No. 16-210

In the Supreme Court of the United States

LAVONNE PFEIL, PETITIONER

v.

ST. MATTHEWS EVANGELICAL LUTHERAN CHURCH OF THE UNALTERED AUGSBURG CONFESSION OF WORTHINGTON, NOBLES COUNTY, MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

KEN D. SCHUELER
JENNIFER PETERSON
DUNLAP & SEEGER, P.A.
206 South Broadway
Suite 50
P.O. Box 549
Rochester, MN 55903
(507) 288-9111

PAUL C. PETERSON
Counsel of Record
WILLIAM L. DAVIDSON
TIMOTHY J. O'CONNOR
LIND JENSEN SULLIVAN & PETERSON, P. A.
901 Marquette Ave. S.
Suite 1300
Minneapolis, MN 55402
(612) 333-3637
paul.peterson@lindjensen.com

QUESTION PRESENTED

Whether the Minnesota Supreme Court correctly held, consistent with other courts to consider the question and this Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012), that the First Amendment's prohibition of government involvement in ecclesiastical decisions bars "a defamation claim based on statements made during a church disciplinary proceeding and published only to members of the religious organization and its hierarchy," because adjudicating such a claim would "'interfere[] with an internal church decision that affects the faith and mission of the church itself.'" Pet. App. A-24 to A-25 (quoting *Hosanna-Tabor*, 132 S. Ct. at 707).

RULE 29.6 STATEMENT

St. Matthew Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington, Nobles County, Minnesota, has no parent, and no publicly held corporation owns 10% or more of its stock.

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The opinion of the Minnesota Supreme Court (Pet. App. A-1 to A-36) is reported at 877 N.W.2d 528. The opinion of the Minnesota Court of Appeals (Pet. App. A-37 to A-50) is unreported, but available at 2015 WL 134055. The order and memorandum of the Nobles County District Court (Pet. App. A-51 to A-77) is unreported, but available at 2014 WL 12479465.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on May 13, 2016, and the petition for a writ of certiorari was filed on August 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

It is well settled that the First Amendment to the United States Constitution bars civil courts from reviewing internal decisions that shape a church's faith and mission. This case fits squarely within that tradition and implicates no meaningful division of authority. Following a long and acrimonious period of tension and disagreement that the pastors of St. Matthew Lutheran Church had with two parishioners regarding compliance with church teachings and the conduct of church affairs, respondent pastors (with the approval of the church's Board of Elders) sent those parishioners a confidential letter explaining their decision to terminate their church membership. Pet. App. A-3; Pltf.'s Second Am. Compl., Exh. 2.[1] The letter stated that the parishioners (petitioner

[1] Like the Minnesota Supreme Court, respondents refer to the church as "St. Matthew." See Pet. App. A-2 n.1.

and her late husband) had violated church doctrine and teachings in numerous respects, including engaging "in a public display of sin," refusing to meet for confession and forgiveness, and speaking ill of both church leadership and the congregation's work and ministry. *Id.* at A-4. Respondents shared this letter only with other church members, in convening a special meeting of the congregation to discuss, and ultimately affirm as a church body, respondents' disciplinary decision. *Ibid.* Petitioner sought review of the disciplinary decision and voluntarily participated in an appeal challenging the decision. A Missouri Synod panel composed of denominational leadership subsequently considered and approved that disciplinary decision. *Id.* at A-5.

Petitioner sued in state court, alleging defamation and negligence claims against the church and its two pastors based exclusively on statements allegedly made in the context of those internal, closed church disciplinary proceedings, convened solely to determine whether the parishioners should be disciplined under church doctrine and should continue to be members of the St. Matthew Lutheran Church. Pet. App. A-5.

The Minnesota Supreme Court, following this Court's recent teaching in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012), correctly held that petitioner's claims were properly dismissed because the First Amendment prohibits civil courts from reviewing and interfering in internal church decisions that are central to the mission of the church. No less than in *Hosanna-Tabor*, adjudicating petitioner's claims

would entangle a civil court in core matters of internal church governance and discipline. And doing so would require the court to attempt to differentiate between secular and religious statements, all undisputedly made in the context and furtherance of an internal church disciplinary proceeding. This process necessarily would lead to "excessive governmental entanglement with religion" (Pet. App. A-15 to A-16), running afoul of the First and Fourteenth Amendments.

The decision does not conflict with rulings of any other state court of last resort or federal court of appeals that has considered statements confined to internal church disciplinary proceedings of this nature and made only to members of the church congregation and its leadership. Almost without exception, the cases petitioner relies on predate this Court's decision in *Hosanna-Tabor* and involve readily distinguishable facts. Contrary to the petition's high-decibel claims of sweeping immunity, the court below ruled in a self-consciously narrow and fact-bound manner. The petition should be denied.

