

No. 14-220

In the Supreme Court of the United States

THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF
BATON ROUGE & THE REVEREND M. JEFFREY BAYHI,
Petitioners,

v.

ROBERT D. MAYEUX & LISA M. MAYEUX,
Respondents.

**On Petition for a Writ of Certiorari to the
Louisiana Supreme Court**

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a claim under Louisiana state law based on an alleged failure by one of the petitioners, Father Bayhi, to comply with a statutory obligation to report instances of child abuse to state officials.

On appeal from the denial of a pretrial motion in limine, the Louisiana Supreme Court held that nothing in Louisiana state law precluded the abuse victim from testifying voluntarily about her confidential conversations with her priest. It remanded the case for an evidentiary proceeding to determine (a) whether Father Bayhi acquired information sufficient to trigger the reporting obligation from sources other than his conversations with the abuse victim and confidential communications with other parishioners and (b) whether the abuse victim's conversations with Father Bayhi were "confidential communications" under Louisiana law.

The questions presented are:

1. Whether the Louisiana Supreme Court decided any question of federal law.
2. Whether the state court's judgment is "final" or otherwise within this Court's jurisdiction under 28 U.S.C. § 1257.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, defendants below included the estate of George J. Charlet, Jr. and the Charlet Funeral Home, Inc.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Pet. App. 1a-10a) is reported at 135 So.3d 1177. The opinion of the Court of Appeal of Louisiana, First Circuit (Pet. App. 11a-64a) is reported at 135 So.3d 724. The judgment of the district court (Pet. App. 65a-66a) is unreported.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on April 4, 2014. A petition for rehearing was denied on May 23, 2014. Pet. App. 70a-75a. The petition for a writ of certiorari was filed on August 21, 2014. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257, but the Court lacks jurisdiction because the Louisiana court's judgment is not "final" within the meaning of that provision (see pages 19-29, *infra*).

STATEMENT

Petitioners' description of this case bears no resemblance to reality. The Louisiana Supreme Court held only that Louisiana law creates a private cause of action for harm resulting from a failure to comply with a statutory duty to report possible child abuse and that a minor child may testify voluntarily about her conversations with a priest.

The state court did not compel the priest to testify about those conversations. Nor did it address whether the priest was liable for failing to tell authorities that a prominent male adult within the church was molesting the minor child. Instead, the court remanded the case to allow the trial court to

determine (1) whether information learned by the priest from sources other than conversations with the child was sufficient to trigger the reporting obligation and (2) whether the priest's conversations with the child were "confidential" within the meaning of Louisiana's priest-penitent privilege. (Petitioners are wrong in claiming that the Louisiana Supreme Court directed the trial court to determine whether those conversations were confidential as a matter of Church law—an inquiry that is irrelevant to the issues to be determined on remand.)

This Court accordingly lacks jurisdiction in this case. First, the state court's ruling did not address any question of federal law; rather, the Louisiana court construed only Louisiana law. Second, the state court's judgment is not "final," as 28 U.S.C. § 1257 requires.

A. Legal Background.

Louisiana imposes upon certain individuals designated as "mandatory reporters" a duty to report information about possible child abuse to appropriate government authorities. Article 609 of the Louisiana Children's Code provides that, "[n]otwithstanding any claim of privileged communication, any mandatory reporter who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse * * * shall report * * * ."

Another section of the Children's Code, Article 603(17), identifies the categories of "mandatory reporters." One such category is "members of the clergy," defined as "any priest, rabbi, duly ordained clerical deacon or minister, Christian Science practitioner, or other similarly situated functionary of a reli-

gious organization.” La. Child. Code Ann. art. 603(17)(c) (2014).¹ This provision states:

[A member of the clergy] is not required to report a confidential communication, as defined in Code of Evidence Article 511, from a person to a member of the clergy who, in the course of the discipline or practice of that church, denomination, or organization, is authorized or accustomed to hearing confidential communications, and under the discipline or tenets of the church, denomination, or organization has a duty to keep such communications confidential.

Ibid.

Article 511 of the Code of Evidence states: “A communication is ‘confidential’ if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.” La. Code Evid. art. 511(A)(2). The statute sets forth a “general rule of privilege” for such communications: “A person has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.” *Id.* art. 511(B).

B. Factual Background.

The trial court has not yet conducted a trial or an evidentiary hearing in this case. The following dis-

¹ The statute was codified as Article 603(15)(c) of the Children’s Code until 2014, when it was recodified (without substantive change) as Article 603(17)(c). See Pet. 1-2. Many of the court documents and lower-court opinions refer to the previous codification.

cussion is based on documents filed in that court: the complaint, petitioners' submissions, and transcripts of deposition testimony.

Rebecca Mayeux was six years old when her family moved to Clinton, Louisiana, and began attending Our Lady of the Assumption Catholic Church. Two men soon befriended the family: Father Jeff Bayhi, the church priest, and George Charlet, a longtime parishioner and active member of the Church. Pet. App. 13a. Charlet became especially close to Rebecca, who came to view him "as a second grandfather." Pet. App. 14a.

