No. 18-921

In the Supreme Court of the United States

ROMAN CATHOLIC ARCHDIOCESE OF SAN JUAN, PUERTO RICO, ET AL., PETITIONERS

v.

YALI ACEVEDO FELICIANO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Puerto Rico Supreme Court violated the Free Exercise Clause of the First Amendment by subjecting a particular religion to a special rule of liability that the court would not apply to other religions or to secular entities.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, this Court should grant the petition, vacate the judgment of the Puerto Rico Supreme Court, and remand the case for further proceedings. Alternatively, the Court should grant the petition, in which case the Court may wish to direct the parties to brief an additional question as described herein.

STATEMENT

A. Factual Background

In 1511, Pope Julius II founded the Diocese of San Juan in Puerto Rico. Pet. App. 42 n.7. Over the next several centuries, as the population of Puerto Rico grew, new parishes were established, but the island continued to have only one diocese. *Id.* at 76-77.

Spain ceded Puerto Rico to the United States in the Treaty of Paris in 1898. See Treaty of Paris, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1755; Pet. App. 6. The law in effect in Puerto Rico "at the time of the cession"—including the Spanish Civil Code and two agreements between Spain and the Holy See—recognized "the juristic personality and legal status of the church." *Ponce* v. *Roman Catholic Apostolic Church in Porto Rico*, 210 U.S. 296, 310 (1908); see *id.* at 309-310. The Treaty of Paris carried that recognition forward, providing that the cession "cannot in any respect impair the property or rights" of "ecclesiastical or civic bodies" on the island. *Id.* at 310 (citation omitted). "There can be no question that the ecclesiastical body referred to, so far as Porto Rico was concerned, could only be the Roman Catholic Church in that island, for no other ecclesiastical body there existed." *Id.* at 311.

In subsequent years, the Holy See founded several additional dioceses on the island: Ponce in 1924, Arecibo in 1960, Caguas in 1964, Mayaguez in 1976, and Fajardo-Humancao in 2008. Pet. App. 43 n.7. In addition, the Holy See elevated the Diocese of San Juan to an archdiocese in 1960. Pet. 7. Petitioners contend that "each of the six dioceses (including the Archdiocese of San Juan) now 'enjoys the same legal status as the original Diocese of Puerto Rico'"—*i.e.*, that each now constitutes a separate legal entity. *Ibid.* (citation omitted). They further contend (Pet. 6) that each local parish constitutes a separate legal entity. They likewise contend (*ibid.*) that some "Catholic social service entities" are "distinct legal entities," while others "are established as part of a parish or order with a distinct legal capacity and status."

B. Proceedings Below

1. In 1979, the Office of the Superintendent of Catholic Schools of the Archdiocese of San Juan created the Pension Plan for Employees of Catholic Schools Trust —as its name suggests, a trust to administer a pension plan for employees of Catholic schools. Pet. App. 2 n.1. Participating Catholic schools included three schools in the Archdiocese of San Juan that are involved in this case as respondents supporting petitioners—Perpetuo Socorro Academy, San Ignacio de Loyola Academy, and San Jose Academy. *Id.* at 101-102.

In 2016, active and retired employees of the Academies filed complaints in the Puerto Rico Court of First Instance alleging that the Trust had terminated the plan and had eliminated the employees' pension benefits. Pet. App. 1-2. They named as defendants the "Roman Catholic and Apostolic Church of Puerto Rico" (which they claimed was a legal entity with supervisory authority over Catholic institutions across the island), the Archdiocese, the Superintendent, the Academies, and the Trust. *Id.* at 58-59 (emphasis omitted). As relevant here, the employees sought a preliminary injunction ordering the payment of their pension benefits. *Id.* at 2. The Court of First Instance denied a preliminary injunction, and the Puerto Rico Court of Appeals affirmed, but the Puerto Rico Supreme Court reversed. *Id.* at 2-3. The Puerto Rico Supreme Court further held that, "if the Trust did not have the necessary funds to meet its obligations, the participating employers would be obligated to pay." *Id.* at 3. Observing that "there was a dispute as to which defendants in the case had legal personalities," the Puerto Rico Supreme Court remanded the case to the Court of First Instance so that

it could "determine who would be responsible for continuing paying the pensions." *Ibid.*