A. Factual Background

Henry and LaVonne Pfeil were members of St. Matthew Lutheran Church in Worthington, Minnesota. Pet. App. A-3. Respondents Thomas Braun and Joe Behnke were pastors at that church. *Ibid.* St. Matthew Lutheran Church is a member of the Lutheran Church-Missouri Synod. *Ibid.*

Following a long period of internal conflict and acrimony about church leadership and the conduct of church affairs, the pastors (with the approval of the

church's Board of Elders) sent the Pfeils a letter explaining that the church was terminating their church membership for numerous violations of church doctrine and teachings, and they had been excommunicated. Pet. App. A-3. The letter stated that the Pfeils had violated numerous church doctrines over the past two years. *Ibid.* And it detailed congregational complaints that the Pfeils were speaking against the church leadership and ministry of St. Matthew. *Ibid.*

St. Matthew then held a "special voters' meeting" attended only by church members, for the congregation to consider—and ultimately affirm or reject—the church leadership's disciplinary decision. Pet. App. A-3. Pastor Braun led the meeting. *Id.* at A-4. Petitioner alleges that Braun's remarks at this meeting, and in the earlier letter, contained several defamatory statements, including:

- The Pfeils had engaged in a "public display of sin."
- The Pfeils had led other people to sin.
- The Pfeils had refused to follow the commands and teachings of God's word and had "engaged in behavior unbecoming of a Christian."
- The Pfeils had refused to meet for the purpose of confession and forgiveness.
- The Pfeils had intentionally attacked, questioned, and discredited the integrity of church leadership within the congregation.
- The Pfeils had publicly engaged in "sinful behavior" inside and outside St. Matthew.

- The Pfeils were actively involved in "slander, gossip, and speaking against" Pastor Braun and his wife, Pastor Behnke, and the St. Matthew Board of Elders.
- The Pfeils had "refused to show respect" toward servants of God and St. Matthew church leadership.
- Other people had observed the Pfeils display anger and disrespect toward Pastor Braun.

See *ibid.*

The pastors distributed to church members a voting ballot that listed the proposed reasons for excommunication, with corresponding scripture references for each. See Br. in Opp. App. 1a-2a. Church members at the meeting voted to affirm the decision to terminate the Pfeils' church membership. Pet. App. A-4 to A-5.

The pastors then convened a Missouri Synod panel, composed of church denominational leadership, "for the sole reason of reviewing the decision of the [s]pecial [v]oters' [m]eeting to excommunicate [the Pfeils]" and "held in accordance with the Church's formal internal dispute resolution process." Pet. App. A-74. Petitioner and approximately 10 others—all members of St. Matthew or church leadership—attended the Synod hearing. *Id.* at A-60. Among other things, Petitioner alleges that during this hearing, Pastor Behnke falsely claimed that the Pfeils had accused him of stealing money from St. Matthew. *Id.* at A-5.

B. Procedural History

1. Petitioner brought suit in state court, asserting claims for defamation and negligence against St. Matthew Lutheran Church and its pastors. Pet. App. A-5.[2] Respondents moved to dismiss on several grounds, including (as relevant here) for lack of subject matter jurisdiction, arguing that the claims were barred by the First Amendment to the United States Constitution. *Ibid.*

The district court dismissed the case, holding that the First Amendment "bars the review of a defamation claim brought against a religious institution and its clergy arising out of the discipline and termination of the institution's members." Pet. App. A-73. That court specifically found that "each of the alleged defamatory statements was made within the church at church disciplinary proceedings." *Id.* at A-61. And it observed that the purpose of the special voters' meeting was to ask the congregation "to affirm the chosen discipline" of the Pfeils, and that the Synod panel hearing "was held for the sole reason of reviewing the decision" of the special voters' meeting. *Id.* at A-74.

The district court emphasized that all of the alleged statements at issue "involve the reasons and motives for disciplining [the Pfeils], which were based in scripture, church governance, and internal church policy." Pet. App. A-75. It noted that if the alleged

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[2] Henry Pfeil died before this litigation commenced. The Nobles County District Court held that his claims did not survive his death, and petitioner did not appeal that ruling. Pet. App. A-5 n.4.

statements had been published outside of the congregation, "the Court's decision in this case would be different." *Id.* at A-76. The Court found no indication, however, "that the publication went to persons beyond church members or was outside the internal church appeal process." *Ibid.*

The court of appeals unanimously affirmed, agreeing that "any judicial inquiry into the truth of statements made during a church disciplinary proceeding would create an excessive entanglement with the church that would violate the First Amendment." Pet. App. A-38.

2. The Minnesota Supreme Court also affirmed, focusing narrowly on the specific circumstances and allegations of this case, and holding that "the First Amendment prohibits holding an individual or organization liable for statements made in the context of a religious disciplinary proceeding when those statements are disseminated only to members of the church congregation or the organization's membership or hierarchy." Pet. App. A-26 to A-27.