In 2008, when Rebecca was 14, Charlet initiated a sexual relationship with her. Charlet started by sending Rebecca daily emails with "words of inspiration and daily Bible verses." *Ibid.* Within weeks, the emails grew more frequent, and Charlet's messages became "more personal" and "laced with seductive nuances." *Ibid.* In mid-July, Charlet took a short trip abroad. When he returned, he gave Rebecca a 53-page handwritten journal, in which he "detail[ed] his desires that [she] be on that trip with him, and include[ed] an entry that he had taken a naked picture of himself in the shower to send her at a later time." *Id.* at 14a n.2.

Charlet's advances turned physical a few weeks later. According to Rebecca's testimony, Charlet kissed her and rubbed her breasts on at least three separate occasions. Dep. of Rebecca Lee Mayeux 26-35. "[C]onfused and scared over [her] evolving 'relationship' with Mr. Charlet," Rebecca arranged a meeting at which she planned to confront him about his behavior toward her. Pet. App. 15a-16a.

They met at Charlet's place of business two days later. When Rebecca arrived, "she was surprised to find no one there other than Mr. Charlet, who then proceeded to sexually abuse her in his private office." *Id.* at 16a. Rebecca's complaint details how Charlet sat her on his lap, "plac[ed] his tongue deeply down her throat," "groped her breasts * * * under her shirt and bra," and told her that he "wanted to make love to her." Pet. for Damages 5. Unsure how to escape, Rebecca warned Charlet that her mother would be arriving soon to collect her, to which Charlet responded, "We better go eat before I eat you up." *Ibid.*

Shortly thereafter, Rebecca's parents became concerned about the emails and phone calls between Charlet and their daughter. Pet. App. 16a. They called Charlet to request a meeting. Pet. for Damages 5. Charlet agreed and, during the meeting, assured the Mayeuxs that he and Rebecca had "an appropriate mutual relationship." *Id.* at 6.

Six days later, on August 10, 2008, Rebecca's parents confronted Rebecca about Charlet's emails and phone calls. At that point, Rebecca revealed the sexual nature of her relationship with Charlet. Pet. App. 16a-17a. The Mayeuxs immediately called Charlet and ordered him to cease contact with their daughter. On the following Sunday, however, they caught Charlet hugging Rebecca "openly against her will." Pet. App. 17a.

The Mayeuxs subsequently filed a complaint with their local police department. Pet. App. 17a. Six months later, in the midst of the police investigation—and before he testified regarding his interactions with Rebecca—Charlet suffered a fatal heart attack following knee replacement surgery. *Ibid.*

Father Bayhi knew Charlet well. Charlet had been Lay Director of Our Lady of the Assumption since Bayhi became pastor in 2006. Bayhi Dep. 48.² Charlet's wife stated that he was one of Bayhi's regular dinner companions. Miriam Charlet Dep. 68.

Bayhi testified that Charlet's relationship with Rebecca had raised concerns. Bayhi Dep. 81. Charlet and Rebecca had developed "this being joined at the hip type of thing," which Bayhi "didn't think * * * was appropriate." *Ibid.* He confronted Charlet about this behavior at a dinner in late July. Miriam Charlet Dep. 67. Mrs. Charlet, who attended the dinner, told Bayhi something about emails between her husband and Rebecca. *Ibid.* Bayhi warned Charlet that his "affection [toward Rebecca] could be very misunderstood" and told him to "be very careful" how he interacted with her. Bayhi Dep. 81.

Rebecca also told Father Bayhi about Charlet's actions. Twice in July and once in August, Rebecca told Bayhi about Charlet's behavior—that Charlet had kissed her, rubbed her breasts, and said "he wanted to make love to her." Pet. for Damages 4. Rebecca remembers that Bayhi was "annoyed with [her for] taking awhile to tell him" about the abuse, Dep. of Rebecca Lee Mayeux 207, and told her "to handle the situation herself." Pet. App. 15a. "[T]his is your problem," Rebecca remembers him saying, "[s]weep it under the floor and get rid of it." *Ibid.*

The Mayeuxs' complaint alleges (Pet. for Damages 4) and Rebecca's deposition confirms (Dep. of Re-

² According to the Church's Pagella, or operating guide, the Lay Director's role was to advise Father Bayhi regarding church property and revenue. Diocese of Baton Rouge, Pagella and Policies 171 (2009).

becca Lee Mayeux 37-40) that Rebecca spoke to Bayhi during the Sacrament of Reconciliation. But Rebecca testified that she did not understand the nature of the sacrament nor intend for Father Bayhi to keep what she told him a secret. Rebecca knew, she said, that the purpose of confession is “that your sins [will] be absolved.” *Id.* at 38. But unlike her previous confessions with Father Bayhi, Bayhi did not instruct her to perform a penance after she described her encounters with Charlet. And when asked whether a priest can “talk about the confession to anyone,” Rebecca said she thought “certain things were bendable.” *Id.* at 39.

Between May and August of 2008, Father Bayhi did not speak to Rebecca’s parents or to Louisiana authorities about Charlet’s behavior toward Rebecca.

