No. _____

In the Supreme Court of the United States

THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, ET AL.,

Petitioners,

v.

ALEXANDER BELYA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Amendment's church autonomy doctrine and its "ministerial exception" should be understood as an immunity from judicial interference in internal religious leadership disputes covered by the doctrine, or instead as a mere defense against liability. This overarching question controls the answer to two sub-questions:

A. Whether the church autonomy doctrine protects churches against merits discovery and trial; and

B. Whether denial of a dispositive motion to invoke the church autonomy doctrine is appealable on an interlocutory basis.

II. Whether a minister's defamation claims against his church arising from internal church disciplinary proceedings are barred by the church autonomy doctrine or may instead proceed under the "neutral principles" approach developed for church property disputes.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners the Synod of Bishops of the Russian Orthodox Church Outside of Russia, the Eastern American Diocese of the Russian Orthodox Church Outside of Russia, Hilarion Kapral (also known as Metropolitan Hilarion), Nicholas Olkhovskiy, Victor Potapov, Serge Lukianov, David Straut, Alexandre Antchoutine, George Temidis, Serafim Gan, Boris Dmitrieff, and Mark Mancuso were the defendants-appellants below. Respondent Alexander Belya was the plaintiff-appellee below. Respondent Pavel Loukianoff was not properly served as a defendant below and has not appeared in this case.

Petitioners the Synod of Bishops of the Russian Orthdox Church Outside of Russia and the Eastern American Diocese of the Russian Orthodox Church Outside of Russia and represent that they have no parent entities and issue no stock.

RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

This case involves a dispute between a defrocked priest and his former church arising from his failed appointment as bishop and subsequent removal from office. As all parties to this lawsuit recognize, the Free Exercise Clause and the Establishment Clause of the First Amendment categorically bar judicial interference in such internal church matters as who will be a bishop and who will be a priest. But by casting his lawsuit as a defamation claim—based on the negative things said about him in the course of church disciplinary proceedings—the defrocked priest, Father Alexander Belya, convinced the court below that it could adjudicate the matter, deciding whether the charges against him were true or false and whether the manner of his removal from the priesthood was tortious. Worse yet, the court of appeals opened the door to full discovery about these internal matters, holding that it lacked appellate jurisdiction to decide whether these intrusions into church governance were permissible until after the jury hears the evidence and renders a verdict.

This was constitutional error. As soon as it became clear that Father Alexander was a priest who was suing the hierarchy of his former church over the content of internal church disciplinary proceedings—facts established on the face of the complaint—the case should have been dismissed. And because the district court failed to dismiss the complaint, the court of appeals should have exercised jurisdiction and resolved the constitutional question before, not after, the harm to church autonomy had been done.

But, following the Tenth Circuit holding raised in a parallel petition for certiorari, *Faith Bible Chapel* v.

Tucker (22-741), the Second Circuit held that the protections of the Religion Clauses are merely an "ordinary defense to liability." According to the panel, and over the dissent of six judges calling for rehearing en banc, trial courts can order merits discovery, consider the merits, and submit the case to a jury. The only limit set by the panel is the "neutral principles" approach permitted by this Court for church property disputes—meaning here, the ordinary principles of defamation law will allow the jury to decide whether the charges brought against Father Alexander in the church proceedings were true or false. Compounding the error, the court of appeals held that any review of the trial court's failure to apply church autonomy protections must wait until the Church has been subjected to discovery into its internal proceedings, jury trial about the truth of the accusations made against Father Alexander in church court, and final judgment.

Until the Second and Tenth Circuits held otherwise, every other federal court of appeals and state supreme court to address this issue—thirteen in all—had gone the other way. Those courts treat church autonomy defenses such as the ministerial exception as a shield against the intrusion of merits litigation—not just the possible imposition of damages or reinstatement.[1] That is because, as this Court has long emphasized, church leadership decisions are core matters of internal church governance that must be

[1] Petitioners use the familiar shorthand "ministerial exception" even though the principle covers roles and faiths beyond what the term suggests.

free of state interference and can be infringed by the very process of judicial inquiry.

As relevant here, three conclusions follow from this understanding of the Religion Clauses: (1) the First Amendment protects churches against merits discovery and trial regarding their internal affairs; (2) denial of a dispositive motion to invoke church autonomy defenses must be appealable on an interlocutory basis; and (3) the "neutral principles" approach cannot be invoked to adjudicate religious leadership disputes between ministers and their churches.

On all three of these conclusions, the decision below is on the wrong side of a sharp split: a 13-3 split over whether the Religion Clauses protect against the burden of litigation; a 6-3 split over whether church autonomy defenses are eligible for interlocutory appeal; and a 6-5 split over whether church property "neutral principles" analysis can be exported to adjudicate ministerial disputes.

As Judge Cabranes explained in dissenting from denial of rehearing en banc, "the issues at hand are of 'exceptional importance' and surely deserve further appellate review"—specifically "by the Supreme Court." And as Judge Park and four other judges warned in their dissent, the panel's conclusions in this case would allow "any ministerial dispute" to "be pled to avoid questions of religious doctrine" and require churches to justify their "internal management decisions" regarding priests and would-be bishops in the civil courts. This "would eviscerate the church autonomy doctrine[.]"

If there is one thing clear about the separation of church and state in America, it is that courts have no business meddling in the selection of clergy, whether the cause of action sounds in employment law, defamation, or anything else. Even "the very process of inquiry" into matters of faith and church governance "impinge[s] on [the] rights guaranteed by the Religion Clauses." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979).

That principle is undermined by the decision below and the Tenth Circuit's decision in *Faith Bible*. Certiorari is warranted in both cases.

OPINIONS BELOW

The Second Circuit's opinion is reported at 45 F.4th 621 (2d Cir. 2022) and reproduced at App.1a. The district court's opinion denying Petitioners' motion to dismiss is reported at 2021 WL 1997547 and reproduced at App.29a. The district court's order denying reconsideration is reported at 2021 WL 2809604 and reproduced at App.45a, and its order denying bifurcation is not reported but is reproduced at App.52a. The opinions regarding the Second Circuit's denial of en banc review are reported at 2023 WL 1807013 and are reproduced at App.55a.

JURISDICTION

The court of appeals entered judgment on August 17, 2022, and amended its judgment on September 16. App.92a. The petition for rehearing was denied on February 8, 2023. App.55a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

The text of 28 U.S.C. 1291 is reprinted in the Appendix. App.94a.

