No. 22-824

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

BRIEF OF FEDERAL COURTS PROFESSOR DEREK T. MULLER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a district court's denial of a dispositive motion invoking a church-autonomy defense is immediately appealable under 28 U.S.C. § 1291.

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INTEREST OF AMICUS CURIAE*

Derek T. Muller is the Ben V. Willie Professor in Excellence and Professor of Law at the University of Iowa College of Law. He teaches courses on federal courts and civil procedure, among other subjects. He is a co-author of a federal courts casebook, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (5th ed. 2022), as well as an open-access resource on federal courts and civil procedure, *Rules and Laws for Civil Actions* (2023). He has also published widely in the field of election law and has submitted amicus briefs to this Court in cases including *Moore v. Harper*, No. 21-1271 (argued Dec. 7, 2022), and *Chiafolo v. Washington*, 140 S. Ct. 2136 (2020).

Because this case involves important questions about the scope of the collateral-order doctrine—a key issue in the fields of federal courts and civil procedure—Professor Muller has an interest in the case's resolution within the appropriate legal framework. He submits this brief to offer his view that the Court should grant review and hold that the collateral-order doctrine permits an immediate appeal from the denial of a defendant's dispositive motion invoking a church-autonomy defense.

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* Pursuant to Supreme Court Rule 37, amicus affirms that no counsel for a party authored this brief in whole or in part, and no one other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amicus to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an exceptionally important question at the intersection of civil procedure and constitutional law. Under 28 U.S.C. § 1291, federal courts of appeals have jurisdiction over appeals from "final decisions of the district courts." That provision, which "descends from the Judiciary Act of 1789," has long been understood to confer appellate jurisdiction over more than just case-ending final judgments. *Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999). But precisely which pre-judgment orders can be immediately appealed under Section 1291—often termed "collateral orders"—has been far less clear.

This case does not require the Court to explore the outer limits of the collateral-order doctrine. Under the Court's longstanding and widely accepted construction of Section 1291, an order denying a defendant's request to dispose of a case is immediately appealable where (1) the defendant asserts a *protection against the burdens of further litigation*, as opposed to a protection against liability alone; and (2) the asserted protection is *rooted in constitutional principles*, thereby displacing the default federal preference for "deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009).

That rule resolves the question presented. Faced with defamation allegations from a former priest arising from a dispute over clergy appointments, petitioners moved to dismiss the suit as barred by the church-autonomy doctrine. That doctrine provides more than just protection against the imposition of liability; it directs courts "to stay out" of disputes over church

personnel and governance. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). And the doctrine is grounded in the structural limitations on government created by the Religion Clauses of the First Amendment, *see id.*; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952), which plainly provide a sufficient basis to overcome the default federal policy against piecemeal appeals.

Under that straightforward analysis, the denial of petitioners' church-autonomy defense was a "final decision" appealable under Section 1291, much like orders denying double-jeopardy, official-immunity, qualified-immunity, or sovereign-immunity defenses. *See Abney v. United States*, 431 U.S. 651, 659-60 (1977); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993).

The Second Circuit panel dismissed petitioners' appeal by demoting the church-autonomy doctrine to the status of "an ordinary defense to liability," Pet. App. 21a (citation omitted), thereby subjecting petitioners to constitutionally barred litigation burdens without the opportunity for immediate appellate review. As the forceful dissents from denial of rehearing demonstrate, that decision was wrong on exceptionally important questions of federal law, and it "should be reviewed by th[is] Court." *Id.* at 63a (Cabranes, J., dissenting from denial of rehearing).

ARGUMENT

I. Section 1291 Allows Immediate Appeal Of A Pretrial Order Denying The Assertion Of A Church-Autonomy Defense

The "final decisions of the district courts" subject to immediate appeal under 28 U.S.C. § 1291 include a limited number of orders preceding final judgment—but not many, given the strong federal policy against piecemeal appeals. Defining with precision the category of appealable collateral orders has proven difficult for courts and scholars alike. But the statutory text, purpose, and history—along with this Court's precedent—yield an administrable rule that resolves the question presented here. When a district court denies a pretrial motion (1) asserting a defense against the burdens of litigation itself (2) that is rooted in constitutional principles, its order is immediately appealable under Section 1291. Because the church-autonomy defense that petitioners invoked below meets both those criteria, the Second Circuit should have exercised mandatory jurisdiction over petitioners' appeal.