2. When the case returned to the Court of First Instance, the Archdiocese and the Superintendent removed this case to federal district court. Pet. App. 60. The federal district court later remanded the case to the Puerto Rico court. See 18-cv-1060 Docket entry No. 41 (D.P.R. Aug. 20, 2018). The removing parties appealed that remand order to the First Circuit, but proceedings in the First Circuit are currently stayed. See 18-1931 Order (1st Cir. Jan. 16, 2019).

3. In the meantime, in March 2018, after the case had been removed to federal court and before the federal court had remanded it, the Court of First Instance determined that the only defendant with separate legal personhood under Puerto Rico law was the "Roman Catholic and Apostolic Church"—which, the court concluded, held that status of legal personhood by virtue of the Treaty of Paris. Pet. App. 232. The court found that the Archdiocese, the Superintendent, and the Academies constitute "division[s] or dependenc[ies]" of the Roman Catholic and Apostolic Church, not separate legal persons, because those entities had not separately incorporated. *Ibid.*

As a result of those findings, the Court of First Instance ordered the "Roman Catholic and Apostolic Church in Puerto Rico" to make payments to the employees in accordance with the pension plan. Pet. App. 241. Ten days later, the court concluded that "the Roman Catholic and Apostolic Church in Puerto Rico" had not complied with its order, and ordered that entity to deposit $4.7 million in a court account within 24 hours. *Id.* at 227. The following day, when the court did not receive that sum, it ordered the sheriff to seize church

assets—including "bonds, values, motor vehicles, works of art, equipment, furniture, accounts, real estate, and any other asset belonging to the Holy Roman Catholic and Apostolic Church, and any of its dependencies"—to satisfy the employees' judgment. *Id.* at 223.

4. The Puerto Rico Court of Appeals reversed and remanded. Pet. App. 97-220. The court first held that the "Roman Catholic and Apostolic Church in Puerto Rico" was "a legally nonexistent entity." *Id.* at 136. The court instead held that one of the defendants (the Archdiocese) constituted a separate legal person—in effect as the present-day successor to the Roman Catholic Church in Puerto Rico that was recognized in *Ponce* and the Treaty of Paris as having legal status. *Id.* at 145. The court also held that another defendant (the Perpetuo Socorro Academy) constituted a separate legal person because it had incorporated in accordance with Puerto Rico law. *Id.* at 150. The court concluded that, as a result, it could properly order those two entities to make pension payments. *Id.* at 166. The court further determined that the two remaining Academies, the San Ignacio and San Jose Academies, were part of the same legal entities as "their respective parishes," but that the employees could not obtain relief against those parishes because they had not named the parishes as defendants in this case. *Id.* at 167.

5. The Puerto Rico Supreme Court reversed, reinstating the preliminary injunction granted by the Court of First Instance. Pet. App. 1-94. The court stated that the "relationship" between "the Catholic Church" and "Puerto Rico" is "*sui generis*, given the particularities of its development and historical context." *Id.* at 5. It explained that the Treaty of Paris recognized the "legal personality" of "the Catholic Church" in Puerto Rico.

Id. at 6. The court further stated that "each entity created that operates separately and with a certain degree of autonomy from the Catholic Church is in reality a fragment of only one entity that possesses legal personality" —at least where the entities have not "independently submit[ed] to an ordinary incorporation process" under Puerto Rico civil law. *Id.* at 13-14 (emphasis omitted). "In other words," the court continued, "the entities created as a result of any internal configuration of the Catholic Church are not automatically equivalent to the formation of entities with different and separate legal personalities in the field of Civil Law," but "are merely indivisible fragments of the legal personality that the Catholic Church has." *Ibid.* Applying those principles, the court concluded that the only defendant in this case with separate legal personality was the "Roman Catholic and Apostolic Church in Puerto Rico," and that that entity could properly be ordered to pay the employees' pensions. *Id.* at 2; see *id.* at 17-18, 21.