STATEMENT OF THE CASE

I. Factual background

A. The Russian Orthodox Church Outside of Russia

Petitioners are the Synod of Bishops of the Russian Orthodox Church Outside of Russia, along with individual clergy, a diocese, and other senior leaders (collectively, the "Church" or "ROCOR").

ROCOR is a semi-autonomous part of the Russian Orthodox Church. ROCOR was founded shortly after the Bolshevik Revolution, and this Court recounted its history at length in *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). ROCOR exists to promote "the overall spiritual nourishment of the Orthodox Russian flock in the diaspora." Regulations of the Russian Orthodox Church Outside of Russia ¶3, https://perma.cc/TN4H-FNSG (Regulations). ROCOR's highest ecclesiastical body is the Sobor of Bishops (Архиерейский собор). Regulations ¶7; see *Kedroff*, 344 U.S. at 96 n.1 ("A sobor is a convention of bishops, clergymen and laymen with superior powers" that aids "church officials [to] rule their dioceses"). The Sobor is ROCOR's controlling body and meets every two years to make the Church's laws, guide its ministry,

adjudicate internal disputes, and elect bishops. Regulations ¶¶7-8. The Sobor's president is ROCOR's ruling bishop and First Hierarch of the Church. *Id.* ¶8. At the time of the relevant events, that was His Eminence Metropolitan Hilarion, named here as Hilarion Kapral.[2]

Petitioner Synod of Bishops is the executive body of the Sobor. The Synod consists of the Metropolitan, two of his deputies, and four other Sobor members. Regulations ¶16. It is charged with ecclesiastical responsibilities that include selecting bishops, conducting appellate-style review of proceedings to defrock clergy, and resolving "questions concerning various aspects of church life and church administration." *Id.* ¶¶19, 29. Under the "Act of Canonical Communion," the election of a bishop by ROCOR's Synod must be "confirmed" by the Russian Orthodox Patriarchate in Moscow. See *Act of Canonical Communion*, *The Russian Orthodox Church Outside of Russia,* https://perma.cc/X2WV-86YT; App.108a.

B. Father Alexander Belya's dispute with the Church

Respondent Father Alexander Belya was formerly an "archimandrite," or senior monastic priest, in ROCOR. App.101a. Father Alexander claims he was elected "by a majority of the Bishops" in the Synod to

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[2] Metropolitan Hilarion has since reposed in the Lord. He is succeeded by His Eminence Metropolitan Nicholas, named in the complaint as Petitioner Nicholas Olkhovskiy. A formal suggestion of death will follow when the state court has identified the estate's representative. Cf. Fed. R. App. P. 43(a). The same claims were asserted against all individual petitioners.

become Bishop of Miami, Vicar of the Diocese of Florida, in December 2018. App.107a.

Father Alexander alleges that in December 2018 and January 2019, Metropolitan Hilarion wrote two petitions to the Patriarch to notify him of Father Alexander's election and to "hereby ask Your Holiness to approve this candidacy at the next meeting" of the Moscow Synod. App.109a-110a. Both petitions were allegedly signed by Metropolitan Hilarion and stamped with his official seal. App.110a. On August 30, 2019, the Moscow Synod announced its confirmation. *Ibid*.

On September 3, 2019, several ROCOR clergy, including Synod members, wrote a letter (the "clergy letter") to the Synod and Metropolitan Hilarion in response to Moscow's announcement. App.95a-99a (copy of clergy letter). The clergy letter stated that Father Alexander's election "never took place." App.96a. It also raised concerns about the petitions to the Moscow Patriarch, noting that aspects of them were "irregular" under Church law. App.95a-96a. The clergy letter also described problems with Father Alexander's priestly performance, including "breaking [] the seal of Confession," using "information obtained during Confession * * * for the purpose of denigrating parishioners and of controlling them," and lacking proper accountability for church property and finances. App.96a-97a. The clergy letter asked "the Synod to ascertain the circumstances of the confirmation of the non-existent 'election.'" App.98a. It called on Metropolitan Hilarion to investigate and to temporarily suspend Father Alexander "from performing any clerical functions." App.97a.

Within days, Metropolitan Hilarion made a "public decree" instituting a Church investigation of Father Alexander's activities and removing him from all ministerial duties. App.116a. Father Alexander did not submit to the investigation or appeal internally to the Synod and through ecclesiastical courts. Instead, he left ROCOR for the Greek Orthodox Church and sued the Synod and senior church leaders for defamation. App.117a.

Since the Council of Chalcedon in 451 AD, the Church has required that disputes of this nature be resolved within the Church's own internal dispute resolution system. Canon IX of the Council of Chalcedon ("If any Clergyman have a matter against another clergyman, he shall not forsake his bishop and run to secular courts"); accord Statute of the Russian Orthodox Church I(8) & (9). Because Father Alexander failed to comply with the investigation and the terms of his suspension and left the Church without permission, the ROCOR Synod defrocked him in February 2020. See App.134a; *Synod of Bishops Ratifies Resolution of Spiritual Court in Case of Former Archimandrite Alexander (Belya)*, *Eastern American Diocese, Russian Orthodox Church Outside Russia,* https://perma.cc/XP94-MTHM.[3]

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[3] Father Alexander recently threatened to sue the bishops of other Orthodox denominations who warned that his current position in the Greek Orthodox Church threatens the unity of churches in Orthodox Christianity. See Theodore Kalmoukos, *New Serious Inter-Orthodox Problems at the Archdiocese and the Patriarchate*, *The National Herald*, Jan. 25, 2023, https://www.thenationalherald.com/new-serious-inter-orthodox-problems-at-the-archdiocese-and-the-patriarchate/ (Kalmoukos).

II. Procedural history

A. District court proceedings

On August 18, 2020, Father Alexander filed this lawsuit in the Southern District of New York, alleging defamation, defamation per se, and defamation by innuendo against Petitioners.

Father Alexander's complaint states that all the allegedly defamatory statements were made in the clergy letter. Specifically, he claims the clergy letter's statements that the election "never took place" and that documents supporting the election "were drawn up in an irregular manner" were defamatory. He construes these statements to mean that he "fabricated the content" of the petition sent to the Moscow Patriarch and "forged" Metropolitan Hilarion's signature on it and that he "duped" the Moscow Patriarch into confirming his episcopal election. App.118a-119a. The complaint also discusses the alleged publication of the clergy letter and its contents within the Church and on a local church's website used to communicate with Church members, and subsequent coverage by media outlets that report on Church news. App.115a-116a. Father Alexander seeks over $5 million in damages for "severely impaired reputation and standing" within the Church and for loss of income due to diminished church membership. App.124a-125a, App.127a-128a.