Citing *Hosanna-Tabor*, the court explained that "on the facts before us—where ministers made largely religious and doctrinal allegations as part of an excommunication proceeding and only disseminated those statements to members of the congregation—'the First Amendment has struck the balance for us.'" Pet App. A-24. Rejecting petitioner's argument that a civil court can differentiate between religious and secular statements, the court remarked that "determining which statements are secular and which are religious would, itself, create an excessive entanglement with religion." *Id.* at A-21 to A-22.

The court emphasized that it would "be troubled" if the facts of a different case involved intentional abuse of the First Amendment protection to circumvent liability, particularly if the allegedly defamatory statements were disseminated to non-church members. Pet App. A-23. The Court emphasized, however, that "those facts are not before us and we leave the resolution of such a case for another day." *Ibid.*

In dissent, Justice Lillehaug (joined by Chief Justice Gildea) acknowledged that "religious organizations have a constitutionally protected right to make decisions regarding membership." Pet. App. A-30. And the dissent conceded that petitioner's preferred test (distinguishing claims that can be adjudicated based on neutral principles from those that lead to excessive entanglement) can be "complicated and messy." *Id.* at A-32. Justice Lillehaug further recognized that "adjudicating most of the statements [alleged here] would * * * entangl[e]" the court in a religious dispute. *Id.* at A-35. And even if a civil court were to attempt to adjudicate the one statement that, in his view, could be considered "secular," Justice Lillehaug acknowledged the need to strike a "balance between a defamation victim's right to a remedy and a religious organization's right to discipline." *Id.* at A-33.

REASONS FOR DENYING THE PETITION

A. The Minnesota Supreme Court's Decision Is Correct.

Further review is not warranted because the Minnesota Supreme Court correctly applied the

rationale of *Hosanna-Tabor* to the closely related facts of this case.

1. In *Hosanna-Tabor*, this Court unanimously held that the Establishment and Free Exercise Clauses of the First Amendment "bar[red]" an employment discrimination suit that sought to challenge "the decision of a religious group to fire one of its ministers." 132 S. Ct. at 702. A Lutheran church had held a congregational vote and determined that one of its ministers was incapable of continuing her ministry. *Id.* at 700. The congregation offered the minister a "peaceful release" from her position, but the minister refused to resign, and threatened legal action. *Ibid.* The congregation met again, voted to rescind the minister's "call" to ministry, and then sent the minister a letter of termination, which cited "insubordination," and her failure to abide by "the Synod's commitment to internal dispute resolution" by threatening legal action. *Id.* at 700-701, 709. The Equal Employment Opportunity Commission later brought suit on the minister's behalf, alleging that the church's termination of her employment violated the Americans with Disabilities Act. *Id.* at 701.

This Court recognized a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 132 S. Ct. at 705-706 (citation omitted). Although acknowledging that society has an interest "in the enforcement of employment discrimination statutes," this Court explained that

the First Amendment does not permit interference with church decisionmaking because a church "must be free to choose those who will guide it on its way," *id.* at 710, and select "those who personify its beliefs," *id.* at 706. "[P]unishing a church" by imposing damages because of its employment decisions "interferes with the internal governance of the church, depriving the church of control" over precisely these decisions. *Ibid.*; see also *id.* at 709 ("An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination."). *Hosanna-Tabor* thus establishes that civil courts may not "intrude[] upon" internal church decisions that "shape [the church's] own faith and mission." *Id.* at 706.

Writing for the Court, the Chief Justice recounted examples of colonial-era faith communities that sought freedom from government interference in internal church decisions, such as Puritans fleeing to New England to "establish their own modes of worship." *Hosanna-Tabor*, 132 S. Ct. at 702 (citing Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 3 (1986)). That early experience was embodied in the "scrupulous policy of the Constitution in guarding against * * * interference with religious affairs." *Id.* at 703 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 *Records of the American Catholic Historical Society* 63 (1909)).

This Court's precedent grew around this bedrock principle. *Watson* v. *Jones* held that "[t]he [church's]

right * * * [of] ecclesiastical government of *all the individual members*, congregations, and officers within the general association, is unquestioned." *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring) (quoting *Watson*, 80 U.S. (13 Wall.) 679, 728-729 (1872) (emphasis added)). Likewise, this Court more recently affirmed a "spirit of freedom for religious organizations," and held that churches have the "power to decide for themselves, free from state interference, *matters of church government* as well as those of faith and doctrine." *Hosanna-Tabor*, 132 S. Ct. at 704 (citing *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (emphasis added)). And *Serbian Eastern Orthodox Diocese for United States & Canada* v. *Milivojevich* concluded that the First and Fourteenth Amendments permit "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Milivojevich*, 426 U.S. 696, 724 (1976)).

In sum, *Hosanna-Tabor* recognized that judicial review of—or liability based on—core church governance decisions constitutes "interference with an internal church decision that affects the faith and mission of the church itself." 132 S. Ct. at 707.