Two Justices dissented. Interim Chief Justice Rodriguez Rodriguez stated that "the majority opinion inappropriately interferes with the operation of the Catholic Church by imposing on it a legal personality that it does not hold in the field of private law." Pet. App. 29. Justice Colón Pérez stated that, under Puerto Rico law, "each Diocese and the Archdiocese have their own legal personality," and that there was no separate "legal personality" called "the Roman Catholic and Apostolic Church." *Id.* at 80, 90 (emphasis omitted).

6. On August 29, 2018, the Archdiocese filed for bankruptcy under Chapter 11 of the Bankruptcy Code. See 18-bk-4911 Doc. 1 (D.P.R. Bankr. Aug. 29, 2018). The bankruptcy court dismissed the petition on March 18, 2019. See 18-bk-4911 Doc. 352, at 15 (D.P.R.

Bankr.). The Archdiocese's appeal from the order of dismissal remains pending. See *In re Arquidiocesis de San Juan de P.R.*, No. 19-17 (1st Cir. BAP).

DISCUSSION

Under the Free Exercise Clause, the government may not single out religion in general or a given religious denomination in particular for discrimination on account of religious status. The legal principles applied by the Puerto Rico Supreme Court violate that bedrock rule. The opinion contains some ambiguous and conflicting passages. At the very least, however, the decision contains strong indications that it rests on a special legal presumption applicable to the Catholic Church, but no indications that the Puerto Rico Supreme Court would apply the same presumption to any other entity under the civil law. Under that rule, all Catholic entities in Puerto Rico, no matter how separate and how autonomous in practice, presumptively qualify as components of a single legal person, and, further, are thereby responsible for each other's liabilities. The application of such a special rule violates the Free Exercise Clause.

Although this case raises certain procedural issues, none of them precludes this Court from reviewing the decision below. And because the decision violates the fundamental prohibition on denominational discrimination, the Court should not leave the decision standing. In the view of the United States, the best way for the Court to resolve this case is to grant the petition, vacate the judgment of the Puerto Rico Supreme Court, and remand the case for further proceedings. If the Court decides not to vacate and remand, the Court should simply grant plenary review, in which case the Court also may wish to direct the parties to brief an additional question regarding whether the Puerto Rico Court of

First Instance had jurisdiction to enter the order at issue in this case.

A. The Decision Below Was Incorrect

1. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law * * * prohibiting the free exercise [of religion]." This Court has concluded that at least some provisions of the Bill of Rights, including the Free Speech Clause of the First Amendment, extend to Puerto Rico. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 469 (1979). No party disputes that the Free Exercise Clause likewise extends to Puerto Rico.

This Court has repeatedly held that the Free Exercise Clause protects religion from discrimination by the government. The government may not discriminate against religious people in general on account of religious status. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024-2025 (2017). Nor may the government single out an individual religious denomination or religious belief for discriminatory treatment. See *Murphy* v. *Collier*, 139 S. Ct. 1475, 1475 (2019); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524-525 (1993); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953). As a general matter, however, the government may subject religious groups to the same "neutral, generally applicable law[s]" that govern the rest of society. *Employment Division* v. *Smith*, 494 U.S. 872, 881 (1990); see *City of Boerne* v. *Flores*, 521 U.S. 507, 513 (1997); *Jones* v. *Wolf*, 443 U.S. 595, 597 (1979).