A. Section 1291 allows immediate appeal of a limited category of "final decisions" that precede final judgment

From its earliest days, Congress has provided for appeals as of right from "final" decisions of federal district courts. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The Judiciary Act of 1789 conferred on federal circuit courts mandatory appellate jurisdic-

tion over certain "final judgments and decrees" of district courts. § 22, 1 Stat. 73, 84.[1] When Congress created the federal courts of appeals in the Evarts Act of 1891, it carried forward that provision with a modest revision, providing mandatory appellate jurisdiction over the "final decision" of a district court (or a former circuit court), except where an appeal could be taken directly to this Court. § 6, 26 Stat. 826, 828. The current statute, 28 U.S.C. § 1291, provides in substantially identical language that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts … except where a direct review may be had in" this Court.[2]

None of those statutes has defined precisely what constitutes a "final" judgment, decree, or decision. But for as long as the statutes have been on the books, this Court has understood their references to finality to encompass not only district court rulings that formally "terminate the litigation" but also certain narrow "categories of prejudgment decisions" that must "be treated as 'final'" in order to vindicate the "object of efficient administration of justice in the federal courts." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 884 (1994). As this Court put it in one leading decision, "finality—the idea underlying

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[1] The Judiciary Act of 1789 also conferred on this Court mandatory appellate jurisdiction over certain "final judgments and decrees" of the federal circuit courts. *Id.*

[2] Since the Judiciary Act of 1789, Congress has also provided this Court with appellate jurisdiction over a "final judgment or decree" issued by the highest court of a state that meets specified criteria. § 25, 1 Stat. 85; *see* 28 U.S.C. § 1257.

'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in [Section 1291]—is not a technical concept of temporal or physical termination," but rather a requirement prescribed by Congress to ensure "a healthy legal system." *Cobbledick*, 309 U.S. at 326.

The historical origins of the final-judgment rule buttress that construction. The reference to "final judgments" in the Judiciary Act of 1789 was "declaratory of a well-settled and ancient rule of English" common-law practice, under which "no writ of error could be brought except on a final judgment." *McLish v. Roff*, 141 U.S. 661, 665 (1891). The basis for that English practice was practical rather than doctrinal: an appeal could proceed only when the record of a case was sent up from the trial court, but there was only one "formal record" of the case ("the roll"), and "it could be in only one court at a time." Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 543-44 (1932).

This Court's early decisions accordingly treated "final" as a term of art in which a formal end to the district-court litigation was typically—but not always—required to establish appellate jurisdiction. The Court emphasized that it was "the object of the [appellate-jurisdiction statute] to save the unnecessary expense and delay of repeated appeals in the same suit." *Forgay v. Conrad*, 47 U.S. (6. How.) 201, 205 (1848). Yet the Court repeatedly permitted appellate review of orders that were "not final, in the strict, technical sense of that term" when doing so would be more "consonant with … the meaning of the acts of Congress"—for example, when the decision was practically final and delaying review would inflict

"irreparable injury" on the losing party. *Id.* at 203-04; *see, e.g.*, *Williams v. Morgan*, 111 U.S. 684, 699 (1884); *Bronson v. LaCrosse & M.R. Co.*, 67 U.S. (2 Black) 524, 531 (1862); *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6, 15 (1839); *see also* Adam Reed Moore, *A Textualist Defense of a New Collateral Order Doctrine*, 99 Notre Dame L. Rev. Reflection (forthcoming 2023), bit.ly/3Zj4B1N, at 33-36 (citing additional examples).