2. The decision below represents a straightforward application of *Hosanna-Tabor* to an internal church determination every bit as central to "the faith and mission of the church itself" as selecting a minister: resolving a question of "internal discipline and government" (*Hosanna-Tabor*, 132 S. Ct. at 707,

705 (internal quotation marks omitted)) concerning who will be a member of the church. Deciding who shall be a member of a church, like choosing its ministers, involves the "selection of those who will personify [the church's] beliefs." *Id.* at 706. To be sure, as the Minnesota Supreme Court acknowledged, "a claim for redress arising out of defamatory speech is a valued and important societal interest," Pet. App. A-24, just as *Hosanna-Tabor* acknowledged a public interest in the enforcement of employment statutes, 132 S. Ct. at 710. But the Minnesota Supreme Court correctly recognized, consistent with *Hosanna-Tabor*, that churches have a countervailing and greater interest in making the central decisions that shape their own "faith and mission." Pet. App. A-11 (quoting *Hosanna-Tabor*, 132 S. Ct. at 707). Thus, "the First Amendment has struck the balance" protecting churches from legal challenges that seek to penalize such core acts of self-governance as selecting a church's leaders—or its members. See *Hosanna-Tabor*, 132 S. Ct. at 710; Pet. App. A-24 (quoting *Hosanna-Tabor*, 132 S. Ct. at 710).

As the Minnesota Supreme Court correctly held, the result here follows not only from *Hosanna-Tabor* itself, but also from other well-established First Amendment principles. The facts of this case amply illustrate that a civil court's adjudication of a defamation claim focused on statements "made during a church disciplinary proceeding and published only to members of the religious organization," Pet. App. A-25, would require a civil court to differentiate between supposedly "secular" and "religious" statements. This process would lead

to government entanglement by requiring the government to involve itself in "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707; see also *Westbrook* v. *Penley*, 231 S.W.3d 389, 402 (Tex. 2007) (holding that the court lacked jurisdiction over professional negligence claim against pastor based on statements made to church elders and members in internal disciplinary proceeding); *Brady* v. *Pace*, 108 S.W.3d 54, 60-61 (Mo. Ct. App. 2003) (similar); *Hiles* v. *Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-938 (Mass. 2002) (holding that the court lacked jurisdiction over claim against parishioner based on statements made to the church in internal disciplinary proceeding).

All of the allegedly defamatory statements here were made either at the congregation's "special voter's meeting" or at the synod panel hearing, each attended by the decisionmakers (church members and leadership), the clergy who presented the charges to the decisionmakers, and petitioner. Pet. App. A-3 to A-5; see also *Lee* v. *Son*, No. 1-11-3217, 2012 WL 6962978, at *6 (Ill. App. Ct. Sept. 28, 2012) (in holding statements were not subject to defamation action, emphasizing that they were only made to church members). As the district court noted, all of the statements alleged here "involve[d] the reasons and motives for disciplining [petitioner], which were based in scripture, church governance, and internal church policy." Pet. App. A-75. To take just one example: some of the alleged statements pertain to "slander" and "gossip," words which have particular religious significance in the Lutheran faith. See

Martin Luther, *Small Catechism* § 1, p. 13 (1986) (stating that Christians should "not tell lies about our neighbor, betray him, slander him, or hurt his reputation, but defend him, *speak well of him, and explain everything in the kindest way*" (emphasis added)); see also *Purdum* v. *Purdum*, 301 P.3d 718, 727-28 (Kan. Ct. App. 2013) (refusing to adjudicate suit that required "inquir[y] into religious practices").

Petitioner conceded below that the majority of the statements alleged in the complaint were religious and therefore not justiciable. Pet. App. A-18 ("For instance, a court could not decide whether the Pfeils were engaged in a 'public display of sin' without interpreting the meaning of the word 'sin' as a matter of Lutheran doctrine * * * *"). However, even the few remaining statements petitioner contends are subject to suit all were made along with the concededly religious statements in internal church governance and disciplinary proceedings. Resolving whether certain individual statements have special religious meaning would inevitably entangle a civil court in doctrinal questions, as it attempted to parse which words should be interpreted according to scripture and the Lutheran faith and which according to the lexicon of Messrs. Merriam and Webster. Petitioner "fail[ed] to address," A-21, either before the Minnesota Supreme Court or in her petition, how a court could draw such distinctions without deciding questions of religious doctrine and excessively entangling itself in religion.

3. Furthermore, as the Minnesota Supreme Court correctly concluded, imposing civil liability for defamation based on statements made to

decisionmakers during internal church disciplinary proceedings would inevitably chill church members' candid discussion of doctrinal matters. Church discipline requires frank conversation about the conduct of church members. If congregations and church leadership faced defamation liability for statements made to and among decisionmakers during disciplinary proceedings, they would foreseeably shy away from bringing church disciplinary proceedings or from speaking candidly on matters of doctrine and faith in them. This chilling effect would limit the church's freedom to define its own beliefs and enforce its membership requirements as it sees fit. See *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring) ("The connection between church governance and the free dissemination of religious doctrine has deep roots in our legal tradition."). That result is impossible to square with the Free Exercise Clause, which "protects a religious group's right to shape its own faith and mission." *Id.* at 706. This right extends to "questions of discipline." *Id.* at 704 (quoting *Watson*, 80 U.S. (13 Wall.) at 727); accord *Lee*, 2012 WL 6962978, at *6 (barring defamation suit based on statements made solely during church disciplinary proceeding).