2. The Puerto Rico Supreme Court's decision in this case is inconsistent with the Free Exercise Clause. The court held that the "Roman Catholic and Apostolic

Church in Puerto Rico"—which the court defined to encompass every entity "created by the Catholic Church" in Puerto Rico, regardless of whether it "operates separately and with a certain degree of autonomy"—constitutes one "indivisible" "legal personality." Pet. App. 2, 13-14 (emphasis omitted). That one legal personality, the court further concluded, is legally responsible for the liabilities of all its "fragments." *Id.* at 14. Then, without stating whether or to what extent Catholic dioceses, parishes, schools, and other entities hold property in their own names, it aggregated all assets of any Catholic entity in Puerto Rico under the auspices of that one Island-wide legal personality. As a result, every Catholic entity in Puerto Rico, no matter how separate and autonomous within the church structure, could have the assets that it owns or that are dedicated to its mission seized to satisfy the liabilities of any other Catholic entity, including the three Catholic schools involved in this litigation. The Puerto Rico Supreme Court did not cite any neutral rule of Puerto Rico law governing corporations, incorporated or unincorporated associations, veil-piercing, joint-and-several liability, or vicarious liability that required that result. The court instead relied on a special presumption—seemingly applicable only to the Catholic Church, based on history tracing back to the Treaty of Paris—that all Catholic entities on the Island are "merely indivisible fragments of the legal personality that the Catholic Church has." *Id.* at 13-14. The court did not explore whether such a result could be justified in some neutral way today in light of how other denominations or secular organizations (and their constituents) would be treated in like circumstances. In the absence of any foundation for such a result under neutral principles, the Puerto Rico

Supreme Court's decision constitutes denominational discrimination, and violates the Free Exercise Clause of the First Amendment.

The Puerto Rico Supreme Court's error resulted from an overreading of this Court's opinion in *Ponce* v. *Roman Catholic Apostolic Church in Porto Rico*, 210 U.S. 296 (1908), which involved a suit by the Church against the municipality to obtain possession of property. This Court held that the Church was a juridical entity with capacity to sue. *Id.* at 308-324. The Court explained that, at the time of Spain's cession of Puerto Rico to the United States, Spanish civil law and the Treaty of Paris recognized "the Roman Catholic Church in that island" as a separate legal entity. *Id.* at 311. One perhaps could read the reference to the "Roman Catholic Church," properly understood today, to be a reference to the Diocese (and now Archdiocese) of San Juan. As the Puerto Rico Court of Appeals observed, "at that time there was only a single diocese in Puerto Rico," so the "Catholic Church" and "the diocese" were "the same thing." Pet. App. 144-145. The Puerto Rico Supreme Court, however, elevated that statement in this Court's opinion into a special presumption that the entire "Catholic Church"—meaning all Catholic entities on the island—constitute a single legal person, and that all the entities' assets constitute a single pool, regardless of whether the entities or their assets would have otherwise so qualified under neutral and generally applicable law.

Although the Puerto Rico Supreme Court's opinion contains some ambiguous and conflicting passages, multiple features of this case confirm that the court's decision, as written, did set out distinct rules for the Catholic Church. First, the court repeatedly framed the applicable rule in terms of the Catholic Church alone. It

stated, for instance, that "it is undeniable that each entity created that operates separately and with a certain degree of autonomy *from the Catholic Church* is in reality a fragment of only one entity that possesses legal personality." Pet. App. 13 (some emphasis omitted). It also stated that "the entities created as a result of any internal configuration of *the Catholic Church* * * * are merely indivisible fragments of the legal personality that *the Catholic Church* has." *Id.* at 13-14 (emphasis added). And it stated that "the entities created by *the Catholic Church* * * * are mere indivisible fragmentations of *the Catholic Church* with no legal personality of their own." *Id.* at 14 (emphasis added). Indeed, the Puerto Rico Supreme Court explicitly reasoned that "[t]he relationship between Spain, the Catholic Church, and Puerto Rico is *sui generis*." *Id.* at 5. And the court did not suggest that those statements were merely intended to identify how the attributes of the Catholic Church fit into neutral legal principles of general applicability, rather than to focus on the Catholic Church in isolation.