C. Trial Court Proceedings.

The Mayeuxs filed a petition for damages in state court in July 2009 naming four defendants: Charlet, the funeral home that Charlet owned, Father Bayhi, and the Diocese of Baton Rouge. *Pet. for Damages* 1-2. It alleged in pertinent part that Father Bayhi had breached his duty under Louisiana’s mandatory-reporter statute, Article 609(A)(1), and that the breach had “result[ed] in further abuse * * * by Mr. Charlet.” *Id.* at 8.

Petitioners, defendants below, filed three motions in the state trial court: a motion for summary judgment, a motion in limine, and a request to declare Article 609 unconstitutional.

1. Motion for summary judgment.

Petitioners’ motion for summary judgment argued, in pertinent part, that Article 603(17)(c) of the

Children’s Code exempted all “confidential communications” from mandatory-reporting requirements. See Mot. for Summ. J. 1-11. Petitioners argued that, because Rebecca’s “alleged confession” was covered by the definition of “confidential communication” in Article 511(A)(2) of the Evidence Code, Father Bayhi could not be liable as a matter of law. *Id.* at 7-9.

In their opposition to the motion, the Mayeuxs contended that there were genuine issues of material fact about Father Bayhi’s duty to report—in particular, when, how, and from whom Father Bayhi had obtained information regarding Charlet’s abuse of Rebecca. Mem. in Opp’n to Mot. for Summ. J.

The trial court granted summary judgment in favor of the Diocese with respect to the claims asserted against it. Hr’g and Ruling on Mot. for Summ. J. 16-17. As to Father Bayhi, however, the court denied the motion, explaining that the existence—or absence—of a duty to report would turn on factual findings at trial:

As [plaintiffs’ counsel] has skillfully argued and addressed in depositions, *there are questions of fact as to what Father Bayhi knew, when he knew it, and how he got that information*, and what duty he may have had at that point. * * * [F]or now, there are issues of fact that certainly indicate that *there may have been some sort of duty on the part of Father Bayhi for what he observed and upon which he commented outside of the confessional* * * *.

Id. at 17-18 (emphasis added).

The judge emphasized that, “while the law may give the Plaintiffs the right to inquire as to what went on in the confessional, *I’m not going to hold Father Bayhi to any standard of having to say what went on and to violate his vows to the church.*” *Id.* at 18 (emphasis added).

2. Motion in limine.

Petitioners’ motion in limine sought to exclude all evidence of the alleged one-on-one conversations between Rebecca and Father Bayhi. *Id.* at 2-3. The motion acknowledged that the trier of fact could “adjudicate * * * whether Father Bayhi had a duty to report based upon facts allegedly learned outside the sacrament of confession.” *Ibid.* The trial court denied the motion, holding that Rebecca’s testimony about the disputed conversations was admissible. See Pet. App. 66a-68a.

3. Request to declare Article 609 unconstitutional.

In their third relevant motion, Petitioners sought a ruling declaring Article 609 of the Children’s Code—the mandatory reporting requirement—unconstitutional as applied to Father Bayhi.³ They argued that the statute violated several provisions of the Louisiana Constitution: its Free Exercise Clause, La. Const. art. I, § 8; Free Speech Clause, *id.* § 7; and privacy provision, *id.* § 5.

³ This Request was first filed in tandem with a Motion for Reconsideration of the motion in limine. The court denied the Motion for Reconsideration but “instructed the [defendants] to refile the constitutional issue” as a stand-alone document. See Mem. in Supp. of Req. 1 n.1.

The only mention of the United States Constitution appeared in a footnote, in which petitioners “reserve[d] the right to challenge the [c]ourt’s ruling in federal court” if the state courts did not “obviate the need for seeking such relief” by ruling in their favor. Mem. in Supp. of Req. 2 n.2.

This request to invalidate Article 609 based on the state constitution has not been ruled on, and it remains pending in the trial court.

D. The Court Of Appeal’s Decision.

The court of appeal reversed the trial court’s denial of the motion in limine.

That court found it “clear” that Article 603 categorically exempted clergy members from any mandatory-reporter duties if the communications providing information alleged to trigger the reporting obligation fell under the purview of Article 511 and “equally clear” that “any alleged confession[s]” between Rebecca and Father Bayhi, in this case, were “confidential communications” under Article 511. Pet. App. 32a. Because the court of appeal found it “axiomatic” that “a priest who learns of alleged sexual abuse during confession * * * is not a mandatory reporter,” it agreed with petitioners that all testimony pertaining to the alleged confessions was not probative and therefore inadmissible. *Id.* at 36a.

The court went on to hold *sua sponte* that, because the “entire statutory scheme” providing for mandatory reporting was criminal in character, it did not support a civil cause of action. It therefore di-

rected the trial court to dismiss the action. *Id.* at 37a-41a.⁴

E. The Louisiana Supreme Court’s Decision.

The Louisiana Supreme Court reversed and remanded the case to the trial court for further proceedings. Pet. App. 1a-9a.

The court first ruled that, under Article 511, “the privilege clearly belongs to the penitent-communicant, not to the priest,” and that “the child/penitent is free to testify and introduce evidence as to her own confession.” Pet. App. 6a-7a. For that reason, the court of appeal had erred in excluding all testimony related to the alleged confessions. *Id.* at 7a.