When Congress amended the appellate-jurisdiction statute in 1891, it replaced the phrase "final judgments and decrees" with "final decisions"—the language that remains in force today. Although the 1891 amendment did not broaden the substantive scope of appellate rights, *see, e.g., Cobbledick*, 309 U.S. at 324-25, Congress's use of the term "final decisions" aptly captured this Court's longstanding construction that a formal final judgment or decree was not invariably required to support an appeal. *See, e.g.*, William C. Anderson, *A Dictionary of Law* 318 (1889) (defining a "decision" as "[s]omewhat more abstract or more extensive than 'judgment' or 'decree'"); I Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 356 (1888) (distinguishing a "decision" from "the paper commonly called the 'judgment' docketed with the clerk").

Courts of appeals applying the new statute promptly recognized that "the term 'final decision' … does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings," but "also appl[ies] to a final determination of a collateral matter" meeting certain requirements. *Brush Elec. Co. v. Elec. Imp. Co. of San Jose*, 51 F. 557, 561 (9th Cir. 1892); *see Cassatt v.*

Mitchell Coal & Coke Co., 150 F. 32, 34 (3d Cir. 1907) (similar). And this Court likewise continued to hold that, while "the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that" certain prejudgment orders "may be reviewed without awaiting the determination of the general litigation." *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414 (1926); *see, e.g.*, *Perlman v. United States*, 247 U.S. 7, 12 (1918).

Against that backdrop, Justice Robert Jackson delivered the canonical construction of "final decisions" in his opinion for the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The "effect of the" statutory appellate-jurisdiction language, the Court explained, "is to disallow appeal from any decision which is tentative, informal or incomplete," and also from "fully consummated decisions [that] are but steps towards final judgment in which they will merge." *Id.* at 546. But when a decision falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," it is a "final decision" within the meaning of Section 1291. *Id.*

Although the formulation in *Cohen*—which came to be known as the collateral-order doctrine—was new, the underlying substance was not. *See Cohen*, 337 U.S. at 546 (citing cases dating back to 1828). As this Court later explained, "*Cohen* did not establish new law; rather, it continued a tradition of giving

§ 1291 a 'practical rather than a technical construction.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) (citation omitted).

B. A pretrial decision rejecting a constitutionally rooted defense against the burdens of litigation is immediately appealable under Section 1291

In the decades since *Cohen*, this Court has "distilled" the "requirements for collateral order appeal … to three conditions: that an order "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted). The Court has emphasized that those "conditions are 'stringent,'" and should be "kept so," lest the collateral-order doctrine "overpower the substantial finality interests § 1291 is meant to further." *Id.* at 349-50 (citation omitted); *see, e.g.*, *Mohawk*, 558 U.S. at 106 (emphasizing that doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'") (citation omitted).

Reasonable disagreement exists about how well certain post-*Cohen* decisions cohere with that principle. Scholars have criticized the current state of the doctrine with descriptions such as "hopelessly complicated," "dazzling in its complexity," and "an unacceptable morass." Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1238 (2007) (footnotes and citations omitted); *see id.* at 1238-39 (collecting additional commentary). And the

Court itself has acknowledged "[a]s a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009).

For all the debate about Section 1291's outer limits, however, the Court has generally agreed on its heartland. As explained further below, that is all that is required to resolve this case. This brief accordingly does not attempt to comprehensively define the range of prejudgment decisions that can be "final" under Section 1291. Instead, it is enough that, under this Court's construction of the statute, a prejudgment decision is the proper subject of an immediate appeal under Section 1291 where the decision rejects a defense that (1) protects the losing party *against the burdens of litigation*, not just against liability, and (2) is *rooted in the Constitution* or another important source of public policy that overcomes the general federal preference for appeal only after final judgment. *See, e.g.*, Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 212 (2001) (explaining that prejudgment orders consistent with these categories will qualify as immediately appealable even under a "stringent" interpretation of Section 1291, but comparatively "few others will").[3]

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[3] This approach does not address the branch of the collateral-order doctrine pertaining to decisions (like the order rejecting a requirement to post security in *Cohen*) that would not terminate the litigation. *See, e.g.*, *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 n.1 (2022) (holding that an

1. As to the first of those criteria, this Court has long explained that Section 1291 may permit an immediate appeal from a prejudgment decision resulting in the denial of a "right *not to be tried*" (or to face other burdens of litigation), but that Section 1291 does not permit an immediate appeal from a decision that rejects a right merely *to be free from liability*. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (emphasis added). That is true even when the "remedy" for a violation of the liability protection is "the dismissal of charges." *Id.*; *see Mitchell*, 472 U.S. at 526 (similar).