Second, although the Puerto Rico Supreme Court at points asserted that its decision rested on "Civil and Corporate law of general application" and "'neutral principles of law,'" the court never actually identified any particular neutral and generally applicable rules that supported the result it reached. Pet. App. 9, 12 (citation omitted). Puerto Rico law recognizes various legal principles under which one entity may be held legally responsible for the liabilities of another entity—for instance, agency law, see 31 L.P.R.A. § 4461; joint and several liability for joint tortfeasors, see *Ruiz-Troche* v. *Pepsi Cola of Puerto Rico Bottling Co.*,

161 F.3d 77, 87 (1st Cir. 1998), and veil-piercing, see *Departmento de Asuntos del Consumidor Co.* v. *Alturas de Florida Dev. Corp.*, No. CE-87-220, 1993 WL 840226 (P.R. Mar. 9, 1993) (*D.A. Co.*). But the court in this case did not invoke or apply any of those neutral rules. And the only legal framework that the court *did* discuss was framed in terms of the Catholic Church alone.

Third, the Puerto Rico Supreme Court reached substantive results that it gave no reason to think it would reach in other contexts. The court concluded that, at least where Catholic entities have not "independently submitt[ed] to an ordinary incorporation process," the shared Catholic identity of those entities alone justifies amalgamating them into a single legal person and making them legally responsible for each other's liabilities. Pet. App. 14. On the court's view, it makes no difference whether each entity "operates separately and with a certain degree of autonomy." *Id.* at 13 (emphasis omitted). But the court nowhere stated that, in other contexts, two separate unincorporated entities would count as one legal person, with one pool of assets, simply because of a shared identity akin to a shared faith, or because of accountability to the same hierarchy akin to the hierarchy of the Roman Catholic Church. For example, the court did not state that it would similarly lump together two unincorporated Presbyterian congregations, or two unincorporated Jewish schools, or two unincorporated chapters or lodges of a secular institution, solely on account of their shared identity, without regard to their autonomy from one another. Quite the contrary, the Puerto Rico Supreme Court has stated in another context that a court may "pierce the corporate veil" and hold one entity responsible for the liabilities of another only where "there is such a unity of interest and

ownership" that one entity "actually is not * * * separate and independent" from the other. *D.A. Co.*, 1993 WL 840226, at *7, *14.

To be sure, the Puerto Rico Supreme Court stated that the Catholic Church could establish Catholic entities as separate legal persons simply by "submitting to an ordinary incorporation process" in accordance with "the local Corporate Law." Pet. App. 14. But elsewhere, the court insisted on treating the Perpetuo Socorro Academy as a division of the Catholic Church rather than as a separate person, even though the Academy *had* duly incorporated as its own corporation. See *id.* at 16, 88, 150. The court suggested that it was appropriate to do so because Perpetuo Socorro's certificate of incorporation had lapsed, see *id.* at 16, but the court did not identify any neutral rule under which the expiration of a Catholic school's certificate of incorporation means that the school merges back into the "legal personality of the Catholic Church," *id.* at 8.

3. Petitioners contend that the court below was bound to accept "the Church's own views on how the Church is structured," and that it would be improper to reject those views even in accordance with "neutral principles of law." Pet. 1, 28 (citation omitted); see Pet. Reply Br. 3-4. This Court need not, however, reach that broader theory in order to properly dispose of this case.