On December 8, 2020, the Church filed a three-page letter brief seeking leave to file a motion to dismiss, as required by chambers rules. The Church argued, *inter alia*, that the First Amendment prohibits judicial interference in an ecclesiastical dispute over Father Alexander's alleged election as a bishop. The

district court directed Father Alexander to file a letter brief and amended complaint, which he did.

On May 19, 2021, the district court *sua sponte* construed the Church's letter brief as a Rule 12(b)(6) motion to dismiss and denied it without further briefing or argument. App.43a-44a; see App.66a (Park J., dissenting) (noting the Second Circuit has "repeatedly urged district courts against using this practice to dispose of complex matters"). The court held that the First Amendment does not bar Father Alexander's defamation claims because the suit "may be resolved by appealing to neutral principles of law." App.37a.

The Church moved to certify an interlocutory appeal under 28 U.S.C. 1292(b) and filed a Rule 59(e) motion to alter the judgment. The district court denied both motions. App.45a-49a.

The Church then moved to bifurcate discovery to first resolve whether the ministerial exception and church autonomy defenses applied, or, at a minimum, to stay discovery pending appeal. The court held that bifurcation was "unwarranted" and that the court "w[ould] not pass judgment on the internal policies and * * * determinations of [ROCOR]." App.52a-54a. It also denied the stay. App.52a-54a. And it ordered the parties to complete discovery within four months. App.50a-51a.

The Church timely filed a notice of appeal from the order denying its motion to dismiss. It later amended its notice of appeal to include the orders denying the Rule 59(e) motion and the motion to bifurcate discovery.

B. Second Circuit proceedings

1. The Church filed a motion for stay pending appeal with the Second Circuit. Judge Menashi granted an emergency stay on September 2, 2021, to allow consideration by a full motions panel. On November 3, a motions panel composed of Judges Bianco, Park, and Nardini granted the motion to stay and ordered the case to be expedited. Full briefing and argument followed.

2. On August 17, 2022, the merits panel, composed of Judges Chin, Lohier, and Robinson, dismissed the Church's appeal for lack of jurisdiction. After the Church sought rehearing en banc, the panel amended its opinion on September 16. Addressing the Church's ministerial exception and church autonomy defenses together, App.12a, the panel held that both are governed by the "neutral principles of law approach" used for church property disputes. App.15a-16a (citing *Jones* v. *Wolf*, 443 U.S. 595 (1979)). The panel also held that such defenses provide "neither an immunity from discovery nor * * * trial," but "serve[] more as an ordinary defense to liability." App.21a (cleaned up). To support this holding, the panel cited the Tenth Circuit's decision in *Tucker* v. *Faith Bible Chapel International*, 36 F.4th 1021 (10th Cir. 2022), this Court's denial of certiorari in *Gordon College* v. *DeWeese-Boyd*, 142 S. Ct. 952 (2022), and footnote 4 in *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012), stating the ministerial exception is not jurisdictional. App.21a-22a. The panel concluded that under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), "[i]mmediate appellate review is not the

proper avenue for parties seeking to assert a church autonomy defense." App.22a.

3. On February 8, 2023, the Second Circuit denied the Church's renewed motion for en banc rehearing by a 6-6 vote.[4]

Judge Lohier, joined by Judges Lee, Robinson, Nathan, and Merriam, concurred in the denial, contending that the case does "not implicate church autonomy." App.61a. Judge Chin issued a separate statement, which stated that "this is a defamation case and not a case over religious matters," relied on *Faith Bible* and *Gordon College* to justify allowing the case to proceed to the merits, and argued that this Court's precedent indicated that the "neutral principles" approach applies outside the church property context. App.84a, 88a-90a.

Judge Cabranes dissented, writing to "underscore that the issues at hand are of 'exceptional importance' and surely deserve further appellate review." App.63a. He concluded that "[t]he denial of *en banc* review in this case is a signal that the matter can and should be reviewed by the Supreme Court." *Ibid.*

Judge Park, joined by Chief Judge Livingston and Judges Sullivan, Nardini, and Menashi, also dissented, warning that it "imperils the First Amendment rights of religious institutions" to leave churches "subject to litigation, including discovery and possibly trial, on matters relating to church governance." App.64a. They emphasized that "[o]ur Court's disagreement in this case reflects the growing number of courts struggling to define the contours of

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[4] Judge Bianco did not participate in the en banc vote.

the church autonomy doctrine," and noted that the Second Circuit joins two other "closely divided" courts of appeals that have "narrowly denied" en banc petitions on these issues. App.81a.

The dissenters concluded that the panel made two substantial errors. First, the panel erred in "categorically deny[ing] interlocutory appeals for church autonomy defenses and reduc[ing] the doctrine to a defense against liability only." App.64a. The dissenters viewed this Court's reasoning in *Our Lady*, *Hosanna-Tabor*, *Catholic Bishop*, and *Milivojevich* as all "lead[ing] to the same conclusion: that 'the very process of inquiry' into matters of faith and church governance offends the Religion Clauses." App.72a (quoting *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979)). They further explained that church autonomy bears a "strong resemblance" to qualified immunity, as both are "rooted in foundational constitutional interests," are "protections against the burdens of litigation itself," and are "at bottom a question of law." App.75a-76a.

Thus, as applied to the collateral order doctrine, the dissent explained that "[a] court order denying a church autonomy defense is 'conclusive'" sufficient to justify immediate appeal "because it decides the church's right not to face the other burdens of litigation, which is the critical part of this inquiry." App.72a (cleaned up). Such an order is "effectively unreviewable" after final judgment because, by that point, the "harm from judicial interference in church governance will be complete." App.74a-75a. The dissenters rejected the panel's reliance on *Hosanna-Tabor*'s footnote 4, explaining that whether church autonomy is jurisdictional does not determine if it is

immediately appealable. App.74a-75a (comparing to qualified immunity).

