THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2019-001470

John Doe,……...Respondent,

v.

The Diocese of Charleston, a Corporation Sole, and the
Bishop of the Diocese of Charleston in his official capacity,.....Petitioners,

and

Richard Roe,……...Respondent,

v.

The Diocese of Charleston, a Corporation Sole, and the
Bishop of the Diocese of Charleston in his official capacity,.....Petitioners,

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, the Petitioners, Bishop of Charleston, a Corporation Sole, and the "the Bishop of the Diocese of Charleston, in his official capacity" ("the Diocese") petitioned this Court to issue a writ of certiorari to the Court of Appeals and to review that Court's decision in this matter. The Court of Appeals erred in dismissing these appeals as interlocutory because Petitioner should not have to sustain a contempt order before challenging the Circuit Court's order to reveal the identities of victims of childhood sexual abuse. Further, because the Circuit Court violated the fundamental rights of religious freedoms guaranteed by both the United States and South Carolina constitutions, that order is immediately appealable.

I. The order compelling production of confidential information about innocent third parties is immediately appealable and presents an important question that this Court, or the Court of Appeals, must answer now rather than later.

In their Return, the Respondents rely almost exclusively on an assertion that "discovery orders" are not immediately appealable. That statement is true in a general sense, but it does not acknowledge or address the special circumstances presented in this appeal. This is not a garden variety discovery order, and the Respondents cannot seriously contend that the Petitioner has undertaken this appeal for purposes of delay. This discovery order will directly – and negatively – impact the lives of innocent third parties, and the Petitioner has an obligation to challenge that order to the fullest extent possible. This is only one of the points the Respondents fail to confront in their arguments in opposition to the pending petition.

Respondents also overlook the clear and obvious nature of the harm the challenged order will cause. Although the Respondents claim that there is "nothing in the record" to support the argument that the order compels the production of confidential and harmful information, their position ignores important facts. First, no one can credibly dispute the principle that victims of sexual abuse have a right to keep their identities and their past traumas confidential. This right

stems from the unfair, but all too real stigma that some in society tend to place on such victims. Indeed, this is presumably why the *Respondents themselves* have chosen to protect their identities and to prosecute their cases anonymously. Second, this Court has previously found that the identities of sexual abuse victims are confidential and worthy of protection. *See Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354, 355 (Ct. App. 2004).[1] Thus, the Petitioner was not required to make any evidentiary showing to support its position that the information being sought is confidential. That position is self-evident under these circumstances.

Furthermore, it was not even possible for the Petitioner to place "evidence" into the record in the circuit court. Doing so would have caused the very harm the Petitioners are trying to prevent by challenging the order. What "evidence" could the Petitioner have presented to the circuit court other than the identities of past abuse victims who did not want their identities revealed? Forcing the Petitioner to make such showings in order to obtain relief would make any such relief meaningless. It makes no sense at all to require a party to reveal confidential information in order for it to remain confidential. Yet, that is necessarily the position that the Respondents have taken in their Return. For that reason, this Court should not give any credence to that argument.

The Respondents also choose to avoid the fact that disclosure of the requested information will cause serious and irreparable harm to past abuse victims. Most, if not all, of those victims reached settlements with the Petitioner in which keeping their identities confidential was a material term. Having resolved their legal claims, those victims chose to conceal their status as abuse victims, as they had every right to do. But now, in a proceeding to which those victims have no connection, the circuit court has ordered that their names be

[1] The General Assembly has also reached this conclusion. *See* S.C. Code Ann. §16-3-730 (prohibiting the publication of the identities of sexual abuse victims).

provided to attorneys with whom the victims have no relationship. This disclosure, if it occurs, will allow the attorneys to contact the victims out of the blue. Granted, the victims can always refuse to talk to the attorneys, but the contact itself will be enough for most of the victims to rekindle old hurts and traumas. The Respondents do not state any position as to this very real potential for significant harm to innocent third parties. In fact, they do not even mention it to any real degree. The Petitioner respectfully submits that the Respondents' silence on this point is deafening.