This Court has held that, in general, the First Amendment allows the government to subject religious groups to the same "neutral, generally applicable law[s]" that govern the rest of society. *Smith*, 494 U.S. at 881; see, *e.g.*, *Flores*, 521 U.S. at 513. For example, the Court has held that civil courts may use a "neutral-principles approach" to resolve "dispute[s] over the ownership of

church property," and it has rejected "a rule of compulsory deference" that would require "civil courts [to] defer to the 'authoritative resolution of the dispute within the church itself.'" *Jones*, 443 U.S. at 597, 604-605 (citation omitted); see *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Synanon Found., Inc.* v. *California*, 444 U.S. 1307, 1307-1308 (1979) (Rehnquist, J., in chambers). At the same time, the principle that the government may apply neutral and generally applicable laws to religious groups is subject to limitations. For example, this Court has held that the Free Exercise Clause precludes the application of even neutral employment-discrimination laws to a religious group's selection of its ministers. See *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). The Court also has held that, even in the course of applying neutral principles, civil courts may not "resolve a religious controversy" or engage in the interpretation of "religious concepts." *Jones*, 443 U.S. at 604; see *Serbian E. Orthodox Diocese for the U.S.A. & Canada* v. *Milivojevich*, 426 U.S. 696, 709 (1979).

This Court need not decide how that body of law ultimately applies to this case, because, as explained above, the Puerto Rico Supreme Court's decision is wrong for a simple and fundamental reason: As written, it rests on legal reasoning applicable only to the Roman Catholic Church. And this Court's precedents leave no doubt that the Constitution forbids discrimination against religious denominations. The case thus presents no occasion for considering whether the decision below would also be wrong if it had instead reached the same result by applying a neutral legal rule.

B. This Case Raises Procedural Issues, But They Do Not Preclude Granting The Petition

This case raises procedural issues. In the end, however, none of them precludes the Court from granting the petition.

1. The employees suggest (Br. in Opp. 14-15) that this Court lacks jurisdiction because the decision below is not a final judgment. That is incorrect. The applicable statute grants this Court jurisdiction to review the "[f]inal judgments or decrees" of the Puerto Rico Supreme Court. 28 U.S.C. 1258. This Court has long followed a "pragmatic approach * * * in determining finality" under the parallel statute governing review of state-court decisions. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 486 (1975). Applying that pragmatic approach to finality, the Court has repeatedly held that a state court's injunction can qualify as final where that injunction restricts the exercise of an important federal right. See, *e.g.*, *National Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (injunction depriving party of First Amendment rights); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n.* (1971) (same); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 548 (1963) (injunction depriving party of labor rights); see also *Cox*, 420 U.S. at 484-485. Under the reasoning of those cases, the injunction in this case qualifies as final.

2. Separately, although the employees do not raise the point, it is at least arguable that the certiorari petition may have been filed in violation of Bankruptcy Code's automatic stay. The Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of * * * the commencement or continuation" of any judicial action to recover certain

"claim[s] against the debtor." 11 U.S.C. 362(a)(1). Most courts of appeals have held that, if the original suit was brought against the debtor, the automatic stay precludes even the debtor from continuing the suit by taking an appeal. See, *e.g.*, *TW Telecom Holdings Inc.* v. *Carolina Internet Ltd.*, 661 F.3d 495, 496-497 (10th Cir. 2011) (Gorsuch, J.). Most courts of appeals also have held that an act taken in violation of the automatic stay is void and of no effect, at least where there is no equitable reason to conclude otherwise. See, *e.g.*, *Soares* v. *Brockton Credit Union* (*In re Soares*), 107 F.3d 969, 976 (1st Cir. 1997). And some Justices of this Court have stated that, where a certiorari petition "comes within the scope of the automatic stay," it may be "best to deny the petition." *DTD Enters., Inc.* v. *Wells*, 558 U.S. 964, 965 (2009) (statement of Kennedy, J., respecting the denial of certiorari).

In this case, an automatic stay came into effect on August 29, 2018, when the Archdiocese filed a petition for bankruptcy. See p. 7, *supra*. The stay was still in effect on January 14, 2019, when the Archdiocese, along with the other petitioners, filed the petition for a writ of certiorari in this case. See *ibid.* Although the stay has since expired, it is possible that the employees could have argued that, because the petition was filed while the stay was still in effect, this Court should deny the petition or treat it as void.