Second, the dissenters explained that "the panel's novel extension of the 'neutral principles' approach is inconsistent with precedent and threatens to eviscerate the church autonomy doctrine." App.77a. They noted that *Hosanna-Tabor* and *Our Lady* had "already rejected this approach" for church leadership disputes, since applying "[e]ven 'valid and neutral'" secular laws in that context would impermissibly "affect[] the faith and mission of the church itself." App.78a-79a (quoting 565 U.S. at 190 and 140 S. Ct. at 2055). They explained that using the "neutral principles" approach to adjudicate ministerial disputes has been repeatedly rejected. App.77a-80a (citing examples from the Fifth and Sixth Circuits and state supreme courts). Because "[a]lmost any cause of action has secular components" and "almost any ministerial dispute could be pled to avoid questions of religious doctrine," "[g]iving courts a license to apply 'neutral principles' to matters of church government, faith, or doctrine" both "elevates form over substance" and "would swallow the church autonomy doctrine altogether." App.79-81.

On February 23, 2023, the panel stayed the mandate pending disposition of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. The decision below widens two splits over the scope of the Religion Clauses' bar on judicial interference in church leadership disputes.

The panel's decision widens two important splits over the scope of the Religion Clauses. The panel's

foundational error is its holding that the church autonomy doctrine provides "an ordinary defense to liability," not a defense from merits discovery or trial. App.21a. As explained in the *Faith Bible* petition, the Tenth Circuit and the Massachusetts Supreme Judicial Court have recently reached the same holding. But that splits with every other federal circuit and state high court to address the issue—thirteen in all. These courts treat the Religion Clauses' guarantee of religious independence as a threshold legal question that, in the nature of an immunity, must be resolved before allowing merits litigation.

The second split concerns whether the denial of a dispositive motion to invoke Religion Clauses defenses is appealable on an interlocutory basis. The panel held that interlocutory appeal is not available because the church autonomy doctrine provides no immunity from merits proceedings. Appeal is thus proper only after merits discovery, potential jury trial, and final judgment. That conclusion is now the subject of a 6-3 split among the federal circuits and state high courts.

These splits reflect a square and acknowledged conflict over the scope of the Religion Clauses. Both independently warrant review.

A. The decision below widens a 13-3 split in holding that the Religion Clauses bar only the imposition of liability and not merits discovery or trial.

This Court has long recognized that an immunity is not "a mere defense to liability" but an "entitlement not to stand trial or face the other burdens of litigation," including "broad-reaching discovery." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). That

right is "effectively lost if a case is erroneously permitted to go to trial." *Ibid.* "Immunity-related issues, th[is] Court has several times instructed, should be decided at the earliest opportunity." *Osborn* v. *Haley*, 549 U.S. 225, 238, 253 (2007).

The same is true of constitutional claims that "contest[] the very authority of the Government to hale [the defendant] into court to face trial." *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (Double Jeopardy Clause); see also *Helstoski* v. *Meanor*, 442 U.S. 500, 507 (1979) (Speech or Debate Clause). In such cases, the "full protection" of the right "would be lost" if the defendant were "forced to 'run the gauntlet'" and "endure a trial" that the Constitution prohibits. *Abney*, 431 U.S. at 662.

1. The panel held that church autonomy doctrine is only "an ordinary defense to liability," not a defense from merits discovery or trial. App.21a; App.64a (en banc dissent explaining the panel's holding "reduce[s] the doctrine to a defense against liability only"). Thus, in the Second Circuit, vindicating the defense on appeal must await the "final judgment of the district court." App.22a.

The Tenth Circuit and Massachusetts' high court reached that same conclusion. See *Faith Bible*, 36 F.4th at 1037 (concluding "any error the district court makes in failing to apply [the ministerial exception] can be effectively reviewed and corrected through an appeal after final judgment"); *Doe* v. *Roman Catholic Bishop of Springfield*, 190 N.E.3d 1035, 1044 (Mass. 2022) (concluding church autonomy protects against liability only).

2. Thirteen federal circuits and state high courts disagree. The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, and the Connecticut, Kentucky, North Carolina, Texas, and District of Columbia high courts have determined that the Religion Clauses provide protection—similar to an immunity—against the burdens of litigation.

The "pioneering cases" that first recognized the ministerial exception emphasized that it bars merits discovery and trial. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (citing *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)). The Fifth Circuit explained in *McClure* that judicial "investigation and review" of a minister's Title VII claim would, without more, "produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." 460 F.2d at 560. Similarly, Judge Wilkinson warned for the Fourth Circuit that in Title VII lawsuits by ministers, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, [and] cross-examination," unleashing the "full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Relying on this Court's guidance in *Catholic Bishop*, the Fourth Circuit determined this result was unconstitutional because "[i]t is not only the conclusions that may be reached" in litigation, but "the very process of inquiry" that can "infringe on rights guaranteed by the Religion Clauses." *Ibid.* (quoting 440 U.S. at 502). "[P]itting church and state as adversaries" in a "protracted legal process" would pressure churches to base decisions on "avoid[ing]

litigation or bureaucratic entanglement," not "doctrinal assessments[.]" *Ibid.*

Until last year, federal circuits uniformly agreed. For instance, the Seventh Circuit explained that the denial of a Religion Clauses defense was "akin to a denial of official immunity," which protects "from the travails of a trial and not just from an adverse judgment." *McCarthy* v. *Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). "Adjudicating" the merits of claims subject to the ministerial exception causes "impermissible intrusion into, and excessive entanglement with" church autonomy through the "prejudicial effects of incremental litigation." *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968, 980-982 (7th Cir. 2021) (en banc).

Similarly, the D.C. Circuit relied on this Court's guidance in *Catholic Bishop* to hold that "the EEOC's two-year investigation" of a claim subject to the ministerial exception, "together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with [religious] judgments." *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996). That entanglement included being "deposed, interrogated, and haled into court." *Ibid.*

Other circuits concur. See *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (chaplaincy decisions are "*per se* religious matters and cannot be reviewed by civil courts"; "the very process of inquiry" would violate Religion Clauses (quoting *Catholic Bishop*, 440 U.S. at 502)); *Natal* v. *Christian & Missionary All.*, 878 F.2d 1575, 1577-1578 (1st Cir. 1989) (civil court cannot "probe into a

religious body's selection and retention of clergymen"; the "inquiry" itself is barred).