4. Finally, there is no basis for petitioner's claim that the decision below provides religious leaders wide-ranging "absolute immunity" for any defamatory statements they might make, regardless of the audience, regardless of the person they are speaking about, and regardless of the subject matter. See, *e.g.*, Pet. 6-7. The Minnesota Supreme Court carefully limited its holding to "statements made

during a church disciplinary proceeding and published only to members of the religious organization." Pet. App. A-25. The court emphasized that it was addressing only "the facts before [it]," *id.* at A-23 to A-24, and indicated that it might allow a case to proceed if the defamatory speech was disseminated to persons outside the church or if the speaker was purposefully attempting to evade liability by couching defamatory statements in religious terms. *Id.* at A-23. Just as the Minnesota Supreme Court held that "[i]t would be inappropriate to speculate on how the First Amendment may apply to hypothetical facts that are not before us," *id.* at A-23 n.12, this Court need not and should not entertain petitioner's hypothetical "parade of horribles," *Hosanna-Tabor*, 132 S. Ct. at 710, absent any indication the decision would be applied in such circumstances.

B. The Decision Implicates No Split of Authority

Petitioner asserts that a "lack of guidance" from this Court has led to a split on the question of immunity for defamatory statements in religious proceedings. Pet. 7. Petitioner's assertion misses the mark. The petition's claimed split consists almost entirely of cases decided before this Court's recent decision in *Hosanna-Tabor*, a case which the petition remarkably does not even acknowledge. There is no reason for this Court to rush to address these issues again, before lower courts have had a chance to consider and apply *Hosanna-Tabor* in this closely related context. This is particularly so because claims involving internal church discipline disputes

are not common. Moreover, even putting aside *Hosanna-Tabor*, the Minnesota Supreme Court's holding that "the First Amendment prohibits holding an individual or organization liable for statements made in the context of a religious disciplinary proceeding when those statements are disseminated only to members of the church congregation" is consistent with the rulings of every federal circuit and state court of last resort to address the question in materially similar circumstances. Any difference in outcome in the cases cited in the petition follows from different underlying facts, not any difference in courts' understandings of the application of First Amendment principles to internal church discipline matters.

1. As discussed, *Hosanna-Tabor* unanimously held that allowing a minister's employment discrimination suit to proceed would impermissibly constrain a church's right to choose its ministers. See *Hosanna-Tabor*, 132 S. Ct. at 705-09. As the Minnesota Supreme Court's decision recognizes, a church's ability to freely select its members and ensure that its congregation follows core church doctrines and teachings is at least as fundamental to its autonomy as the choice of leadership. *Hosanna-Tabor* at a minimum strongly suggests that courts should not entertain defamation suits that are predicated on statements made during church disciplinary proceedings when those statements are not published outside of the church.

Because virtually all of the cases petitioner cites as supposedly conflicting with the decision here predate this Court's decision in *Hosanna-Tabor*, those

cases cannot be said to reflect confusion or disagreement under current law. See, *e.g.*, *Connor* v. *Archdiocese of Phila.*, 975 A.2d 1084 (Pa. 2009); *Bowie* v. *Murphy*, 624 S.E.2d 74 (Va. 2006); *Lipscombe* v. *Crudup*, 888 A.2d 1171 (D.C. 2005); *McAdoo* v. *Diaz*, 884 P.2d 1385 (Alaska 1994); *Marshall* v. *Munro*, 845 P.2d 424 (Alaska 1993); *Drevlow* v. *Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993); *Cargill* v. *Greater Salem Baptist Church*, 215 S.W.3d 63 (Ky. Ct. App. 2006); *Klagsbrun* v. *Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732 (D.N.J. 1999). The petition does not suggest that those jurisdictions have had occasion to consider *Hosanna-Tabor*'s effect on those prior rulings.[3] That fact both undermines any suggestion that the issue here recurs with particular frequency and shows that this Court should not deprive lower courts of an opportunity to analyze the issues under current law.

2. Even putting aside *Hosanna-Tabor*, the alleged split of authority evaporates under passing scrutiny. The cases petitioner cites do not reflect disagreement with governing First Amendment principles, but instead simply reflect the application of law to materially different circumstances. Indeed, every federal circuit or state court of last resort to address

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[3] *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), not cited in the petition, did not involve defamation. The Kentucky Supreme Court expressly adopted the ministerial exception from *Hosanna-Tabor* and affirmed the dismissal of a seminary professor's state-law employment discrimination claim against his employer; the court allowed claims sounding purely in breach of contract to proceed. *Id.* at 607, 614-615.

the question actually presented here has ruled in accord with the Minnesota Supreme Court.