But here, the employees never made that argument. Under this Court's Rules, a party forfeits a "nonjurisdictional issue" by "fail[ing] to raise" that issue in its "brief in opposition." *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019); see Sup. Ct. R. 15.2. The automatic-stay statute "does not concern jurisdiction." *In re Anderson*, 917 F.3d 566, 572 (7th Cir. 2019).

And the employees failed to assert any violation of the automatic-stay statute in their brief in opposition. This Court may therefore deem any contention that the petition is void to have been forfeited.

3. Finally, although the Puerto Rico Supreme Court did not address the issue, and although the parties again do not raise the point in their filings in this Court, there is a substantial question whether the Puerto Rico Court of First Instance had jurisdiction to issue its injunction. That is so because the case had at that point been removed to federal district court and had not yet been remanded.

Federal law provides that, once a notice of removal is filed and notice is given to the state court, the state court "shall proceed no further unless and until the case is remanded." 28 U.S.C. 1446(d). This Court has long treated that requirement as jurisdictional. It has explained that, once a party files a notice of removal, the state court "los[es] all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment [a]re not * * * simply erroneous, but absolutely void." *Kern* v. *Huidekoper*, 103 U.S. 485, 493 (1881); see *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882) ("Upon the filing [of the notice of removal] * * * the jurisdiction of the state court absolutely ceased[.] * * * Every order thereafter made in that court was *coram non judice*."); 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3736, at 727-729 (2018) ("[A]ny post-removal proceedings in the state court are considered coram non judice * * * even if the removal subsequently is found to have been improper and the case is remanded back to that state court."). Here, the Archdiocese removed this case to federal court in February 2018. Pet. App. 174. The Puerto Rico Court of

First Instance issued its injunction in March 2018. *Id.* at 222. And the federal court did not remand the case until August 2018. See 18-cv-1060 Docket entry No. 41. There is thus a substantial question whether the Court of First Instance had jurisdiction to enter the order at issue here.

There are two contrary arguments. First, the Puerto Rico Court of Appeals suggested that petitioners waived their right to challenge the trial court's lack of jurisdiction by filing motions in that court after removal. See Pet. App. 131-132. By definition, however, a jurisdictional defect "cannot be waived or forfeited." *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And this Court has explained that a removing party's right to a federal forum "bec[omes] fixed" once it files its notice of removal, and that if the state court "ignore[s]" that right, the removing party is "at liberty" to "make defence in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing, in the slightest degree, its right to [the federal forum]." *Tugman*, 106 U.S. at 122-123. It is unclear whether petitioners' affirmative filings in the Court of First Instance are within the scope of that principle.

Second, the federal district court's remand order recited that it "shall be retroactively applied as of March 13, 2018." 18-cv-1060 Docket entry No. 41. This Court has stated, however, that federal courts have the power to enter "*nunc pro tunc*" orders only to ensure that the record "reflect[s] the reality" of what occurred—not to "make the record what it is not" or to "make it appear that it took an action which it never took." *Missouri* v. *Jenkins*, 495 U.S. 33, 49 (1990). In this case, the federal district court did not take any action on March 13, 2018 to remand the case. As a result, there is a substantial

question whether its later attempt to make its remand order retroactive could cure the defect in the jurisdiction of the Court of First Instance.

The apparent defect in the jurisdiction of the Puerto Rico Court of First Instance, however, does not deprive this Court of certiorari jurisdiction under 28 U.S.C. 1258. Quite the opposite, any such defect would constitute an additional error in the decision below and thus could be an additional reason to vacate the Puerto Rico Supreme Court's judgment. See, *e.g.*, *Tugman*, 106 U.S. at 123. Accordingly, as explained below, should the Court decide to grant certiorari in this case, it may wish to direct the parties to brief that additional, threshold jurisdictional question, which could potentially allow this Court to resolve the case without needing to address the Free Exercise Clause claims on the merits. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998).

