority." Letter of President Thomas Jefferson to the Ursuline Nuns of New Orleans (July 13, 1804), in 44 *The Papers of Thomas Jefferson*, 1 July to 10 November 1804, at 78-79 (James P. McClure ed., Princeton Univ. Press 2019).

This division of authority was further apparent in the nation's first religious liberty judicial decision. In 1813, a New York trial court prohibited New York state from subpoenaing the testimony of a Catholic priest regarding information about stolen goods he may have learned in the sacrament of confession. See

People v. *Philips* (N.Y. Ct. Gen. Sess. June 14, 1813).[3] The court held that it could not compel the priest's testimony, because to do so would be to "declare that there shall be no penance; and this important branch of the Roman Catholic religion would thus be annihilated." William Sampson, *The Catholic Question in America* 111 (photo. reprint. 1974) (1813). The court further held that it is "essential to the free exercise of a religion[] that its ordinances should be administered—that its ceremonies as well as its essentials should be protected." *Ibid.* While the decision did not use the words "church autonomy," the premise of *Philips*'s holding is that "[t]he laws which regulate" religious disciplines "must emanate from the Supreme Being, not from human institutions." *Id.* at 109.

"Although *Philips* was not officially reported, knowledge of the decision appears to have spread widely." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 588 (2021) (Alito, J., concurring). Indeed, after *Phillips*, the safeguarding of church government from state interference would be invoked later in the nineteenth century to democratically defeat "trustee" governance—where states sought to "undermine[] * * clerical authority" by prohibiting Catholic parishes from incorporation unless they were governed by lay trustee boards. See Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. Contemp. Legal Issues 693, 713 (2002).

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[3] This case was not officially reported, but a record of the arguments and the court's rulings are found in William Sampson, *The Catholic Question in America* (photo. reprint. 1974) (1813).

It is thus unsurprising that "the First Amendment analysis" does not apply "the same" to "the Lutheran Church, a labor union, [and] a social club." *Hosanna-Tabor*, 565 U.S. at 189. Rather, religious institutions receive "special solicitude." *Ibid*. That is because, when religious institutions exercise religious governance, they manifest "a sav[ed] * * * allegiance to the Universal Sovereign," an allegiance that has a priority on state power. Madison, *Memorial* at 185. Indeed, "[n]o other freedom is a duty to a higher authority." Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 30 (2000).

Church autonomy is therefore protected not only because religious institutions engage in "advocacy" or diverse "expression"—though they certainly do that. *Hosanna-Tabor*, 565 U.S. at 201-202 (Alito, J., concurring) ("archetype of associations formed for expressive purposes"); cf. *Americans for Prosperity* v. *Bonta*, 594 U.S. 595, 606 (2021) (explaining the virtues of free association). Rather, church autonomy recognizes that religious institutions manifest a way of life that is responsive to an authority beyond the secular world. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 223 (1972) ("We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles.").

B. Church autonomy is a structural limit that authorizes affirmative judicial relief.

Given this historical tradition, the Court's cases describe church autonomy—like the reserved sover-

eignty of states—as part of "[t]he structure of our government." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 730 (1872).

1. As a structural allocation of authority between church and state, church autonomy guarantees that religious institutions remain self-governing "organism[s]," ones that direct "strictly and purely ecclesiastical" issues "over which the civil courts exercise no jurisdiction." *Watson*, 80 U.S. at 729, 733. Indeed, *Kedroff* later described *Watson*'s holding as "radiat[ing] * * * a spirit of freedom for religious organizations" and "an independence from secular control or manipulation." 344 U.S. at 116; *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.").

In *Serbian Eastern Orthodox Diocese for the United States and Canada* v. *Milivojevich*, the Court reaffirmed that "religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government.'" 426 U.S. 696, 722-723 (1976). And *Our Lady* held that "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt to dictate *or even to influence* such matters would constitute one of the central attributes of an establishment of religion." 591 U.S. at 746 (emphasis added).