That "crucial distinction" follows directly from the reasoning of *Cohen*. *Hollywood Motor Car*, 458 U.S. at 269. When a defendant invokes a protection against further trial proceedings, a district court's rejection of that protection is necessarily "conclusive" of the defense, because the defendant by definition must continue with the proceedings to which he objects. *Mitchell*, 472 U.S. at 527. For similar reasons, such a denial is "separate from the merits" and "effectively unreviewable" on appeal, because the defendant will have irretrievably lost the protection against further litigation regardless of the ultimate result on the merits or in a subsequent appeal. *Id.* at 527-28. By contrast, when a defendant invokes only a protection against liability, a prejudgment order rejecting the defense does not necessarily satisfy any *Cohen* factor,

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order to transport prisoner for medical testing was immediately appealable); *Sell v. United States*, 539 U.S. 166, 176-77 (2003) (holding that a forced-medication order in a criminal case was immediately appealable).

because the defendant retains the ability to adequately vindicate the protection from liability later in the trial litigation or on appeal. *See, e.g.*, *Lauro Lines v. Chasser*, 490 U.S. 495, 496 (1989); *Van Cuawenberghe v. Biard*, 486 U.S. 517, 530 (1988).

The distinction between a right not to be tried and a mere protection against liability is illustrated by two criminal-procedure cases decided by the Court in back-to-back Terms. In *Abney v. United States*, the Court held that the denial of a motion to dismiss a criminal prosecution on double-jeopardy grounds is appealable under Section 1291, because "the Double Jeopardy Clause protects an individual against more than being subjected to double punishments"; it provides "a guarantee against being twice *put to trial* for the same offense." 431 U.S. at 660-61 (emphasis added). Because that "protection[] would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken," the Court explained that only immediate appeal can give "full protection" to that constitutional right "not to face trial at all." *Id*. at 662 & n.7.

"In sharp distinction," the Court held a year later in *United States v. MacDonald*, 435 U.S. 850, 858 (1978), that the denial of a motion to dismiss on speedy-trial grounds is *not* appealable under Section 1291, because "the essence of a defendant's" speedy-trial claim is typically "that the passage of time has frustrated his ability to *establish his innocence* of the crime charge," not that is entitled to be entirely free from trial. *Id.* at 860 (emphasis added); *see id.* at 861 ("It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial.").

Given the centrality of that distinction, the paradigmatic example of a prejudgment order that may be immediately appealable under Section 1291 is the denial of an asserted "*immunity from suit*." *Mitchell*, 472 U.S. at 526. Because such immunities by their nature protect a defendant from any further litigation proceedings, this Court has repeatedly held that they may qualify for immediate appeal under Section 1291. *See Puerto Rico Aqueduct*, 506 U.S. at 144-45 (state-sovereign immunity); *Mitchell*, 472 U.S. at 526 (qualified immunity[4]); *Nixon,* 457 U.S. at 742-43 (absolute immunity); *cf. Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (protection under the Speech or Debate Clause, which protects Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves") (citation omitted). By contrast, the Court has held that many other asserted defenses fail to qualify as a "right not to stand trial." *Digital Equip.*, 511 U.S. at 871; *see id.* at 872-74 (collecting decisions).

2. At the same time, this Court has explained that an "order[] denying an asserted right to avoid the

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[4] Separate questions exist about the substance of the qualified-immunity doctrine. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018). This brief takes no position on that question. It is notable, however, that even Members of the Court who have expressed skepticism about the breadth of the collateral-order doctrine generally have consistently taken the position that denials of qualified immunity can be immediately appealed under Section 1291. *See, e.g.*, *Iqbal*, 556 U.S. at 672 (questioning the scope of the doctrine but stating that its "applicability … in the context of qualified-immunity claims is well established").

burdens of trial" is not alone enough to establish a right to immediate appeal under Section 1291. *Hallock*, 546 U.S. at 351. In part because the notion of a "right to avoid trial" plays into "the lawyer's temptation to generalize," *id.* at 350; *see Digital Equip.*, 511 U.S. at 873 (acknowledging that "there is no single, 'obviously correct way to characterize'" some asserted rights) (citation omitted), "some further characteristic" is needed for a prejudgment order to satisfy Section 1291, *Hallock*, 546 U.S. at 351.