C. This Court Should Not Allow The Decision Of The Puerto Rico Supreme Court To Stand

This Court has described the prohibition on denominational discrimination as the "clearest command" of the First Amendment. *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). It also has explained that the principle is "so well understood that few violations are recorded in [the Court's] opinions." *Church of the Lukumi Babalu Aye*, 508 U.S. at 523. And the Court has intervened where it has been "[c]oncerned that this fundamental nonpersecution principle" has been violated. *Ibid.*; see, *e.g.*, *Murphy*, 139 S. Ct. at 1475; *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). The decision below, as written, rests on legal reasoning that violates that foundational principle. And it has serious practical implications, not just in this case,

but also in future cases involving Catholic entities in Puerto Rico. This Court's intervention is thus warranted.

The government believes that the best way for this Court to resolve this case is for the Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings. As an initial matter, vacating and remanding is appropriate to enable the Puerto Rico Supreme Court to address the jurisdiction of the Court of First Instance to enter the injunction at issue here. Vacating and remanding would also provide an opportunity for the Court of First Instance to enter a new order, if warranted, that would be free of any jurisdictional defect flowing from the prior removal.

On the merits, vacating and remanding is warranted under this Court's decision in *Jones*. In that case, the state courts had adjudicated a church-property dispute without "explicitly stat[ing]" any neutral grounds for their decision, and "there [we]re at least some indications" of reliance on an impermissible legal rule. *Jones*, 443 U.S. at 608-609. This Court accordingly vacated the state supreme court's judgment and remanded the case for clarification of the grounds of the state court's opinion. *Ibid.* In this case, the Puerto Rico Supreme Court similarly failed to identify any neutral grounds for its holding, with the result that its decision rests on a discriminatory legal rule. This Court could therefore follow the same approach that it followed in *Jones*.

This Court's impending decision in *Espinoza* v. *Montana Department of Revenue*, cert. granted, No. 18-1195 (oral argument scheduled for Jan. 22, 2020), may provide a further basis for vacating and remanding. *Espinoza* presents the question whether a state violates the Free Exercise Clause by disqualifying a reli-

gious school from receiving neutral and generally available public funds. The Court's decision could shed light on the application of the Free Exercise Clause in this case. The Court could, therefore, hold the petition pending the disposition of *Espinoza*, and then grant the petition, vacate the judgment, and remand the case for further proceedings in light of that decision.

If the Court decides not to vacate and remand, it should simply grant plenary review. We acknowledge that the case raises procedural issues, that the facts are complex, and that the record is not fully developed at this preliminary-injunction stage. Even so, this Court has previously granted review in other complex cases in order to correct serious violations of fundamental constitutional principles. See, *e.g.*, *Flowers* v. *Mississippi*, 139 S. Ct. 2228 (2019). Given the seriousness of the constitutional claim in this case, it would be appropriate for the Court to follow a similar course. If the Court does so, the Court may wish to direct the parties to brief the additional question whether the Court of First Instance had jurisdiction to enter the order at issue in this case.

CONCLUSION

This Court should grant the petition, vacate the judgment of the Puerto Rico Supreme Court, and remand the case for further consideration—including for consideration of the jurisdiction of the Court of First Instance to enter the order at issue; for articulation of the neutral grounds, if any, supporting its result, in accordance with *Jones* v. *Wolf*, 443 U.S. 595 (1979); and, if appropriate, for reconsideration in light of *Espinoza* v. *Montana Department of Revenue*, cert. granted, No. 18-1195 (oral argument scheduled for Jan. 22, 2020). Alternatively, the Court should grant the petition, in which case it may wish to direct the parties to brief the additional question whether the Court of First Instance had jurisdiction to enter the order at issue in this case.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

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