With this guarantee of "independent authority," *Our Lady*, 591 U.S. at 747, the Constitution did not understand religious freedom as "purely a negative freedom, a freedom to be left undisturbed in one's conscience"—as in revolutionary France. See Kellen Funk, *Church Corporations and the Conflict of Laws*

in Antebellum America, 32 J.L. & Religion 263, 278 (2017); cf. National Assembly of France, Declaration of the Rights of Man, sec. 10 (1789) ("No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.").

Rather, the American legal tradition inherited free religious exercise as "a positive liberty," manifested in "a corporate freedom, the right of an aggregate to see its institutional rules and actions validated in the state courts." Funk, 32 J.L. & Religion at 278. This is why "19th century decisions developing the church autonomy doctrine 'essentially treated these church tribunals as competent foreign courts.'" *Catholic Charities Bureau*, 605 U.S. at 259 (Thomas, J., concurring) (citing Funk, 32 J.L. & Religion at 281). "[U]nder the church autonomy doctrine, religious institutions are a parallel authority to the State, not a creature of state law." *id.* at 260. States cannot, therefore, use their powers to manipulate "the structure of [a religious institution's] polity," or governance. *Ibid*.

2. Drawing on this "broad and sound view of the relations of church and state" underlying "our system of laws," *Watson*, 80 U.S. at 727, this Court's cases recognize that church autonomy is more than an affirmative defense. Sometimes it might be, as when the ministerial exception is at issue, and church autonomy "bar[s] a court" from "entertaining a[ ] * * * claim" at all. *Our Lady*, 591 U.S. at 736. But the ministerial exception is only one "component" of the "broad" "sphere" of church autonomy, *id.* at 746-747.

In other cases, church autonomy requires civil courts to "recognize" a religious institution's authority

on a matter of religious governance. *Southern Methodist Univ.* v. *South Cent. Jurisdictional Conf. of the United Methodist Church*, 716 S.W.3d 475, 508 (Tex. June 27, 2025) (Young, J., concurring). In such cases, "judicial *inaction*" or "dismissal" is "what would jeopardize church autonomy." *Ibid.* Indeed, it is a "core judicial function" to "identify the correct entity" to exercise authority and "enforce whatever decision that entity makes." *Id.* at 501.

This understanding of church autonomy comes from this Court's cases. In *Kedroff*, for example, New York enacted a statute that effectively transferred authority over a New York City cathedral from one faction of the Russian Orthodox Church to another. 344 U.S. at 97-99. The fact that a state legislature authorized this intrusion into church governance was not a reason for this Court to avoid upholding religious institutional authority. To the contrary, this Court took jurisdiction over the case to vindicate the mother church's power of "ecclesiastical government." See *id.* at 115.

Further, in *Milivojevich*, the mother church was not a defendant using church autonomy as an affirmative defense. Rather, the mother church brought a church autonomy claim as a plaintiff—and won in this Court. That affirmative judicial action rested on state actors being "bound to accept" "the decisions of the highest judicatories of a religious organization" when the matter is one "of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." 426 U.S. at 713. "[A] searching * * * inquiry into church polity" is a "therefore impermissible inquiry." *Id.* at 723. On remand, to ensure the mother church's authority was effectuated, the Illinois trial court declared the

plaintiff's status as the authoritative church body and ordered the defendants (a rival faction) to recognize its governance. See Pet. A14-A28, *Serbian E. Orthodox Diocese for U.S. & Can.* v. *Serbian E. Orthodox Diocese for U.S. & Can.*, 443 U.S. 904 (1979) (No. 78-1765), https://perma.cc/7R5V-97ZU. The subsequent petition for certiorari was denied. *Serbian*, 443 U.S. 904.

3. Church autonomy thus cautions against limiting the ability of federal courts to protect against interference with internal religious governance.