Rather than addressing the harm to other abuse victims, the Respondents raise a slippery slope argument, imagining that immediate appellate review in this case will somehow lead to interlocutory appeals of multitudes of discovery orders. This argument mischaracterizes the Petitioner's position. The Petitioner is not arguing that *all* discovery orders relating to potentially confidential information are *always* immediately appealable. That is an issue for another day, as the Court does not need to reach it in order to resolve the current dispute. The Petitioner instead contends that orders forcing a party to reveal the identities of sexual abuse victims are – and *must be* – immediately appealable. This is true regardless of whether the order addresses a victim's desire to pursue a legal action anonymously (as in *Howe*), or whether the order arises in a discovery context. In either situation, the point is not the type of order involved, but rather the need to protect the identities of abuse victims. Thus, there is no need for the Court even to start down the slippery path that the Respondents posit. The Court need only declare that orders having the effect of revealing the identities of sexual abuse victims are immediately appealable. Such a declaration would protect a legitimate and important public interest while guarding against a flood of future discovery-related appeals in other contexts.

As noted above, this Court has already found that protecting the identities of sexual abuse victims, particularly when the victims were children at the time, is a matter of great public importance. That policy goal impacted the Court's decision in *Howe*, and the Court mentioned it again earlier this year in *Hensley v. S.C. D.S.S.*, ___ S.C. ___, 838 S.E.2d 510 (S.C. 2020). While discussing the prospect of immediate appealability in a different context, the Court stated:

> Whether this Court should extend the reasoning of *Doe* [*v. Howe*] to allow immediate appeals of orders other than those denying a child sexual assault victim's request to proceed anonymously in a civil lawsuit is an important question. For the reasons we will explain, however, we decline to address the question until the actual danger of disclosure of confidential information is squarely before the Court.

Id. Although the Court found the order in *Hensley* was not immediately appealable, the current case presents a very different scenario.

The Petitioner respectfully submits that this challenge to an order requiring disclosure of the identities of past sexual abuse victims places "the actual danger of disclosure of confidential information squarely before the Court." There can be no question that the identity of a sexual abuse victim who has chosen to remain anonymous is confidential information, and the order on appeal, if enforced, will lead to that information being disclosed. This erases the concerns raised by the Court regarding the order in *Hensley*. The Court now has the opportunity to rule on the "important question" of whether an order that compels the disclosure of confidential information about sexual abuse victims is immediately appealable. Thus, the future day anticipated by the Court in *Hensley* has arrived.

An appellate court must review the challenged order *now*. If not, the information that the Petitioner must shield in order to protect innocent third parties from harm will have to be

disclosed.[2] At that point, the damage to those past abuse victims (and to the Petitioner also, as explained in the Petition) will be done. No amount of subsequent appellate review will be able to repair or even alleviate that damage. Whether the Respondents' purported, and mostly unexplained, need for the confidential information outweighs the substantial harm that disclosure will cause is a question that requires immediate attention. Any time later is far *too late*. Therefore, the Court should grant the petition, reverse the Court of Appeals' dismissal of the appeal, and either remand to the Court of Appeals to consider the merits of the appeal, or retain jurisdiction to conduct that review itself.

II. The Court should grant certiorari because the Circuit Court's Order refusing to recognize and give full effect to the decisions of a hierarchical church regarding its organization, administration, and presence in civil law, is an affront to the United States Constitution and to the South Carolina Constitution.

The effect of the Circuit Court's order refusing to give respect to the ecclesiastical decisions of a religious organization regarding how it is organized and administered is essentially to strike the Church's First Amendment defenses. That, standing alone, serves as grounds for an immediate appeal.

Civil courts lack subject matter jurisdiction to second-guess a church hierarchy's decisions and actions regarding how the church is organized and administered. The State is required to defer to, and respect, a church's determination of how it will organize itself, and how the church will have a civil law presence.[3] The First Amendment's Religion Clauses prohibit

[2] The Respondents' cavalier suggestion that the Petitioner has the option of defying the order and then appealing a finding of contempt is cold comfort. A party seeking to protect legitimately confidential information should not have to risk sanctions in order to challenge an order that compels its disclosure. This Court apparently believes this is an important question as well, as it is currently considering whether the "sanctions first" rule should remain in place. *See Mosely v. Alston*, Appellate Case No. 2019-001056.

[3] *See e.g. Watson v. Jones*, 80 U.S. 679, 733-34 (1871)

secular, civil courts from exercising jurisdiction over the internal affairs of religious organizations.[4] Civil courts, quite simply, have never been vested with any authority or judicial power to countermand ecclesiastical or religious determinations of a church.[5] The State has no authority to ignore the distinct personhood, both under canon law and in civil law, of the Diocese and its Bishop. The Circuit Court simply ignored these important constitutional principles.