Far from granting "comprehensive immunity for defamatory statements arising from religious proceedings," Pet. 7, the Minnesota Supreme Court's holding was narrowly focused on immunity for statements made in the context of a church's internal disciplinary proceedings involving alleged violations of church doctrine and teaching, and open only to church members. By ruling that "the First Amendment prohibits holding an individual or organization liable for statements made in the context of a religious disciplinary proceeding when those statements are disseminated only to members of the church congregation or the organization's membership," Pet. App. A-26 to A-27, the Minnesota Supreme Court reached the same result as every other court that has adjudicated materially similar facts. See *Hiles*, 773 N.E.2d at 936-937 (holding the court lacked jurisdiction over a defamation claim based on statements made during internal church discipline); accord *Lee*, 2012 WL 6962978, at *6 (allegedly defamatory statements were "confined * * * to church disciplinary proceedings"); *Stepek* v. *Doe*, 910 N.E.2d 655, 666 (Ill. Ct. App. 2009) (same); *Brady* v. *Pace*, 108 S.W.3d 54, 60 (Mo. Ct. App. 2003) (same); *Howard* v. *Covenant Apostolic Church*, 705 N.E.2d 385, 386, 388-389 (Ohio Ct. App. 1997) (same).

By contrast, the cases petitioner cited as supposedly conflicting with the Minnesota Supreme Court's approach did not involve statements made in a church's internal religious disciplinary proceeding regarding the question of church membership;

indeed, some involved statements made not only in public but regarding non-church members.

The petition's centerpiece is *Connor* v. *Archdiocese of Phila.*, 975 A.2d 1084 (Pa. 2009), which petitioner paints as presenting a square legal conflict. But that case addressed statements made by a school principal during an expulsion hearing for a student who brought a pen knife to Catholic school—not statements made during a church decision on membership due to a parishioner's refusal to abide by religious doctrine. The Minnesota Supreme Court correctly debunked any suggestion of a conflict, cautioning that "it is quite possible that even the *Connor* court would bar suits based on statements made during the course of a church disciplinary proceeding." Pet. App. A-21. The court noted that *Connor* had "cited * * * with approval" decisions by Minnesota appellate courts consistent with the ruling here, "indicating that our court of appeals made the correct decision by refusing to delve into statements made during a church disciplinary proceeding because adjudicating the parishioners' claims would have 'obviously intrude[d] into the sacred precincts.'" *Ibid*. (alteration in original; quoting *Connor*, 975 A.2d at 1108 (citing *Schoenhals* v. *Mains*, 504 N.W.2d 233, 234 (Minn. Ct. App. 1993))).

Like *Connor*, many of the other state court decisions the petition cites as part of a supposed split dealt with statements made in non-religious or even public contexts, or did not involve disputes about church membership. See *Bowie* v. *Murphy*, 624 S.E.2d 74, 76-78 (Va. 2006) (involving statements made to police officers and "numerous" third parties

about an alleged physical assault in a church); *McAdoo* v. *Diaz*, 884 P.2d 1385, 1387 (Alaska 1994) (pre-*Hosanna Tabor* decision involving statement made about removal of volunteer receptionist and Pastoral Council duties, without affecting church membership); *Banks* v. *St. Matthew Baptist Church*, 750 S.E.2d 605, 608 (S.C. 2013) (involving statements about "trustee" duties rather than church membership, where speaker conceded "the non-religious nature of his statements," which court viewed as "independent of religious doctrine or governance"). This case, by contrast, involves statements made exclusively to church members, in the context of an internal church disciplinary process, to decide whether petitioners should remain members of the church or should be excommunicated for religious transgressions.

Petitioner's remaining cases are readily distinguished for similar reasons. Two (which predate *Hosanna-Tabor* by decades), involved employment decisions for church ministers, not disciplinary proceedings for church members, and also involved statements to those outside the congregation. See *Marshall* v. *Munro*, 845 P.2d 424, 425 (Alaska 1993) (involving statements made by a church official to members of a *different* church about a minister's fitness to perform work at his new congregation); *Drevlow* v. *Lutheran Church, Mo. Synod*, 991 F.2d 468, 469-470 (8th Cir. 1993) (involving statements about minister's wife made to members of a different church). Another case involved a minister's statement to a public gathering that included non-members. See *Lipscombe* v. *Crudup*, 888 A.2d 1171,

1172 n.1 (D.C. 2005). The petition does not demonstrate, and a fair reading of the cases does not reveal, any meaningful conflict in the governing legal principles.

Other cases petitioner cites similarly involve different circumstances, were decided on state-law grounds, or were decided by intermediate appellate and federal district courts.[4] Further review is not warranted. See R. 10(b).