In *Catholic Bishop*, that interference came in the form of a government investigation. There, the National Labor Relations Board claimed that the National Labor Relations Act gave it jurisdiction over teachers at parochial schools. 440 U.S. at 507. The Court rejected that interpretation and refused to grant the NLRB authority over teachers at religious schools "in the absence of a clear expression of Congress' intent to" do so, *id.* at 507; cf. *West Virginia* v. *EPA*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (requiring "clear statement" from Congress before piercing spheres of state or federal authority). As the Court explained, granting NLRB jurisdiction on such a question of religious governance would have been problematic. ""[N]ot only the conclusions that may be reached" but "the very process of inquiry" could "impinge on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502. The Court would not "construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions

arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

Catholic Bishop reflects what the Court has "long recognized," namely, that "the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Protecting that "independence from secular control or manipulation," *Kedroff*, 344 U.S. at 116, requires federal courts to act, no matter the state actor committing the interference. See *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (holding it "not of moment" whether the legislative or judicial "branch" caused the interference, as "'it is still the application of state power which we are asked to scrutinize'") (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958)). If investigative "intrusion * * * could run afoul of the Religion Clauses," then the civil government's "jurisdiction" is "preclude[d] * * * on constitutional grounds." *Catholic Bishop*, 440 U.S. at 499. With the growth of modern regulatory power, "the First Amendment protections at the root of *Catholic Bishop* are as vital today as they ever have been." *Loma Linda* v. *NLRB*, No. 23-5096, 2023 WL 7294839, at *16 (D.C. Cir. May 25, 2023) (Rao, J., dissenting).

"This does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady*, 591 U.S. at 746.[4] Nor does it mean that courts are incapable of evaluating whether an organization is, in

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[4] For example, courts properly decide claims that have nothing to do with religious doctrine, religious questions, or a religious body's internal governance. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("The minister struck on the head by a

fact, religious or exercising religious governance when claiming that sphere of authority. See *Markel* v. *Union of Orthodox Jewish Congregations of Am.*, 124 F.4th 796, 804 (9th Cir. 2024) (explaining how the circuit's understanding of "religious organization" in Title VII "tracks the guidance in *Our Lady* and may be looked to when considering whether defendants are religious organizations").

But "it is a very different thing where a subject-matter of dispute * * * concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. (13 Wall.) at 733. When such issues of internal religious governance are subjected to government interference, then religious organizations "enjoy a greater right to control their own affairs than that enjoyed by other groups." *Catholic Charities Bureau*, 605 U.S. at 257 (Thomas, J., concurring).

Accordingly, when government regulators make demands that "refuse[] to respect the limits of [their] jurisdiction, religious institutions must be permitted to vindicate their First Amendment rights in district court without waiting for the conclusion of intrusive [regulatory] proceedings." *Loma Linda*, 2023 WL 7294839, at *18 (Rao, J., dissenting).

This rule comports with the logic of other contexts where "it is incumbent upon the federal courts" to

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falling gargoyle as he is about to enter the church may have an actionable claim."). The same is true for claims of physical harm. See, *e.g.*, *Paul* v. *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) ("physical assault or battery" arising out of a religious practice is justiciable).

act—for example, to avoid "upsetting the usual constitutional balance" of federal and state power. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); cf. *Catholic Bishop*, 440 U.S. at 507 (declining to construe the NLRA to give the NLRB jurisdiction over religious school-teachers "in the absence of a clear expression of Congress' intent"). Or to "develop[ ] a uniform body of law" in sensitive areas, like those involving the governance of a foreign sovereign. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983); cf. *Catholic Bishop*, 440 U.S. at 500 (analogizing to a case that "implicated sensitive issues of the authority of the Executive over relations with foreign nations"). Or to ensure that *Younger* comity does not extend beyond "state functions" that involve "the filing of a formal complaint or charges." *Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69, 77-80 (2013); see *Seattle Pac. Univ.* v. *Ferguson*, 104 F.4th 50, 64 (9th Cir. 2024) ("[I]f there were no daylight between the invocation of pre-enforcement standing and the start of *Younger* abstention, then litigants would have virtually no opportunity to seek federal review of state laws infringing on constitutional rights.").

This rule also follows the "[t]he general rule" of constitutional rights: "plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." *Knick* v. *Township of Scott*, 588 U.S. 180, 194 (2019) (cleaned up). Indeed, no other rule would be consistent with "[t]he connection between church governance and the free dissemination of religious doctrine [that] has deep roots in our legal tradition." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring).