Rather, in countermanding the Diocese's ecclesiastical determinations, and in ruling that the "Bishop of Charleston, in his official capacity" is amenable to being haled in to court, the Circuit Court violated both the Establishment Clause, by interposing its own judgment of the Diocese's civil law presence, and the Free Exercise Clause, by refusing to give respect to the Diocese's determinations regarding its own organization and administration. Church governance, organization, and administration are attributes of the religion, and it is not up to the courts, as a State body, to define, much less intervene in, the internal structure or the church's functioning.[6]

It is axiomatic, then, that civil courts have no authority to reallocate ecclesiastical authority among church bodies, or to overturn the decisions of ecclesiastical authorities

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[4] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 186 (2012); *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449–50 (1969); *Commack Self–Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427–28 (2d Cir. 2002); *Dixon v. Edwards*, 290 F.3d 699, 714–15 (4th Cir. 2002); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 117 (1952).

[5] When the Constitution was ratified, England had ecclesiastical courts, such as the Court of Arches and the Court of Peculiars. *See* 3 Blackstone, *Commentaries on the Laws of England* ch. 5 (1768). Because the Framers neither established a national church, nor intended to, civil courts were expressly denied the authority to adjudicate ecclesiastical disputes.

[6] *Presbyterian Church*, 393 U.S. at 449 (to conclude that the State can, in any way, define what the Church is, and what it is not, "would be to render judgment on the internal ecclesiastical hierarchy of the Catholic Church, in clear violation of the total separation between Church and State.")

regarding the distribution of responsibility within the church. As this Court made clear in *Protestant Episcopal Church v. Episcopal Church*, civil courts cannot inject themselves into church governance and cannot reevaluate decisions on matters of governance using state law principles. Civil courts simply cannot intrude into matters of church governance, administration, and polity.[7] Nor can they cannot interfere with or manipulate those decisions without violating the First Amendment.[8]

The Respondents' argument and commentary regarding how the Diocese may have appeared in court proceedings in years past is neither in evidence, nor is it meaningful. Counsel for the Respondents mentioned previous court proceedings at the hearing in the Circuit Court, but did not introduce any materials from those cases into the evidentiary record. Thus, they are not properly a part of record to be considered for purposes of this Petition and the appeal giving rise to it.

Yet, even if the Court were to consider those previous actions, the end result would be the same. It is of no consequence what the Diocese was, or was not, called in prior legal actions. The Diocese has constitutional rights to determine the title of its civil law presence, and the fact that a different name might have been used in the past is insignificant. The Respondents seem to suggest that the Diocese somehow waived its constitutional rights in those past actions. Even if that were true, which it is not, such waivers in past actions would have no effects whatsoever on the Diocese's rights and defenses in the present case. The Respondents have not cited any authority for that type of "continuing waiver" proposition, and the Diocese is not aware of any.

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[7] *Protestant Episcopal Church v. Episcopal Church*, 806 S.E.2d 211, 229 (S.C. 2017).

[8] As Acting Justice Toal wrote in dissent, when the first state constitution disestablished the Church of England, the individual parishes could petition the legislature to incorporate the parish by legislation. *Protestant Episcopal Church*, 806 S.E.2d at 110 (Toal, A.J. dissenting). It was not until 1973 that the Episcopal Diocese actually incorporated as an entity. *Id.*

Therefore, the Respondents' reliance on past legal proceedings involving the Diocese is misplaced.

The Circuit Court's error was to engage in exactly the inquiry forbidden by *Milivojevich, Kedroff, Presbyterian Church* and *Protestant Episcopal Church* – looking behind, and overturning the dictates of the Roman Catholic Bishop regarding the organization and administration of the Diocese. That violation of a religious organization's fundamental constitutional rights must be immediately appealable. An immediate appeal is the only way to reverse that unconstitutional violation of religious freedom, and this Court should grant *certiorari*.

CONCLUSION

A writ of *certiorari* should issue in this case. The Circuit Court's order to reveal the confidential identities of victims of childhood sexual abuse is an immediately appealable collateral order. There could be no meaningful appellate review after a decision on the merits and victims who are not even parties to this litigation should have at least as much protection for their very private life history as this Court afforded actual litigants in *Doe v. Howe.*

The same is true regarding Petitioner's appeal of the Circuit Court's order that violated both the Free Exercise Clause and Establishment Clause of the First Amendment. The Petition should be granted, and the Diocese should be allowed to appeal an order that effectively struck its constitutional defenses.

Respectfully submitted,

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