The supreme court also held that the mandatory-reporting statute gave rise to a civil cause of action for breach of a duty to report. *Id.* at 7a-9a. “Whether this particular priest owed this particular duty to the plaintiffs in this case,” the court stated, “is a mixed question of law and fact” best “resolved by the factfinder at trial.” *Id.* at 8a-9a.

Among the material issues of fact to be addressed, the court explained, were “whether the communications between the child and the priest were confessions *per se* and whether the priest obtained knowledge outside the confessional that would trigger his duty to report.” *Id.* at 9a. It remanded the case for further proceedings. *Ibid.*

⁴ One judge concurred on the ground that imposing mandatory reporting obligations on a priest would violate the First Amendment. Pet. App. 42a-64a.

Petitioners sought rehearing, asserting that an inquiry by the trial court into whether “confessions *per se*” had occurred would violate the Establishment Clauses of the Louisiana and United States Constitutions. App. for Reh’g 5.

The Louisiana Supreme Court denied the application. Pet. App. 70a-71a. Concurring in the denial of rehearing, Justice Guidry reiterated the court’s holding that Article 511 created a civil privilege belonging to the communicant. *Id.* at 72a. He opined that “[w]hether or not the communication was part of a ‘confession *per se*’ as that term is understood in religious doctrine, may be an ecclesiastical problem for the priest, but it does not appear to be relevant here to consideration of the meaning and intent of the Louisiana statutes involved in this case.” *Id.* at 72a-73a.

Justice Victory voted to grant rehearing, stating that the proper inquiry for the trial court would be “whether the communications were ‘confidential communications’ under” Article 511. *Id.* at 74a.

ARGUMENT

This Court should deny review for two reasons. First, the Louisiana Supreme Court did not address any issue of federal law. Petitioners ask this Court to review a state court’s interpretations of state law relating to a state-law cause of action that remains pending and unresolved in the state court. Second, the decision below is not a “final judgment” under 28 U.S.C. § 1257, and this Court accordingly lacks jurisdiction. None of the exceptions recognized in *Cox Broadcasting* are applicable here.

I. The Louisiana Supreme Court’s Ruling Does Not Address Any Question Of Federal Law.

The Louisiana Supreme Court decided only questions regarding the proper interpretation of state statutes, because the opinion of the court of appeal granting the motion in limine resolved only state statutory issues. In determining on remand whether the communications in question were “confessions per se,” the trial court will apply state evidentiary law—Article 511’s priest-penitent privilege—to the facts here.

The Louisiana Supreme Court did not direct the trial court to determine whether Rebecca’s conversations with Father Bayhi constituted confessions as a matter of Catholic doctrine, and there is no conceivable reason for the trial court to address that question. This case turns on Louisiana law, not religious doctrine.

For that reason, nothing in the lower court’s decision implicates the holdings of this Court that petitioners describe as the “Religious Question Doctrine.” Petitioners strive mightily, but ultimately they cannot transform a directive to conduct fact-finding on remand (in applying a state-law standard) into an order to engage in theological decision-making.

A. The Proceedings Below Resolved Only The Questions Of State Law Necessary To Decide Petitioners’ Motion In Limine.

The Louisiana Supreme Court reviewed two questions of state law that the Louisiana Court of Appeal had addressed in its disposition of petitioners’ motion in limine: (1) whether Rebecca had the

right to testify voluntarily about her confessions to Father Bayhi; and (2) whether the breach of the statutory reporting duty “would sustain a private or civil cause of action.” Pet. App. 5a, 7a. In resolving each of these questions, the state’s high court simply interpreted—and relied upon—state law and went no further than necessary to dispose of the motion at issue.

The court’s reference to “confessions *per se*” was not, as petitioners assert, a holding that Louisiana may “override a religion’s view of what its own faith means and requires.” Pet. 14. There is no basis for construing the court’s directive as an order to “interpret religious doctrine.” *Id.* at 30. Rather, that phrase simply instructs the state trial court to determine whether the conversations between Rebecca and Father Bayhi were “confidential communications” under Article 511.

To make that determination, the trial court need only apply the Louisiana statute, which prescribes a civil definition of “confidential communications.” A “confession *per se*”—literally, a confession “as a matter of law”—is a communication that falls within Article 511’s definition of confidential communication.⁵

⁵ In Louisiana, as in many jurisdictions, the phrase “*per se*” in legal doctrine simply describes something that is determined as a matter of law. See *Black’s Law Dictionary* 1323 (10th ed. 2014) (defining “*per se*” as “a matter of law”). Cf. *Costello v. Hardy*, 864 So.2d 129, 140 (La. 2004) (“In Louisiana, defamatory words have traditionally been classified into two categories: those that are defamatory *per se* and those that are susceptible of a defamatory meaning.”); *Robichaux v. Huppenbauer*, 245 So.2d 385, 389 (La. 1971) (“A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or

The statements of two Justices of the Louisiana Supreme Court issued in connection with the denial of rehearing confirm that a limited, civil-law inquiry was that court's intention. Concurring in the denial, Justice Guidry highlighted the critical distinction between "the express statutory privilege" in Article 511 and how the term "confession per se" might be understood in religious doctrine. The latter question, he emphasized, was none of the courts' concern: "[It] may be an ecclesiastical problem for the priest, but it does not appear to be relevant here to consideration of the meaning and intent of the Louisiana statutes involved in this case." Pet. App. 73a.