Several circuits have emphasized that, far from an ordinary defense to liability, the Religion Clauses provide a structural check on judicial interference in internal religious matters. The Sixth Circuit held that the ministerial exception is not merely a "personal" protection but a "structural limitation imposed on the government by the Religion Clauses" that "categorically prohibits" judicial "involve[ment] in religious leadership disputes." *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). See also *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (agreeing with *Conlon* that "the exception is rooted in constitutional limits on judicial authority"). Under this structural limitation, "even if a religious organization wants" adjudication of ministerial disputes, a federal court has an independent duty "not [to] allow itself to get dragged in[]." *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated in part on other grounds by Hosanna-Tabor*, 565 U.S. 171. See also *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 367, 373-374 (5th Cir. 2018) (citing *Hosanna-Tabor* to conclude that the Religion Clauses' "structural protection" applies against "judicial discovery procedures"), *cert. denied* 139 S. Ct. 1170 (2019).

Four states and the District of Columbia have similarly held that the Religion Clauses provide "protection against the 'cost of trial' and the 'burdens of broad-reaching discovery.'" *Presbyterian Church (U.S.A.)* v. *Edwards*, 566 S.W.3d 175, 179 (Ky. 2018); *In re Diocese of Lubbock*, 624 S.W.3d 506, 515-516

(Tex. 2021) (church autonomy bars "any investigation" by courts of "the internal decision making of a church judicatory body"); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192, 1199-1200 (Conn. 2011), *abrogated in part on other grounds by Trinity Christian Sch.* v. *Comm'n on Hum. Rts.*, 189 A.3d 79 (Conn. 2018) ("the very act of litigating" a ministerial dispute is barred, "making the discovery and trial process itself a [F]irst [A]mendment violation"); *Harris* v. *Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) ("substantial" church autonomy rights are "irreparably injured" by allowing merits proceedings); *United Methodist Church* v. *White*, 571 A.2d 790, 792-793 (D.C. 1990) (Religion Clauses "grant churches an immunity from civil [merits] discovery").

Scholars agree that church autonomy is not limited to liability. One brief explained below that "the ministerial exception is best understood as an immunity analogous to immunity for government officials[.]" Laycock & McConnell Amicus C.A. Br. 4. Other scholars concur. See, *e.g.*, Peter Smith & Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) (exception "limits the power of the government not only to issue and enforce a binding judgment on [religious] matters but also merely to entertain such questions"); Carl H. Esbeck, Thomas C. Berg, Richard W. Garnett, et al., *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 189-190 (2011) (similar).

The conflict between the Second Circuit's opinion and other courts is both square and acknowledged. The panel confirmed that several circuits have "draw[n] explicit parallels between qualified

immunity and church autonomy." App.23a & n.12. And the Tenth Circuit in *Faith Bible* noted that its liability-only approach departs from the "structural" holdings of the Third, Sixth, and Seventh Circuits. 36 F.4th at 1043-45. Massachusetts likewise acknowledged the split. *Doe*, 190 N.E.3d at 1044.

3. The panel's decision also conflicts with this Court's precedents. As the five-judge en banc dissent concluded, this Court's reasoning in *Our Lady*, *Hosanna-Tabor*, *Catholic Bishop*, and *Milivojevich* all "leads to the same conclusion: that 'the very process of inquiry' into matters of faith and church governance offends the Religion Clauses." App.72a (quoting *Catholic Bishop*, 440 U.S. at 502). "[R]eligious controversies are not the proper subject of civil court inquiry"—"[f]or civil courts to analyze" the internal "ecclesiastical actions of a church" would require "exactly the inquiry that the First Amendment prohibits." *Serbian E. Orthodox Diocese for U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 713 (1976). On "matters of church government as well as those of faith and doctrine," religious groups must have "independence from secular control or manipulation." *Kedroff*, 344 U.S. at 116.

Hosanna-Tabor explained that ministerial selection is "strictly ecclesiastical" and the "Religion Clauses bar the government from interfering with th[at] decision." 565 U.S. at 181, 187 (quoting *Kedroff*, 344 U.S. at 119); see also *id.* at 196 ("the ministerial exception *bars such a suit*" (emphasis added)). Even "inquiring into" a church's leadership decisions is "unconstitutional[]." *Id.* at 187. As Justices Alito and Kagan explained in their concurrence, the "mere adjudication" of a minister's Title VII claim against his

church "pose[s] grave problems for religious autonomy." *Id.* at 205-206.

This of course does not mean that religious groups "enjoy a *general* immunity from secular laws." *Our Lady*, 140 S. Ct. at 2060 (emphasis added). Churches may not commission battery or commit securities fraud. But the First Amendment does "protect their autonomy with respect to internal management decisions," including "the selection of the individuals who play certain key roles" for their "central mission." *Ibid.* For courts "even to influence" such matters is something the "First Amendment outlaws." *Ibid.* Thus, courts are "bound to stay out of [ministerial] employment disputes" altogether. *Ibid.*

The panel failed to grapple with this, instead arguing, like the Tenth Circuit, that *Hosanna-Tabor*'s footnote 4 settled the question by describing the ministerial exception as an affirmative defense, not a "jurisdictional bar." App.21a. But that is a non sequitur. Many immunities are not jurisdictional, and some jurisdictional defenses do not provide immunities. Thus, the Court's holding that the ministerial exception is not jurisdictonal tells us nothing about whether it is an immunity or a defense solely to liability. See, *e.g.*, App.74a; see also *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (ministerial exception is "akin to a government official's defense of qualified immunity"—"barr[ing] adjudication of" the merits, not jurisdiction).

The relevant question is whether the Religion Clauses allow the "full panoply of legal process" to "probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171 (quoting *Catholic Bishop*). For Father Alexander to prove the

elements of defamation, civil courts must pass judgment on the meaning and truth of statements made by clergy in the church discipline process and whether an episcopal election took place in accordance with church law. This will require intrusive discovery into internal church disciplinary proceedings, review of internal church communications regarding election of bishops, analysis of church law, and depositions of senior hierarchs. Then the court will be required to parse Father Alexander's claimed damages arising from his diminished status within the Church, distinguishing the harm allegedly caused by identifying "irregularities" with his election from the dimunition caused by his other priestly malfeasance (the truth of which he does not contest). These are things no civil courts previously could do, but in the Second and Tenth Circuits now must do.

B. The decision below widens a 6-3 split over whether denial of a dispositive motion based in the Religion Clauses is appealable on an interlocutory basis.

The panel's erroneous conclusion that church autonomy is merely an "ordinary defense to liability" fatally infected its holding that the doctrine is ineligible for interlocutory appeal. The Tenth Circuit and Massachusetts hold the same. But the Fifth and Seventh Circuits allow interlocutory review of church autonomy defenses, as do Connecticut, Kentucky, North Carolina, and the District of Columbia.