II. A federal forum is required here to protect First Choice's internal religious governance.

Forcing First Choice to comply with New Jersey's subpoena will subject First Choice to "the very process of inquiry" that "impinge[s] on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502, 507. To avoid that impermissible "[s]tate interference," *Our Lady*, 591 U.S. at 746, and in the absence of a formal complaint or charges, church autonomy requires federal court access to ensure that New Jersey's subpoena does not infringe on First Choice's "internal management decisions that are essential to the institution's central mission," *ibid*. The importance of federal court access here is underscored by the increasing—and intentional—threats to religious bodies from some states.

A. The subpoena interferes with First Choice's internal religious decisions.

First Choice is a religious ministry. It is a "faith-based nonprofit that exists to encourage and equip women and men to make informed pregnancy decisions." Pet.App.180a. As First Choice's executive director testified, "[c]entral to the ministry's mission is the belief that every person is created in the image of God and is valuable at all times, from conception to death." Pet.App.186a. First Choice therefore "seeks to serve women and the unborn as the Bible instructs in James 2:26, 'As the body without the spirit is dead, so faith without deeds is dead.'" *Ibid.*

First Choice "abides by its Christian beliefs in how it operates, including in what it teaches and how it treats others." Pet.App.117a. All of First Choice's employees, board members, and volunteers are required

to adhere to its statement of faith. *Ibid.* As First Choice publicly tells its donors, "[c]hurches play a critical role in our ministry," including by identifying "Prayer Partners * * * for specific clients and needs," hosting First Choice to speak at houses of worship on "Sanctity of Human Life Sunday" to discuss "what God is doing in the ministry," and "encourag[ing] * * * members" to pursue volunteer opportunities at First Choice. *Churches,* First Choice Women's Resource Centers, https://perma.cc/N8RT-PS57.

As Petitioner explains, New Jersey's subpoena demands (among many other things) copies of every donor solicitation and every document or video provided to donors over a nearly three-year period. Pet.App.90a, 100a-102a. It also demands the full names, phone numbers, addresses, and present or last known place of employment of First Choice's donors who gave through any means other than a designated website. Pet.App.98a, 110a. Petitioner has well detailed the myriad reasons these demands chill First Choice's associational and speech rights. Pet.Br.33-47.

But these threats to First Choice's donor relationships do not encompass the full threat to First Choice's *internal* religious governance. The subpoena further demands that First Choice hand over its internal religious communications, policies, and guidance documents, ones that are integral to its religious mission. Specifically, the subpoena orders First Choice to produce all "Documents" (to include pre-decisional deliberative drafts), all "Policies" ("written or oral"), and all "Communications" (to include "any conversation" or "message," "in writing, orally, electronically, or by any

other means") provided to *its own employees* and volunteers to "guide their interactions" with client and donors. Pet.App.95a-96a, 99a, 108a. That includes all "volunteer handbooks," "volunteer agreements," and "training materials." Pet.App.108a.

In other words, New Jersey demands that First Choice disclose the internal deliberations, conversations, communications, and training materials that direct its core religious ministry. This will necessarily include how First Choice applies its statement of faith to its employees and volunteers. It also necessarily includes how First Choice articulates and upholds its Christian beliefs when training employees and volunteers and counseling clients. Being forced to turn over all that to a hostile state actor would not only injure First Choice *now*. It would also be a permanent chill on the candor and deliberation necessary for effective religious decision-making and vigorous pursuit of First Choice's religious mission. As First Choice's executive director put it: complying with the subpoena "would weaken the ministry" by "compromising its ability to coordinate" with its "personnel." Pet.App.187a.

New Jersey's subpoena is thus the type of "process of inquiry" that "impinge[s] on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502. Indeed, if "scrutinizing" "whether and how" a religious school pursues its mission "raise[s] serious concerns about state entanglement with religion," *Carson*, 596 U.S. at 787, then requiring a religious ministry to disclose all internal communications about how to accomplish its core religious mission does too. "[A]

searching * * * inquiry into church polity" is a "therefore impermissible inquiry." *Milivojevich*, 426 U.S. at 723.