Justice Victory, despite dissenting from the denial of rehearing, was in agreement on this critical point. He clarified that "the proper inquiry" for the trial court would be whether the discussions at issue were "confidential communications" under Louisiana civil law and not an inquiry that would delve into Church policy or doctrine. *Id.* at 74a.

B. The Opinion Below Did Not Address Any Federal Constitutional Issue.

Petitioners suggest that, by remanding the case to the state trial court for further factfinding, the Louisiana Supreme Court either "rejected" what petitioners refer to as the "Religious Question Doctrine" or violated an implied federal constitutional privilege permitting Father Bayhi to withhold any information he obtained during a confession. Both contentions simply are wrong.

No federal question was presented to the Louisiana Supreme Court—the issues on appeal concern—surroundings * * * the right to relief is established by averment and proof of the mere fact.").

ing the proper disposition of the motion in limine related only to state law. See pages 13-15, *supra*. Indeed, the trial court instructed petitioners to present their constitutional challenge in a separate motion—not yet decided by the trial court—so that petitioners could pursue an interlocutory appeal of the state law questions decided in connection with the motion in limine. Mem. in Supp. of Req. 1 n.1. By separating the issues, the trial judge correctly recognized that the question regarding the facts relevant to ascertaining whether an individual had a reporting obligation under the state statutes is legally distinct from the question of the statutes’ constitutionality as applied to a member of the clergy. The Louisiana Supreme Court considered only the former question.⁶

⁶ Moreover, petitioners’ constitutional arguments were based on the *Louisiana* Constitution, not the U.S. Constitution. Their filing with the trial court invoked the free exercise guarantee in the Louisiana Constitution and the Louisiana Preservation of Religious Freedom Act, La. Rev. Stat. Ann. § 13:5231 (2010). See Mem. in Supp. of Req. 1-2.

The same filing acknowledged specifically that petitioners were *not* raising any claims grounded in federal law. Rather, they reserved (in a footnote) the right to raise an argument based on the U.S. Constitution in a subsequent lawsuit. *Id.* at 2 n.2 (“Out of an abundance of caution, Defendants expressly reserve the right to challenge the Court’s ruling in federal court under the protections provided by the federal constitution * * * . The instant motion seeks relief only under the provisions of the Louisiana Constitution.”).

1. *The Louisiana Supreme Court’s opinion did not in any way implicate the “Religious Question Doctrine”—much less reject it.*

Petitioners claim that, by using the term “confession *per se*” in the penultimate sentence of its opinion, the court adopted an unconstitutional standard, ignoring a consensus reached by “all federal courts of appeals and all other state supreme courts” regarding the scope and application of the “Religious Question Doctrine” (Pet. App. 25)—and did all of this “[w]ithout holding argument or requiring subsequent briefing on the merits” (*id.* at 12).

But the correct, much simpler interpretation is that Louisiana’s high court remanded for a determination whether the communications between Rebecca and Father Bayhi were “confidential” under Article 511. Pet. App. 8a-9a.

Not one document in the record supports petitioners’ contrary view. To begin with, the Louisiana Supreme Court addressed only two state law questions, neither of which had a federal constitutional dimension.

Moreover, the state supreme court explicitly stated that “[w]hether this particular priest owed this particular duty to the plaintiffs in this particular factual context is a mixed question of law and fact,” and directed the trial court to address those questions on remand. *Ibid.* The state supreme court recognized, in other words, that whether Father Bahyi was protected by Article 603’s exception for communications that are “confidential” under Article 511 depends on facts not yet in the record—whether communications between Rebecca and Bayhi were

“made privately and not intended for further disclosure” as specified in the latter provision, see La. Code. Evid. art. 511(A)(2), and whether information Bayhi obtained outside of confession triggered his reporting obligation.

Indeed, both the concurrence and dissent to the Louisiana Supreme Court’s denial of rehearing confirm that the term “confession *per se*,” on which Petitioners fixate, and on which their entire petition rests, is a red herring. It has, as Justice Victory explained, “no legal relevance to this case.” Pet. App. 74a.

In sum, the question on remand is one of state statutory law: whether Rebecca’s communications with Father Bayhi were “confidential” under Article 511 of Louisiana’s Code of Evidence. Because the trial court will be applying a standard specified in Louisiana law, the decisions cited by petitioners are not implicated here.

2. No Louisiana state court has ordered Father Bayhi to testify about what he heard during Rebecca’s confession.

Petitioners claim that, by remanding the case for further fact-finding, “the court must break the sacred seal of the confession by demanding Father Bayhi testify about what was said [in confessional] * * * .” Pet. App. 25. But petitioners, again, misconstrue the Louisiana Supreme Court’s holding.

The court remanded for further fact-finding in order to determine whether the communications between Rebecca and Father Bayhi were “confidential,” and to determine “whether the priest obtained knowledge outside the confessional that would trigger his duty to report.” Pet. App. 9a. The lower court

can make these findings without Father Bayhi's testimony. As the Louisiana Supreme Court explained, Rebecca "is free to testify and introduce evidence as to her own confession." Pet. App. 7a.