C. This Case Is A Poor Vehicle To Address A Question That Rarely Arises

Just some four years ago in *Hosanna-Tabor*, this Court provided significant guidance to lower courts on the framework for analyzing claims about the interaction between generally applicable law, internal church proceedings, and the First Amendment. As the Minnesota Supreme Court noted, *Hosanna-Tabor* and other decisions provide ample direction for lower courts to consider and decide the situation presented in this case. Pet. App.

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[4] See *Kavanagh* v. *Zwilling*, 997 F. Supp. 2d 241, 254-255 (S.D.N.Y. 2014) (dismissing one libel claim on First Amendment grounds and two libel claims on state law grounds for inadequate pleading); *Ciganik* v. *York*, No. 2013-P-0018, 2013 WL 6881611 (Ohio Ct. App. Dec. 31, 2013); *Cargill*, 215 S.W.3d at 69 (applying a state law "privilege" defense to defamation for statements made during church matters). Both federal district court cases petitioner cited are consistent with the Minnesota Supreme Court's decision here, as they declined to adjudicate claims involving statements made in church disciplinary proceedings. See *Kavanagh*, 997 F. Supp. at 252-253; *Klagsbrun*, 53 F. Supp. 2d at 742 (finding that resolution of factual disputes in the case would "require this court to inquire into religious doctrine and practice").

A-25 ("The absence of a U.S. Supreme Court decision directly on point with the decision we reach today does not constrain our ability to interpret the First Amendment in light of the cases the U.S. Supreme Court has decided.").

Given *Hosanna-Tabor*'s recent vintage, and the dearth of appellate precedent that has arisen since (let alone precedent that is in conflict), there is no need for this Court to intervene. Critically, of the 25 cases petitioner cites as part of the supposed split of authority, Pet. 7-9, only five were decided after *Hosanna-Tabor*.[5] And only one of those—*Banks*—was decided by a state court of last resort; the others were decided by federal district courts or intermediate appellate state courts. This Court appropriately denied review in *Banks*. See 135 S. Ct. 48. There is no reason for a different result here; this Court should allow the federal courts of appeals and state courts of last resort to apply their Establishment Clause and Free Exercise jurisprudence in light of *Hosanna-Tabor*.

In any event, this case is a poor vehicle to address the question presented. First, as noted above, see pp. 15-16, 19 *supra*, the question petitioner poses is not actually presented here. The Minnesota Supreme Court issued a narrow holding and explicitly limited it to the circumstances of this case, see Pet. App. A-23 n.12, leaving for another day resolution of other cases, *id.* at A-23, including the sensationalized

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[5] *Banks*, 750 S.E.2d 605; *Kavanagh*, 997 F. Supp. 2d 241; *Ciganik*, 2013 WL 6881611; *Lee*, 2012 WL 6962978; *Purdum*, 301 P.3d 718.

hypotheticals imagined by petitioner and the dissent below. Pet. 6; Pet. App. A-31. Critically, the narrow fact pattern present in this case does not arise frequently.[6]

Second, petitioner forfeited key arguments and failed to create an adequate record for this Court to consider and endorse the rule she advocates. Petitioner "conceded [below] that the majority of the statements detailed in [her] second amended complaint cannot serve as the basis for a defamation claim, even under the rule announced in *Connor*, because adjudicating the truth or falsity of the statements would require the court to consider and interpret matters of church doctrine." Pet. App. A-18. But even as to the few allegedly defamatory statements that petitioner contends can be adjudicated using neutral principles, petitioner "fail[ed] to address [below] the argument that determining which statements are secular and which are religious would, itself, create an excessive entanglement with religion." *Id.* at A-21. The petition does nothing to cure this defect, leaving this Court without a framework or an adequate record to decide whether and how courts can separate supposedly "secular" statements from "religious" ones without becoming entangled in questions of religious doctrine. This defect deprives this Court of the ability to address comprehensively even the question presented.

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[6] Petitioner's research identified 25 total cases, spanning nearly 30 years. Pet. 7-9. Fewer than half of those have facts remotely comparable to those here. See *supra* pp. 18-22.

Third, even if this Court vacated the judgment below and adopted petitioner's preferred standard from *Connor*, the outcome is unlikely to change. As the Minnesota Supreme Court noted, "it is quite possible that even the *Connor* court would bar suits based on statements made during the course of a church disciplinary proceeding" such as the statements alleged here. Pet. App. A-21. *Connor* itself cited with approval the Minnesota Court of Appeals decision in *Schoenhals*, 504 N.W.2d at 235, which is consistent with the Minnesota Supreme Court's decision in this case. Pet. App. A-21. This Court should not devote its limited resources to a case in which the outcome would be the same under either standard. See Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964), for the proposition that "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied").