1. Under *Cohen*'s collateral order doctrine, pretrial orders denying an immunity are immediately appealable under 28 U.S.C. 1291 because they (1) "conclusively determine whether the defendant is entitled to immunity from suit," (2) the "immunity

issue is both important and completely separate from the merits of the action," and (3) "this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Plumhoff* v. *Rickard*, 572 U.S. 765, 772 (2014). This Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of the litigation." *Wood* v. *Moss*, 572 U.S. 744, 755 n.4 (2014) (cleaned up). A "substantial claim" to immunity is therefore "an order appealable before final judgment." *Mitchell*, 472 U.S. at 525.

Here, the panel held that because church autonomy doctrine provides no legal immunity, the church must undergo discovery and trial before its church autonomy defenses can be appealed. On *Cohen*'s first prong, the panel held that the district court's orders declining to dismiss the case or bifurcate discovery did not conclusively resolve the Church's church autonomy rights because discovery could proceed "under neutral defamation laws" in order to "develop[]" "relevant facts" such as the provenance of ecclesiastical letters. App.19a-20a. On the second prong, the panel held it was "too soon to say" whether the church autonomy doctrine was, like an immunity, separate from the merits. App.21a. And on the third prong, the panel held that church autonomy "provides religious associations neither an immunity from discovery nor * * * trial," but "serves more as an ordinary defense to liability." App.21a (cleaned up). Church autonomy immunity is thus dispositive to the court's holding on appealability. And, as the dissenters warned, that holding "categorically den[ies] interlocutory appeal for church autonomy defenses." App.64a.

The Tenth Circuit and Massachusetts agreed with the panel. *Faith Bible*, 36 F.4th at 1047; *Doe*, 190 N.E.3d at 1043-1044.

2. The Fifth and Seventh Circuits go the other way. In *Whole Woman's Health*, the Fifth Circuit permitted interlocutory appeal from the denial of church autonomy defenses, holding that "interlocutory court orders bearing on First Amendment rights remain subject to appeal pursuant to the collateral order doctrine." 896 F.3d at 368 (collecting cases). There, the district court ordered Catholic bishops to produce decades of internal communications pursuant to a third-party subpoena. *Id.* at 366. Citing the "structural protection afforded religious organizations and practice under the Constitution," the court held that "[t]he standards of the collateral order doctrine are met" because "the consequence of forced discovery here is 'effectively unreviewable' on appeal from the final judgment." *Id.* at 367, 373.[5]

In *McCarthy*, the Seventh Circuit likewise allowed an interlocutory appeal where the district court "ruled that a federal jury shall decide" whether a defendant is "a member of a Roman Catholic religious order." 714

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[5] The panel distinguished *Whole Woman's Health* as "related 'to the predicament of third parties.'" Op.22, App.19a. But the Fifth Circuit has rejected that view. *Vantage Health Plan* v. *Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 n.2 (5th Cir. 2019) (*Whole Woman's Health* concerned not merely a "third-party document production order" but also "the First Amendment claim of a religious institution to protection from discovery of internal governance documents"). And *Whole Woman's Health* itself repeatedly emphasized that it concerned "privileges * * * go[ing] to the heart of the constitutional protection of religious belief" and cited precedent finding "appellate jurisdiction" for "comparable First Amendment claims." 896 F.3d at 368, 374.

F.3d at 976. Because that decision was "closely akin to a denial of official immunity"—an "immunity from the travails of a trial and not just from an adverse judgment"—the order was "within our appellate jurisdiction under the collateral order doctrine." *Id.* at 974-975. The court reasoned that the erroneous denial of an immunity defense "irrevocably deprive[s]" the defendant of "one of the benefits * * * that his immunity was intended to give him"—the "freedom from having to undergo a trial." *Id.* at 975. And the "harm" of "governmental intrusion into religious affairs" would be similarly "irreparable," "just as in the other types of case in which the collateral order doctrine allows interlocutory appeals." *Id.* at 974-976.[6]

The Connecticut, Kentucky, North Carolina, and District of Columbia high courts likewise allow interlocutory appeal of denied ministerial exception and church autonomy defenses. *Dayner*, 23 A.3d at 1200 (allowing "interlocutory appeal from the denial" of ministerial exception); *White*, 571 A.2d at 793 (under *Cohen*, denial of exception "is immediately appealable as a collateral order"); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (denial of exception "is appropriate for interlocutory appeal"); *Harris*, 643 S.E.2d at 569-570 ("immediate

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[6] The panel declined to follow *McCarthy*, instead relying on *Herx* v. *Diocese of Fort Wayne-South Bend*, 772 F.3d 1085 (7th Cir. 2014). App.17a-18a, 23a. But *Herx* nowhere disavowed *McCarthy*, instead "hold[ing] only" that the defendant's "few sentences" of briefing failed to carry its burden of persuasion for interlocutory jurisdiction. 772 F.3d at 1090-1091. That is not this case.

appeal is appropriate").[7] While state courts of course have their own rules governing interlocutory appeal, their understanding of the scope of the Religion Clauses drives how they apply those rules. The dispositive difference is whether they understand the clauses to provide immunity from merits discovery and trial.

Judge Lohier's concurrence framed the panel's opinion as resolving an "extremely narrow procedural issue," and thus asserted that there is "no circuit split." App.60a. But, as the en banc dissenters responded, there is no question that three en banc courts are "closely divided" on the Religion Clauses questions raised here. App.81a (citing en banc votes in the Fifth and Tenth Circuits). And even though precedents like *Hosanna-Tabor*, *Our Lady*, *Milivojevich*, and *Catholic Bishop* did not "ar[i]se at the motion to dismiss stage" and so did not "explicitly h[o]ld" that merits discovery and trial were barred, "the reasoning of these cases leads to th[at] conclusion." App.71a-72a. The circuit and state precedent cited above relied on that reasoning to bar merits litigation and permit interlocutory appeal—in sharp contrast to the panel.

3. The panel's opinion is also inconsistent with this Court's precedent. This Court has "often" permitted interlocutory appeals to determine "the proper scope of First Amendment protections," *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1989) (collecting cases), including in the context of church autonomy rights. See *Roman Catholic Archdiocese of San Juan* v.

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[7] Legal scholars agree interlocutory appeal is appropriate. See *supra* at 20.

Feliciano, 140 S. Ct. 696 (2020) (considering under 28 U.S.C. 1258 an interlocutory appeal of an order foreclosing Religion Clauses defenses).

