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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Father Alexander admits he is a priest suing his former Church and its senior hierarchy over church disciplinary communications. His complaint concedes those communications were made solely because fellow clergy "opposed [his] appointment as the Bishop of Miami." App.111a. On those admissions alone, his case should have been dismissed as a blatant violation of the First Amendment.

There is no "neutral" way to determine whether a priest should have been a bishop, or whether his election was authentic. Nor is it "neutral" to allow a defrocked priest to use judicial power to compel church hierarchs to sit for depositions over how they frustrated his ecclesiastical ambitions. Yet, according to the panel, the First Amendment can be artfully pled into irrelevance until (at best) after merits discovery and trial. As five dissenting judges warned below, the panel's holding "swallows the church autonomy doctrine altogether" and "eviscerate[s]" the church-state protections it guarantees.

This dire result stems from the panel's central error: reducing church autonomy to an ordinary defense against liability, with no concern for the entangling judicial process by which courts adjudicate conflicts between ministers and churches. Until last year, no court took such a narrow view of religious independence. But now there is a sharp, intractable split over whether religious governance decisions belong to the church alone, or if they may first be probed by civil courts, juries, and enforcement agencies. As Judge Cabranes said, "the issues at hand are of 'exceptional importance'" and "should be reviewed by the Supreme Court."

I. Courts are divided over the scope of the Religion Clauses.

A. Courts are divided over whether the Religion Clauses provide a form of immunity.

Respondent embraces the panel's liability-only holding, which is its core error. BIO.29; App.21a ("ordinary defense to liability"). And he doesn't dispute that the Tenth Circuit and Massachusetts agree with that holding.

1. Thirteen federal circuits and state high courts disagree. Pet.17-20. In those courts, "the very process of inquiry" into religious governance—not merely the imposition of liability—can "impinge on rights guaranteed by the Religion Clauses." *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968, 982-983 (7th Cir. 2021) (en banc) (quoting *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979)); accord *Duquesne Univ.* v. *NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (same). Allowing judges to probe ministerial choices is an "*independent*" constitutional harm that "*alone* is enough to bar the involvement of the civil courts," since such inquiry "*necessarily* intrude[s] into church governance." *Combs* v. *Cent. Texas Ann. Conf.*, 173 F.3d 343, 350 (5th Cir. 1999) (emphases added). Scholars agree, Scholars Br.12-20, as do tradition and caselaw starting before the Founding, Belmont Abbey Br.4-14.

2. Respondent's counterarguments fail. First, he mischaracterizes the ruling below. He claims that—in a case about a priest suing his church over not being made bishop—the ministerial exception somehow isn't at issue and the panel "[n]ever addressed" the exception. BIO.12, 18-19, 26. Not so. The panel agreed with

the Church that "the ministerial exception is one component of church autonomy" and thus analyzed both protections together, over Respondent's objection. App.21a (citing *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S.Ct. 2049, 2060-2061 (2020)); App.12a; accord App.48a (district court acknowledging exception as "controlling legal doctrine[]"). Indeed, the panel drew support for its core error—denial that the Religion Clauses provide a form of immunity—from *Hosanna-Tabor*'s ruling that the *ministerial exception* is not a jurisdictional bar. App.21a-22a. And the panel repeatedly addressed ministerial exception caselaw. App.15a-18a, 21a-22a; BIO.15, 29-30. It just landed on the wrong side of the split.

Respondent's treatment of church autonomy fares no better. His mention of *Milivojevich*, BIO.29, fails to address how it held that inquiries into "the ecclesiastical actions of a church" violate the First Amendment. 426 U.S. 696, 713, 721, 724-725 (1976). He ignores this Court's other key precedents, such as *Catholic Bishop*, *Kedroff*, and *Watson*—all cited in the petition and the Second and Tenth Circuit dissents, and all "leading to the same conclusion": the Religion Clauses bar judicial inquiry, not merely liability. App.72a.