That further characteristic is a "justification for immediate appeal" that is "sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk*, 558 U.S. at 107. And one sure way to demonstrate the requisite strength is to show that the asserted protection against the burdens of litigation "is embodied in a constitutional or statutory provision." *Digital Equip.*, 511 U.S. at 879; *see id.* ("Where statutory and constitutional rights are concerned, 'irretrievable loss' can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law.") (brackets and citation omitted).

The requirement that an asserted protection against the burdens of litigation must reflect such a "value of a high order," *Hallock*, 546 U.S. at 352, in order to be immediately appealable under Section 1291, also follows from *Cohen*. "The second [*Cohen*] condition insists upon '*important* questions separate from the merits.'" *Mohawk*, 558 U.S. at 107 (citation omitted). And "the third *Cohen* question, whether a

right is 'adequately vindicable' or 'effectively reviewable,' … cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equip.*, 511 U.S. at 878-79; *see Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine.").

In keeping with that understanding, the Court's cases finding prejudgment orders appealable under Section 1291 have consistently involved the denial of defenses rooted in the Constitution, statutes, or similarly higher-order public policies. *See, e.g.*, *Puerto Rico Aqueduct*, 506 U.S. at 145 (reasoning that the denial of an assertion of state-sovereign immunity is immediately appealable in part because it "involves a claim to a fundamental constitutional protection"); *Nixon*, 457 U.S. at 749 (invoking the constitutional "separation of powers"); *Helstoski*, 442 U.S. at 508 (1979) (Speech or Debate Clause); *Abney*, 431 U.S. at 660-61 (Double Jeopardy Clause); *see also Mitchell*, 472 U.S. at 525-26 (relying on the importance of the qualified-immunity defense to the effective operation of government). The Court, meanwhile, has declined to permit immediate appellate review of prejudgment orders rejecting defenses based on, *inter alia*, "the typical defense of claim preclusion" or private contractual agreements. *Hallock*, 546 U.S. at 355; *see Digital Equip.*, 511 U.S. at 873; *Lauro Lines*, 490 U.S. at 501.

C. A church-autonomy doctrine is a constitutionally rooted defense against the burdens of litigation

A district court's denial of a church-autonomy defense squarely implicates both of the criteria described above: (1) a church-autonomy defense is a protection against the burdens of litigation, not just against liability, and (2) that protection is constitutionally rooted. Orders that would force litigants who have asserted a church-autonomy defense to proceed through discovery and trial are accordingly immediately appealable under Section 1291.

First, a church-autonomy defense—like immunity defenses for states or government officials—provides an "entitlement not to stand trial or face the other burdens of litigation," not a mere "defense to liability." *Mitchell*, 472 U.S. at 526; *see* pp. 11-13, *supra*. This Court has long and repeatedly recognized that, on "matters of church government as well as those of faith and doctrine," a religious organization is entitled to be "free from state interference"—not just from judicial judgments. *Kedroff*, 344 U.S. at 116. Courts are accordingly "bound to stay out of" litigation over a religious entity's "internal management decisions," including "the appointment and authority of bishops." *Our Lady*, 140 S. Ct. at 2060-61; *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (explaining that the church-autonomy doctrine and its concomitant ministerial exception "bars such a suit"); *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 708 (1976). Indeed, the "very process of inquiry" into such internal religious matters "impinge[s] on rights guaranteed by the Religion

Clauses." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *see Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring) (explaining that the "mere adjudication" of such claims "pose[s] grave problems for religious autonomy"); *cf. Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.").