The risk of issuing an advisory opinion in this case is heightened by the looming presence of the Minnesota Constitution as an alternative basis for dismissing petitioner's claims. Pet. App. A-15 n.8. If this Court were to vacate the judgment below, and the case were returned to the district court, respondents could, and would, then raise the Minnesota Constitution as a defense in their first responsive pleading.[7] There is every reason to believe that

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[7] Petitioner's claims were dismissed under Minnesota Rule of Civil Procedure 12. Pursuant to Minnesota Rule of Civil Procedure 12.01, after a Rule 12 motion to dismiss is denied, defendant has ten days to file a responsive pleading. An

Minnesota courts would hold that petitioner's claim is barred by the state constitution, which provides broader protection to matters of internal church governance than the First Amendment. *E.g.*, *State* v. *Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) ("Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."). It would not be prudent for this Court to address an issue of federal constitutional law if it might be irrelevant to the ultimate outcome of the case.

Finally, there is no reason to hold this case for *Trinity Lutheran* v. *Pauley*, 136 S. Ct. 891 (2016). Here, unlike in *Pauley*, the church is not arguing that religious institutions are being singled out for exclusion from a generally applicable government aid

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affirmative defense may be properly raised in a responsive pleading. Minn. R. Civ. Proc. 8.03.

Because respondents did not make a state constitutional argument in their motion to dismiss in the district court, the Minnesota Supreme Court deemed the argument forfeited for purposes of the motion to dismiss. Pet. App. A-15 n.8. However, the failure to raise an argument in a motion to dismiss does not foreclose a party from raising the matter as an affirmative defense in a subsequent pleading. See *Writing Assistance, Inc.* v. *Axiom Solutions, LLP*, No. A11–1749, 2012 WL 2368896, at *5 (Minn. Ct. App. June 25, 2012) (holding that the district court should have allowed appellants to file an answer, presenting their affirmative defenses, after their motion to dismiss raising similar arguments was denied); see also *Van Tu* v. *Koster*, 364 F.3d 1196, 1200 (10th Cir. 2004) (holding, under Federal Rules of Civil Procedure, that it is "irrelevant that [a defendant] did not present [an argument] in his motion to dismiss," because defense was "properly raised * * * in his answer").

program.[8] Thus, the judgment in this case will not be affected by this Court's resolution of whether such a targeted exclusion violates the Free Exercise and Equal Protection Clauses. There is therefore no need to further delay the resolution of this already protracted dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN D. SCHUELER
JENNIFER PETERSON
DUNLAP & SEEGER, P.A.
206 South Broadway
Suite 50
P.O. Box 549
Rochester, MN 55903
(507) 288-9111

PAUL C. PETERSON
WILLIAM L. DAVIDSON
TIMOTHY J. O'CONNOR
LIND JENSEN SULLIVAN & PETERSON, P. A.
901 Marquette Ave. S.
Suite 1300
Minneapolis, MN 55402
(612) 333-3637
paul.peterson@lindjensen.com

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[8] Moreover, the question presented in *Pauley* includes an assumption not present here—that the state government has no legitimate Establishment Clause concern.

APPENDIX

STATE OF MINNESOTA
COUNTY OF NOBLES

DISTRICT COURT
FIFTH JUDICIAL DISTRICT

Court File No: 53-CV-13-817
Case Type: Personal Injury
Judge: Gordon L. Moore III

LaVonne Pfeil; and **Henry Pfeil**, deceased, by and through LaVonne Pfeil, Trustee of Henry Pfeil,

Plaintiffs,

vs.

St. Matthews Evangelical Luthern Church of the Unaltered Augsburg Confession of Worthington, Nobles County, Minnesota, a Minnesota Nonprofit Corporation; **Pastor Thomas Braun**, individually and as Pastor, employee, and agent of St. Matthews Evangelical Luthern Church of the Unaltered Augsburg Confession of Worthington, Nobles County, Minnesota; and **Pastor Joe Behnke**, individually and as Pastor, employee, and agent of St. Matthews Evangelical Luthern Church of the Unaltered Augsburg Confession of Worthington, Nobles County, Minnesota,

Defendants.

PROPOSED SECOND AMENDED COMPLAINT WITH JURY DEMAND

* * *

EXHIBIT 3

Ballot

Pastor Braun and Pastor Joe with the approval of the Board of Elders and the blessing of the Church Council bring to the voters this recommendation that Burdell and Jolene Kuhl and Henry and LaVonne Pfeil be excommunicated from the membership roster of St. Matthew Lutheran Church, Worthington, Minnesota for the following reasons:

1. Refusing to stop their slander and gossip (Lev. 19:16, James 4:11).
2. Leading other people into sin by their behavior (Proverbs 16:28, 1 Cor. 10:31-32).
3. Refusing to follow the commands of God's Word and Scriptural warnings by elected leaders of the congregation (Heb. 13:7, 1 Thess. 5:12-13).
4. Publically attempting to discredit the integrity of the pastors and church leaders (Hebrews 13:17, Romans 13:12).
5. Refusing to show respect to called and ordained servants of the Word (public sin) (1 Thess. 5:12-13, Romans 12:10).
6. Refusing to meet with both pastors and the Board of Elders for the purpose of confession and forgiveness (unrepentant attitude) (Matthew 18:16-17).

_____ I accept the recommendation

_____ I do not accept the recommendation