This special care where First Amendment and other "constitutional rights are concerned" "reflect[s] the familiar principle of statutory construction" that courts "should construe statutes (here, § 1291) to foster harmony with * * * constitutional law." *Digital Equip. Corp.* v. *Desktop Direct*, 511 U.S. 863, 879 (1994). The statutory "policy * * * to avoid piecemeal litigation" must therefore "be reconciled with policies embodied in * * * the Constitution." *Ibid.*; see also *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy*, 506 U.S. 139, 145 (1993) (permitting interlocutory appeal of "a claim to a fundamental constitutional protection").

The Religion Clauses are core limitations on state power that "lie[] at the foundation of our political principles" and safeguard the "broad and sound view of the relations of church and state under our system of laws." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) (applying federal common law); *Kedroff*, 344 U.S. at 116 (adopting *Watson*'s analysis as constitutional). Our system of government thereby reflects a "broad principle" of "church autonomy" that flatly "outlaws * * * [s]tate interference in that sphere." *Our Lady*, 140 S. Ct. at 2060-2061. The panel did not explain why such fundamental rights are "categorically" ineligible for appellate review, App.64a (Park. J., dissenting), while many less weighty interests are reviewed regularly, see, *e.g.*, *Doe* v. *MIT*, 46 F.4th 61, 65-66 (1st Cir. 2022) (nine circuits allow interlocutory appeal of orders denying pseudonymity).

Instead, both the panel and the Tenth Circuit resisted this conclusion by reference to Justice Alito's statement respecting the denial of certiorari in *Gordon College* v. *DeWeese-Boyd*, 142 S. Ct. 952 (2022). App.22a; *Faith Bible*, 53 F.4th at 624. But *Gordon College* is distinguishable. There, the questions presented solely concerned the application of the ministerial exception, and the "interlocutory posture" of the case—under 28 U.S.C. 1257, not 1291—would have unduly "complicate[d]" review of those questions. 142 S. Ct. at 955. Here, the lead issue *is* the interlocutory posture—and particularly whether the proper scope of the Religion Clauses requires immediate review to avoid the irreparable harm of merits discovery and trial. As in other immunity cases, the "source of the [Second] Circuit's confusion was its mistaken conception of the scope of protection afforded by" the claimed immunity. *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996).

II. The decision below sharpens a 6-5 split over whether "neutral principles" can be used to adjudicate church leadership disputes.

Certiorari is also warranted to resolve the split over when courts can use "neutral principles of law" to adjudicate a minister's claims against his church arising from a church's selection and control of the minister, especially in the church discipline context. This Court has rejected allowing "neutral" laws to govern such disputes, as have the Sixth and D.C. Circuits and four state high courts. But the Second Circuit joins the Fifth and Eighth Circuits and two state high courts in permitting such claims to proceed under the "neutral principles" approach.

As the dissenting judges warned, this expansion of the "neutral principles" approach beyond church property disputes will require courts to adjudicate "matters of church government, faith, or doctrine," and will ultimately "swallow the church autonomy doctrine altogether." App.79a.

1. "Neutral principles" analysis was developed and primarily used in church property disputes to adjudicate conflicts over which party is the true church. See *Jones* v. *Wolf*, 443 U.S. 595 (1979); Michael McConnell & Luke Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 316-319 (2016) (describing origin of the "neutral principles" approach). This Court has never used it to resolve disputes within intact church bodies over "matter[s] of internal church government," such as the selection of church leaders. *Milivojevich*, 426 U.S. at 714-715, 721 & n.8. Quite the opposite: in *Milivojevich*, a former bishop sued the Serbian Orthodox Church, arguing that because his defrocking affected who had control over church property, the church's decisions could be adjudicated by neutral principles of law. *Id.* at 706-707. This Court disagreed, holding that "the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation." *Id.* at 720.

Hosanna-Tabor likewise explained that disputes over church leadership are not governed by "neutral" laws such as employment discrimination statutes, since "select[ing] and control[ling] who will minister to the faithful" is "strictly ecclesiastical." *Hosanna-Tabor*, 565 U.S. at 195 (quoting *Kedroff*, 344 U.S. at 119); see also *Our Lady*, 140 S. Ct. at 2061 ("broad principle" of church autonomy governs judicial

analysis of "matters of internal government"); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (refusing to adjudicate claim to chaplaincy under the terms of a trust because eligibility for the role was "purely ecclesiastical" and governed by "canon law"). Accord App.77a-78a.

2. For these reasons, two circuits and four state high courts have rejected reliance on the "neutral principles" approach to adjudicate a minister's claims against his church arising from church disciplinary matters over the selection or control of the minister. The Sixth Circuit, rejecting a minister's defamation claim, squarely held that the "neutral principles" approach "applies only to cases involving disputes over church property" and is "simply not applicable" where a minister's claim relates to a dispute over his "status and employment as a minister of the church." *Hutchison* v. *Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). Similarly, in *EEOC* v. *Catholic University of America*, the D.C. Circuit explained that "neutral principles" refers to "trust and property law," and rejected the argument that a ministerial Title VII dispute "can be resolved without entangling the Government 'in questions of religious doctrine, polity, and practice' by invoking 'neutral principles of law.'" 83 F.3d at 465-466.

Four state high courts have reached similar results. *In re Diocese of Lubbock*, 624 S.W.3d at 516 ("neutral principles" inapplicable to defamation claim over statement from diocesan disciplinary proceedings "regulat[ing] the character and conduct of [church] leaders"); *El-Farra* v. *Sayyed*, 226 S.W.3d 792, 795-796 (Ark. 2006) (rejecting "neutral principles" approach, dismissing defamation claims regarding statements

"made in the context of a dispute over [plaintiff's] suitability to remain as Imam"); *Hiles* v. *Episcopal Diocese of Mass.*, 773 N.E.2d 929, 935-937 (Mass. 2002) (rejecting adjudicating church-minister defamation disputes under "the established rules of common law," since churches are "entitled to absolute protection" from such claims "aris[ing] out of the church-minister relationship in the religious discipline context"); *Heard* v. *Johnson*, 810 A.2d 871, 880-882 (D.C. 2002) (finding "neutral principles" approach inapplicable to minister's defamation claim, holding that "selection and termination of clergy is a core matter of ecclesiastical self-governance" (collecting cases)).