Second, a church-autonomy defense undeniably reflects the kind of "value of a high order" required to overcome the default policy against appeals before final judgment. *Hallock*, 546 U.S. at 352; *see Mohawk*, 558 U.S. at 107. By its terms, the doctrine embodies a protection against litigation that "originat[es] in the Constitution." *Digital Equip.*, 511 U.S. at 879. Specifically, the doctrine is rooted in the Religion Clauses, *see Our Lady*, 140 S. Ct. at 2060; *Kedroff*, 344 U.S. at 116, which provide a "structural" constitutional protection that "categorically prohibits federal and state governments from becoming involved in religious leadership disputes," *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *see, e.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-28 (1872) (grounding church-autonomy principles in the "broad and sound view of the relations of church and state under our system of laws" that "lies at the foundation of our political principles").

Accordingly, a defendant can immediately appeal the denial of a church-autonomy defense under Section 1291 for the same reasons that defendants can immediately appeal denials of defenses under the Double Jeopardy Clause, the Speech or Debate Clause, principles of state-sovereign immunity, and

the qualified- and absolute-immunity doctrines. *See, e.g.*, Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) (explaining that the church-autonomy doctrine "closely resembles qualified immunity for purposes of the collateral-order doctrine"); *see also* Moore, *supra* at 44-46 (similar); Lael Daniel Weinberger, *Is Church Autonomy Jurisdictional?*, Loyola U. Chi. L. Rev. (forthcoming 2023), bit.ly/3nqrcwe, at 24-26 (similar); Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) (similar). If anything, the appealability of denials of church-autonomy defenses follows *a fortiori* from the appealability of qualified-immunity defenses, because the church-autonomy doctrine rests on an express and "fundamental constitutional protection." *Puerto Rico Aqueduct*, 506 U.S. at 145.

II. This Court's Review Is Warranted

In this case, respondent brought a suit arising from a dispute over clergy appointments, and petitioners unsuccessfully moved to dismiss based on the church-autonomy doctrine. Pet. App. 6a-11a. The Second Circuit dismissed petitioners' appeal for lack of jurisdiction under Section 1291. *Id.* at 16a-24a. As explained above, however—and as cogently demonstrated by the five-judge dissent from denial of rehearing en banc, *id.* at 64a—the district court's decision should have been immediately appealable. The Second Circuit's error implicates exceptionally important and frequently recurring questions of both

civil procedure and constitutional law. And the widespread disagreement among lower courts on those questions strongly supports this Court's review.

A. The Second Circuit's decision is wrong

While the Second Circuit erred in applying each of the three *Cohen* factors, its central mistake was its conclusion that "[t]he church autonomy doctrine provides religious associations" with only "'an ordinary defense to liability.'" Pet. App. 21a (citation omitted). As explained above, the church-autonomy doctrine compels courts "to stay out of" litigation over a religious entity's "internal management decisions," including "the appointment and authority of bishops," *Our Lady*, 140 S. Ct. at 2060-61—not merely to refrain from entering judgments against religious entities in such circumstances, *see* pp. 16-17, *supra*.

The Second Circuit based its conception of the church-autonomy doctrine on this Court's holding that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." Pet. App. 21a (quoting *Hosanna-Tabor*, 565 U.S. at 195 n.4). But as the dissenting judges below correctly explained, "affirmative defenses, such as qualified immunity, may still be immediately appealable." *Id.* at 75a. Indeed, many paradigmatic bases for collateral-order appeals—*e.g.*, denials of dispositive motions based on double jeopardy, official or qualified immunity, and state-sovereign immunity—are not jurisdictional. *See id.* at 75a-76a.