Moreover, no court has indicated that Father Bayhi may be forced to testify about anything he heard in confessional. Indeed, the trial judge stated explicitly that he was "not going to hold Father Bayhi to any standard of having to say what went on and to violate his vows to the church." Tr. of Hr'g and Ruling on Mot. for Summary J. 18. It is therefore impossible to understand petitioners' claim that, on remand, "the court must break the sacred seal of the confession by demanding Father Bayhi testify about what was said [in confessional]." Pet. 25. Father Bayhi simply will not be forced to divulge anything that he learned during the Sacrament of Reconciliation.

II. The Louisiana Supreme Court's Decision Is Not "Final" And This Court Therefore Lacks Jurisdiction.

Even if, contrary to our submission, the Louisiana Supreme Court's decision did address an issue of federal law, the state court's decision is not a "[f]inal judgment[]" under 28 U.S.C. § 1257. And the case does not fall within any of the exceptions this Court recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Court therefore lacks jurisdiction.

A. The Many Significant Issues Remaining To Be Determined On Remand Demonstrate That The Louisiana Supreme Court’s Decision Is Not “Final.”

This Court has jurisdiction over a state court decision only when the state’s highest court has rendered a “[f]inal judgment[] or decree[]” that draws the validity of a United States statute into question, brings the validity of a state statute into question on federal grounds, or involves a right “specially set up or claimed under the Constitution” or federal statute. 28 U.S.C. § 1257(a).

Review by this Court is precluded “where anything further remains to be determined by a State court” on remand. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Although that rule is not applied in a “mechanical fashion” (see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 477 (1975)), the plainly interlocutory posture of this case bars review by this Court.

Essential questions of fact and law remain to be resolved on remand:

- The trial court has yet to hear testimony concerning what Father Bayhi learned about Charlet’s abuse of Rebecca from sources other than communications during the Sacrament of Reconciliation, such as what he observed around the parish, what he learned from other parishioners, and what he learned from the Charlets themselves when, during dinner at their home, he expressed his concerns about Charlet’s conduct and obtained some information regarding Charlet’s emails.

- Rebecca will be able to testify in court about any communications and describe the circumstances of those communications, as well as about her interactions around the parish with Charlet that Father Bayhi either observed or could have observed.
- If the trial court determines that Father Bayhi was required to report the abuse under Louisiana’s mandatory reporter statute, La. Child. Code art. 609, the court would still have to determine whether Father Bayhi could, or would, be required to answer in damages for failing to report.
- The trial court will have to address (as a matter of Louisiana law) the interaction between Article 603’s statement that a member of the clergy “is not required to report a confidential communication, as defined in Code of Evidence Article 511,” La. Child. Code art. 603(17)(c), and Article 609’s statement that the reporting duty applies “[n]otwithstanding any claim of privileged communication,” La. Child. Code art. 609.
- Petitioners’ motion to declare Article 609 invalid under the Louisiana Constitution remains pending before the trial court.

The trial court’s determinations regarding these questions could produce a number of different possible outcomes:

- Information obtained by Father Bayhi *outside* the Sacrament of Reconciliation may have been sufficient to trigger his statutory duty to report, rendering irrelevant any

questions concerning communications in the course of the Sacrament of Reconciliation.

- Alternatively, Rebecca’s testimony regarding her conversations with Father Bayhi could demonstrate that—even taking account of that information—Father Bayhi did not learn enough from Rebecca to trigger his duty to report. That would render moot any questions concerning a duty to report on the basis of that information.
- Rebecca’s testimony could clarify whether some or all of her conversations qualify as “confidential” under Article 511.
- Finally, the trial court’s determinations regarding the interaction between Article 603 and Article 609 and regarding petitioners’ state constitutional claims could obviate any federal claim that petitioners could raise.

Deciding any federal question before the Louisiana trial court has heard Rebecca’s testimony, or issued any findings about what Father Bayhi learned outside of confession, would promote “the mischief of economic waste and of delayed justice.” *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). Indeed, the final judgment rule serves the critical function of limiting the circumstances in which this Court enters the “realm of potential conflict between the courts of two different governments.” *Ibid.* Reviewing the Louisiana Supreme Court’s decision before the trial court develops an evidentiary record on remand, or addresses the state statute’s meaning and its validity under the state constitution, would intrude improperly into Louisiana’s administration of its judicial system.

B. The Decision Is Not “Final” Under Any Of The *Cox Broadcasting* Exceptions.

Cox Broadcasting identifies four categories of cases in which a state-court judgment will be considered “final” even if proceedings remain on remand. 420 U.S. at 477. The first three categories are plainly inapplicable to this case; indeed, petitioners refer to no facts relevant to those exceptions.⁷ Rather, their arguments point only to factors not enumerated in *Cox Broadcasting*, demonstrating that petitioners’ argument rests on the fourth, “catch-all” *Cox Broadcasting* category. See Pet. 34-35.