Moreover, the subpoena says that "[f]ailure to comply * * * may render you liable for contempt of Court and such other penalties as are provided by law." Pet.App.90a. That is an express threat to employ coercive state power against a specific religious body unless it complies with an intrusive investigatory demand. And that threat is backed by a state statute providing that the Attorney General "may issue subpoenas to any person," "which shall have the force of law." N.J. Stat. Ann. § 56:8-4(a). There is no other reasonable way to understand this language except as state pressure on First Choice to comply with the subpoena's demands.

First Choice is thus being put to the choice of "water[ing] down" its religious beliefs, making them "more comfortable with what a * * * bureaucrat in [Trenton] might say," or facing the plenary enforcement power of the state's chief law enforcement officer. Oral Argument Transcript at 70:12-18, *Carson* v. *Makin*, 596 U.S. 767 (2022) (Gorsuch, J.). But "forcing religious institutions to defend themselves on matters of internal governance is itself a tax on religious liberty." *McRaney*, 980 F.3d at 1074 (Ho, J., dissenting from denial of rehearing en banc) (citing *Catholic Bishop*, 440 U.S. at 502, *Hosanna-Tabor*, 565 U.S. at 205-206, & *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 373 (5th Cir. 2018)).

B. A federal forum here addresses a growing lack of solicitude for church autonomy.

Vindicating First Choice's right to a federal forum also protects church autonomy in the face of ongoing threats to internal religious governance at the state level.

Some state courts are bypassing church autonomy and giving the "narrowest reasonable reading" of state law hiring protections for religious organizations. See, *e.g.*, *Doe* v. *Catholic Relief Servs.*, 300 A.3d 116, 132 (Md. 2023) (severely restricting religious employment exemption in Maryland Fair Employment Practices Act). Other state courts are reducing church autonomy to the ministerial exception—while disparaging even that as a "license to discriminate." See *Woods* v. *Seattle's Union Gospel Mission*, 481 P.3d 1060, 1071 (Wash. 2021) (Wu, J., concurring) (saying so three times); see also *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094, 1094 (2022) (Alito, J., statement respecting denial of certiorari) (quoting this disparagement). Other states are expanding their antidiscrimination laws "without any concern for whether that interpretation violates constitutional protections of religious liberty." *Rouch World, LLC* v. *Department of C.R.*, 987 N.W.2d 501, 555-556 (Mich. 2022) (Viviano, J., dissenting).

This trend has resulted in a Washington state attorney general "denouncing" a religious university's religious hiring as "illegal discrimination" and then "soliciting more complaints." *Seattle Pac. Univ.*, 104 F.4th at 56. Meanwhile, Michigan began investigating religious organizations for violating its expanded, religious-liberty-free antidiscrimination law. See Opening

Brief at 15-16, *Christian Healthcare Ctrs. Inc.* v. *Nessel*, No. 23-1769 (6th Cir. Oct. 18, 2023). According to Michigan, religious standards on human sexuality can be applied in hiring when they are "reasonably necessary" under state law. *Id.* at 49 (quoting Mich. Comp. Laws § 37.2208). And in Maryland, religious organizations are barred from applying any religious hiring standards, unless employing individuals whom state law sees as "directly" furthering a "core" mission of the religious body. *Doe*, 300 A.3d at 132, 136, 137 n.20.

These examples "illustrate[] th[e] serious risk" and "inevitable" First Amendment conflicts that follow from a lack of state solicitude toward church autonomy. *Seattle's Union Gospel Mission*, 142 S. Ct. at 1094, 1096 (Alito, J., statement respecting denial of certiorari). Indeed, Section 1983's "momentum" did not come from "the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand." *Monroe* v. *Pape*, 365 U.S. 167, 174-175 (1961), *overruled on other grounds by Monell* v. *Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

Government officials today would benefit from a reminder of the First Amendment's "special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189. That may seem obvious, but "civilisation decays by forgetting obvious things." G.K. Chesterton, The New Jerusalem, in *The Collected Works of G.K. Chesterton* 211 (Ignatius Press 1986).

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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