Following *Hutchison*, other courts have denied ministerial defamation claims arising from the disciplinary context without subjecting them to "neutral principles" analysis. *Natal*, 878 F.2d at 1577 (citing *Hutchison* and barring ministerial libel and slander claims; courts "look to the substance and effect of plaintiffs' complaint, not its emblemata"); *Cha* v. *Korean Presbyterian Church*, 553 S.E.2d 511, 516 (Va. 2001) (joining "most courts that have considered the question" in barring clergy defamation claim; citing *Hutchison* and collecting cases).

3. The Second Circuit ignored this precedent, not even citing *Milivojevich* or *Hutchison*. Instead, it echoed the *Milivojevich* dissent by allowing the district court to navigate Father Alexander's claims against his ecclesiastical superiors using neutral principles of defamation law. See 426 U.S. at 727 (arguing civil courts must be allowed to evaluate "the defrockment of [the] Bishop" and "conclude, on the basis of testimony from experts on the canon law at issue," if

"the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure") (Rehnquist, J., dissenting).

Two other circuits and two state high courts have likewise allowed a minister's claims against his church to proceed under the "neutral principles" approach, including claims arising in the disciplinary context. See *Drevlow* v. *Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993); *Banks* v. *St. Matthew Baptist Church*, 750 S.E.2d 605, 608 (S.C. 2013); *Marshall* v. *Munro*, 845 P.2d 424, 427 (Alaska 1993). Most recently, the Fifth Circuit reversed a district court's dismissal of a minister's defamation and other tort claims and ordered the district court to proceed under "neutral principles of tort law." *McRaney* v. *North Am. Mission Bd.*, 966 F.3d 346, 349-350 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2852. That opinion narrowly avoided en banc review by a vote of 9-8, and over two separate dissents by Judges Ho and Oldham. *McRaney* v. *North Am. Mission Bd.*, 980 F.3d 1066, 1071-1072 (5th Cir. 2020) (Ho, J., dissenting) (explaining the circuit's new "neutral principles of tort law" approach will become "the exception that swallowed the rule").

The Second Circuit goes even further in allowing courts to wade into ministerial disputes. Father Alexander's claims open the door to discovery and judgment over deeply religious proceedings. See Part I.A.3, *supra*. Indeed, as the en banc dissenters recognized, even the "secular fact questions" the panel identified—such as whether church leaders signed and sealed ecclesiastical letters in accordance with church procedures—"are the same types of factual questions this Court rejected in *Milivojevich*." App.71a, 79a. And this intrusion will arise in the

context of the church's relationship with her ministers—the "lifeblood" of the church. *McClure*, 460 F.2d at 558. "Taken to its logical endpoint," the panel's approach "would eviscerate the church autonomy doctrine." App.81a.

Father Alexander seems intent to prove the point. Just this winter, he sent individual letters threatening to sue the bishops of other Orthodox churches in communion with both his former church and his current one for defamation. Why? Because they wrote to his current Archbishop raising concerns similar to the ones in the clergy letter.[8] In the Second Circuit and several other jurisdictions, such schismatic lawsuits are now allowed.

In sum, this split is deep and entrenched. Only review by this Court can resolve it.

III. The scope of the Religion Clauses' bar on judicial interference in religious disputes is a question of nationwide importance.

As Judge Cabranes noted, this case presents issues of "exceptional importance" that "should be reviewed by the Supreme Court." App.63a.

1. Here, as with the Tenth Circuit's decision in *Faith Bible*, the stakes for religious organizations are high because the decision below turns a fundamental right into a pleading game. An unhappy minister in the Second and Tenth Circuits can now subject his church to discovery and trial over ministerial decisions. All he must do is find some "secular

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[8] Kalmoukos, *supra* note 3.

component[]" of the dispute to push the case into merits discovery and trial. App.15a.

Playing pleading games is now the strategy du jour in ministerial disputes. In *Faith Bible*, a chaplain became "foremost, a *science* teacher." Petition for Writ of Certiorari at 33, *Faith Bible Chapel* v. *Tucker*, No. 22-741 (Feb. 3, 2023). In *Demkovich*, a church music director "repackaged his allegations of discriminatory termination as hostile work environment claims." 3 F.4th at 973. Here, Father Alexander repackaged a dispute over whether he became Bishop of Miami as a defamation case.

Without interlocutory review, ministerial plaintiffs can turn litigation into leverage by "pitting church and state as adversaries" in a "protracted legal process" to include a jury trial. See *Rayburn*, 772 F.2d at 1171. It is a "tax on religious liberty" to "forc[e] religious institutions to defend themselves on matters of internal governance." *McRaney*, 980 F.3d at 1074 (Ho, J., dissenting) (collecting cases). But the Second and Tenth Circuits now permit just that. Worse still, churches who speak up about clergy misconduct risk liability under "neutral principles" of defamation law. See App.96a (alleging "breaking of the seal of Confession" and using that information "for the purpose of denigrating parishioners and of controlling them"). But see *Hiles*, 773 N.E.2d at 936 (rejecting defamation claim, protecting church's "interest in protecting its faithful from clergy who will take advantage of them"); *In re Diocese of Lubbock*, 624 S.W.3d at 519 (similar).

2. The decision below also undermines procedural tools that lower courts have developed to avoid religious entanglement.

For example: Courts "regularly bifurcate discovery in ministerial cases" by resolving the ministerial exception defense first. *Fitzgerald* v. *Roncalli High Sch.*, No. 1:19-cv-4291, 2021 WL 4539199, at *1 (S.D. Ind. Sept. 30, 2021) (collecting cases). But see App.53a (denying bifucation). Similarly, courts respect "constitutional limits on judicial authority" by raising the ministerial exception *sua sponte*, see *Sixth Mount Zion*, 903 F.3d at 118 n.4, *Catholic Univ.*, 83 F.3d at 459-460, and refusing to ignore it as waived, *Conlon*, 777 F.3d at 836; *Petruska*, 462 F.3d at 309. But the Second and Tenth Circuits undermine these safeguards by treating church autonomy as an ordinary defense.

In an era of increasing societal polarization, the Second and Tenth Circuits' standards will stoke more fights over religion, enflaming the very church-state conflicts that the Religion Clauses proscribe.

* * *

At bottom, this case and *Faith Bible* each present an important opportunity for this Court to clarify the scope of the Religion Clauses. Because the petitions offer different but oft-recurring claims, factual predicates, and procedural postures, the Court should grant both to provide fuller guidance to lower courts. Alternatively, the Court should grant certiorari in one case and hold the other.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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