Under that exception the party seeking this Court’s review must satisfy three threshold requirements:

- (1) “the federal issue [must have] been finally decided in the state courts”;
- (2) “further proceedings [remain] pending in which the party seeking review * * * might prevail on the merits on nonfederal grounds, thus

⁷ The first two *Cox Broadcasting* categories involve situations in which the federal issue is considered “final” because the proceedings on remand “have little substance” or “their outcome is certain.” 420 U.S. 469, 478 (1975). Here, the need for a trial and decision by the fact-finder renders these two categories inapposite. The third category holds judgments “final” if further proceedings remain on the merits “but later review of the federal issue cannot be had,” no matter the outcome. *Id.* at 481. But *if* respondents prevail on remand and *if* Father Bayhi is held liable in damages, petitioners could raise any federal constitutional claim presented in the trial court on appeal from that determination (after permitting the state courts an opportunity to address those questions in the first instance).

rendering unnecessary review of the federal issue by this Court”; and

(3) “reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.”

Cox Broadcasting, 420 U.S. at 482-483. If these three elements are satisfied, a decision is “final” if and only if refusal to grant review “might seriously erode federal policy.” *Id.* at 483. Petitioners cannot satisfy the first, third, and fourth requirements.⁸

Requirement 1: final decision on a federal issue. As explained above, the Louisiana Supreme Court did not decide a federal issue *at all*, let alone “finally” decide a federal issue. Indeed, if the Louisiana Supreme Court’s decision on state statutory interpretation is enough to implicate First Amendment concerns, then *any* court decision considering an issue involving a religious institution could be swept within that overbroad view.

Requirement 3: preclusive of further litigation. Even if the Louisiana Supreme Court had decided a federal question, which it did not (see pages 13-19, *supra*), there will be extensive litigation regarding

⁸ With respect to the second requirement, it certainly is possible that Father Bayhi might prevail on the merits on non-federal grounds: the trier of fact could find that he had no duty to report or the court might find that he is not liable in damages on factual or legal grounds. But—where, as here, the other factors are not present—the fact that a ruling on the federal issue may never be necessary is a strong reason for this Court to deny review, not a reason to grant it.

the state law cause of action on remand—both regarding the relevant facts and whether they satisfy the standard for reporting and regarding the contours of the state-law obligation as applied to a member of the clergy given the constraints of the Louisiana Constitution. This Court’s ruling might conceivably, in some way, affect the “nature and character of” the proceedings and evidence still to come. *Id.* at 483. But regardless of what this Court might rule on petitioners’ non-existent federal claim, the trial court would still have to take testimony regarding information obtained by Father Bayhi outside the Sacrament of Reconciliation. No action by this Court could obviate that need for further litigation.

Requirement 4: eroding federal policy. Permitting the litigation to proceed on remand will not erode any established federal policy. The Louisiana Supreme Court did not assess the validity under the First Amendment of the state’s mandatory reporting requirement. It did not compel Father Bayhi to testify. It did not subject Father Bayhi to sanctions if he declines to testify. And, contrary to petitioners’ claims, it did not trigger any possible issue under a “Religious Question Doctrine”; no court in this litigation has decided, or been ordered to decide, any question of religious doctrine.⁹

This Court accordingly lacks jurisdiction to review the judgment below.

⁹ And, of course, petitioners cannot be asserting that the mandatory reporting statute itself is unconstitutional—because their motion raising that contention (solely under the state constitution) remains pending in the trial court. See pages 9-10, *supra*.

Perhaps petitioners' argument is that states and the federal government must abide by religious institutions' determinations that a communication is confidential—in other words, that the First Amendment bars use of a civil law standard for determining whether a priest-penitent privilege applies. (Even then, of course, *Cox Broadcasting's* fourth exception would not apply because the federal question would not be preclusive of further litigation—the trial court still would have to consider whether Father Bayhi's liability could be premised solely on information not learned through confidential communications.)

But such an extraordinarily broad contention would conflict directly with this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012). After recognizing the existence of a ministerial exception, the Court did not uphold application of the exception based on the religious institution's assertion that the employee was a minister. Rather, the Court conducted its own inquiry based on civil-law criteria: the Court looked to the teacher's "circumstances of * * * employment," including that the church "held [the employee] out as a minister"; that she had a "significant degree of religious training"; and that she was required to perform her duties in accordance with the Bible. *Id.* at 705.

Interpreting the First Amendment to bar states (and presumably the federal government) from requiring disclosure of any communication that a religious authority deems confidential as a matter of religious doctrine would call into question the validity of dozens of state laws. For example, each state pro-

vides a clergy-communicant privilege of some kind.¹⁰ And most require a court to apply statutory criteria to the communication in question—not simply to defer to the religious institution’s determination of confidentiality.¹¹