The Second Circuit also relied on this Court's recent denial of certiorari in *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022), which "permitted a case to go forward to discovery and trial, notwithstanding

the defendant's invocation of the church autonomy doctrine." Pet. App. 22a. But as this Court has often explained, a "denial of a writ of certiorari … imports no expression of opinion upon the merits of the case." *Brown v. Davenport*, 142 S. Ct. 1510, 1529 (2022) (citation omitted). And contrary to the Second Circuit's suggestion (Pet. App. 22a), Justice Alito's statement respecting denial did not rely on a lack of appellate jurisdiction; it simply observed that addressing the jurisdictional question would "complicate" this Court's review. *Gordon College*, 142 S. Ct. at 952.[5]

Finally, while the Second Circuit acknowledged the parallels between the church-autonomy doctrine and qualified immunity, *see* Pet. App. 23a & n.10, it held that those parallels do not help petitioners because this case involves disputed facts and Section 1291 permits a qualified-immunity appeal only "on an issue of law," *id.* at 23a-24a (quoting *Mitchell*, 472 U.S. at 530, and citing *Johnson v. Jones*, 515 U.S. 304 (1995)). This Court has explained, however, that "the concerns that animated the decision in *Johnson*"—in which the Court found that a factual dispute precluded immediate review of a prejudgment order in a

[5] The appellate-jurisdiction question in *Gordon College* was whether this Court could review the state-court decision at issue under 28 U.S.C. § 1257, which authorizes review of "final judgments or decrees rendered by" state high courts. Although that language partially overlaps with prior versions of Section 1291, the federalism implications inherent in this Court's review of state-court decisions "introduce[] additional interests which must be accommodated in fashioning any exception to the literal application of the finality requirement." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 503 (1975) (Rehnquist, J., dissenting).

qualified-immunity case—"are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings." *Iqbal*, 556 U.S. at 674. Here, as in *Iqbal*, "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated." *Id.* at 674-75; *see, e.g.*, *Puerto Rico Aqueduct*, 506 U.S. at 147 (similar reasoning).

Once the church-autonomy doctrine is properly understood as a protection against the "burdens of litigation" and not "a mere defense to liability," *Mitchell*, 472 U.S. at 526, the remainder of the Second Circuit's reasoning is largely inapplicable. The court held that that the district court's rejection of the defense was not conclusive or separate from the merits for Section 1291 purposes because petitioners could still prevail at a later stage in the proceedings. Pet. App. 17a-21a. But because a church-autonomy defense functions as a protection against further proceedings (like double jeopardy and immunities), the district court's order was necessarily conclusive and separate from the merits for Section 1291 purposes because it subjected petitioners to those further proceedings. *See* pp. 16-17, *supra*.[6]

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[6] The Second Circuit also relied on the district court's assurance that those further proceedings would involve only "neutral" (*i.e.*, purportedly non-religious) legal principles. Pet. App. 19a, 21a. But the church-autonomy doctrine protects religious entities against the application of even "valid and neutral" laws to their internal governance decisions, which are inevitably implicated by

B. This Court's guidance is needed on the question presented

The Second Circuit is not the only court to misapply Section 1291 in dismissing an appeal from the denial of a church-autonomy defense. The Tenth Circuit recently issued a similar decision, *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021 (2022), *petition for cert. pending*, No. 22-741 (filed Feb. 3, 2023), which was similarly followed by a divided en banc rehearing vote and a forceful dissent from denial, *Tucker v. Faith Bible Chapel Int'l*, 53 F.4th 620, 625-30 (2022). By contrast, the Fifth and Seventh Circuits have permitted immediate appeal of church-autonomy defenses in at least some circumstances. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-73 (5th Cir. 2018); *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).[7]

As those decisions demonstrate, the question presented is frequently recurring and subject to deep disagreement among and within circuits. *See* Pet. App. 63a (Cabranes, J., dissenting); *id.* at 81a & n.10 (Park, J., dissenting). The question is also highly significant as a matter of both civil procedure and First Amend-

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petitioners' claims. *Hosanna-Tabor*, 565 U.S. at 190; *see* Pet. App. 77a-81a (Park, J., dissenting).

[7] The Second Circuit relied on *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014), but the Seventh Circuit there reaffirmed its *McCarthy* precedent and noted that the religious entity before it had spent "only a few sentences" of briefing addressing appealability and had not sought to invoke Section 1291 jurisdiction over the ministerial-exception ruling. *Id.* at 1091 & n.1.

ment law. This Court has rightly intervened to provide guidance on both those areas in the past, and the Court's review is readily warranted here as well.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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