¹⁰ See Ala. Code § 12-21-166; Alaska R. Evid. 506; Ariz. Rev. Stat. Ann. § 12-2233 (civil), § 13-4062(3) (criminal); Ark. R. Evid. 505; Cal. Evid. Code §§ 912, 917, 1030 to 1034; Colo. Rev. Stat. Ann. § 13-90-107(c); Conn. Gen. Stat. Ann. § 52-146b; Del. R. Evid. 505; D.C. Code § 14-309; Fla. Stat. Ann. § 90.505; Ga. Code Ann. § 24-9-22; Ga. R. Evid. 506, Hawai’i Rules of Evidence, Rule 506; Idaho Code § 9-203.3; 735 Ill. Comp. Stat. Ann. 5/8-803; Ind. Code § 34-46-3-1-(3); Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 60-429; Ky. R. Evid. 505; La. Code Evid. Ann. art. 511; Me. R. Evid. 505; Md. Code Ann., Cts. & Jud. Proc. § 9-111; Mass. Gen. Laws Ann. ch. 233, § 20A; Mich. Comp. Laws Ann. § 767.5a; Minn. Stat. Ann. § 595.02(1)(c); Miss. Code Ann. § 13-1-22; Mo. Ann. Stat. § 491.060(4); Mont. Code Ann. § 26-1-804; Neb. Rev. Stat. § 27-506; Nev. Rev. Stat. § 49.255; N.H. Rev. Stat. Ann. § 516:35; N.J. Stat. Ann. 2A:84A-23; N.M. R. Evid. 11-506; N.Y. Civ. Prac. Law and Rules 4505; N.C. Gen. Stat. § 8-53.2; N.D. R. Evid. 505; Ohio Rev. Code Ann. § 2317.02(C); Okla. Stat. Ann. tit. 12, § 2505; Or. Rev. Stat. § 40.260; 42 Pa. Cons. Stat. Ann. § 5943; R.I. Gen. Laws § 9-17-23; S.C. Code Ann. § 19-11-90; S.D. Codified Laws §§ 19-13-16 to 19-13-18; Tenn. Code Ann. § 24-1-206; Tex. R. Evid. 505; Utah R. Evid. 503; Vt. Stat. Ann. tit. 12, § 1607; Va. Code Ann. § 8.01-400; Wash. Rev. Code Ann. § 5.60.060(3); W. Va. Code § 57-3-9; Wis. Stat. Ann. § 905.06; Wyo. Stat. Ann. § 1-12-101(a)(ii); see also 2 Testimonial Privileges § 6:2 n.2 (3d ed.).

¹¹ See Del. Code Ann. tit. 16, § 903; Fla. Stat. ch. 39.201; Idaho Code § 16-1619; Ind. Code § 31-33-5-1; Ky. Rev. Stat. Ann. § 620.030; Md. Code Ann., Fam. Law § 5-705; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. 202.882; N.J. Stat. Ann. 9:6-8.10; N.C. Gen. Stat. § 7B-301; Okla. Stat. tit. 10, § 7103; R.I. Gen. Laws § 40-11-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code Ann. § 261.101; Utah Code Ann. § 62A-4a-403; Wyo. Stat. Ann. § 14-3-205. 2 Testimonial Privileges § 6:14 (3d ed.); see also sources in note 10, *supra*.

Moreover, each state has a statute that provides an affirmative duty to report child abuse, and 40 states require members of the clergy to report in these mandatory reporting laws.¹² While some of these statutes provide an exception for communications protected by the clergy-communicant privilege,¹³ others do not,¹⁴ and still others fail to address the issue.¹⁵ The argument petitioners appear to be

¹² See Ala. Code § 26-14-3; Ariz. Rev. Stat. § 13-3620; Ark. Code Ann. § 12-12-507; Cal. Penal Code § 11165.7; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; Fla. Stat. ch. 39.201; Idaho Code § 16-1619; 325 Ill. Comp. Stat. 5/4; Ind. Code § 31-33-5-1; Ky. Rev. Stat. Ann. § 620.030; La. Child. Code Ann. art. 603; Md. Code Ann., Fam. Law § 5-705; Me. Rev. Stat. Ann. tit. 22, § 4011-A; Mass. Gen. Laws ch. 119, § 51A; Mich. Comp. Laws Ann. § 722.623; Minn. Stat. § 626.556; Miss. Code Ann. § 43-21-353; Mo. Rev. Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. 202.882; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.C. Gen. Stat. § 7B-301; N.D. Cent. Code § 50-25.1-03; Okla. Stat. tit. 10, § 7103; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. § 6311; R.I. Gen. Laws § 40-11-3; S.C. Code Ann. § 20-7-510; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code Ann. § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; W. Va. Code § 49-6A-2; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205. 2 Testimonial Privileges § 6:14 nn.7-8 (3d ed.).

¹³ Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Kentucky, Louisiana (possibly), Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Wisconsin, and Wyoming. See, *supra*, n.11.

¹⁴ New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia. See, *supra*, n.13.

¹⁵ Connecticut, Indiana, Mississippi, Nebraska, New Jersey, and Tennessee. See, *supra*, n.15.

advancing would call into question the constitutionality of many of these laws.

Finally, petitioners' apparent argument would have extremely broad consequences. As petitioners note (Pet. 18, citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 1779 (2014)), courts may not second-guess "honest" religious beliefs. The assertion by a religious organization, or by an individual believer, that a communication is confidential as a matter of religious belief (whether between a minister and congregant or among congregants) would therefore be determinative under petitioners' view of the First Amendment. The consequences for the ability of litigants, or government investigators, to obtain relevant information would be dramatic.

This Court should not address such an extravagant contention—not endorsed by any decision cited by petitioners—in an interlocutory case with the jurisdictional defects present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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