When Respondent finally reaches the split, he ignores the First Circuit and largely concedes that three other courts *do* break with the panel—but says they don't count because *Hosanna-Tabor* overruled them *sub silentio*. BIO.20 & n.5 (citing 565 U.S. 171, 195 & n.4 (2012) and Pet.17, 18, 20, attacking "decades-old cases"). But *Hosanna-Tabor* "agree[d]" with most existing precedent, including the cases supporting the Church. 565 U.S. at 188 & n.2. Respondent thus leaves much of the split unaddressed.

He also fails to reconcile the Third, Sixth, and Seventh Circuit cases recognizing the structural nature of church autonomy. Compare BIO.19-20, with Pet.19 (citing *Sixth Mount Zion*, *Conlon*, and *Tomic*). He has no response to *Tomic*, and his attempt to distinguish *Sixth Mount Zion* and *Conlon* as "waiver" cases ignores that they categorize Religion Clauses protection as "structural." See App.75a (citing *Conlon*). All three circuits treat the ministerial exception as barring interference even when parties invite it—confirming that the exception is about more than just liability. Pet.19-21. Indeed, where "structural constitutional claims" contest "subjection to an illegitimate proceeding" and not just the outcome, the claim of right is comparable to this Court's "established immunity doctrines." *Axon Enterprise* v. *FTC*, 143 S.Ct. 890, 903-904 (2023). In such contexts, resolving liability on appeal is too little, too late. *Ibid*.

Respondent says little about *McCarthy* v. *Fuller*, where the Religion Clauses provided immunity against judicial resolution of an expelled nun's defamation claims over her religious status—claims that included allegations of forged church documents. 714 F.3d 971 (7th Cir. 2013). He counters with dicta from an unpublished one-page order. BIO.15-16 (citing *Starkey* v. *Roman Catholic Archdiocese*, No.20-3265, 2021 WL 9181051 (7th Cir. July 22, 2021)). But that order turned on conclusiveness considerations, not immunity, and expressly noted that immunity concerns over merits discovery and trial were not yet at issue. Here, without this Court's intervention, the next steps *are* depositions of senior hierarchs and then jury trial about internal religious governance. That's what *McCarthy* bars. And that's why Massachusetts' high court put *McCarthy* on the other side of the split from

the Tenth Circuit (and thus, the panel below). *Doe* v. *Roman Catholic Bishop of Springfield*, 190 N.E.3d 1035, 1044 (Mass. 2022) (recognizing split).

Finally, what Respondent manages to say about the state courts is wrong. *Diocese of Lubbock* prohibits not just liability, but "any investigation" into a claim barred by church autonomy. Pet.20. Kentucky held that church autonomy is akin to immunity. *St. Joseph Catholic Orphan Soc'y* v. *Edwards*, 449 S.W.3d 727, 737 (Ky. 2014). And the Connecticut Supreme Court just confirmed *Dayner* does the same, noting that "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and trial process itself a [F]irst [A]mendment violation." *Smith* v. *Supple*, ---A.3d---, 2023 WL 3214149, at *9 (Conn. May 2, 2023) (quoting *Dayner*), accord *id.* at *20 n.11 (D'Auria, J., dissenting) (*Dayner* upheld "immunity from suit").

3. Thus, the split is sharp, acknowledged, and growing. On the minority side, houses of worship can be haled into court over ministerial discipline—and the First Amendment has nothing to say unless they are on the wrong end of a judgment. But on the majority side, being "haled into court" over such internal governance can itself offend the First Amendment. *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996); *Tilton* v. *Marshall*, 925 S.W.2d 672, 682 (Tex. 1996) ("trial itself," not "merely the imposition of an adverse judgment, would violate [defendant's] constitutional rights"). Certiorari is warranted to resolve this dispute over structural issues at the heart of the Religion Clauses.

B. Courts are divided over whether Religion Clauses defenses are immediately appealable.

The panel's immunity analysis led it to hold that denial of the exception is ineligible for interlocutory review (App.21a-22a)—in conflict with two circuits and four state supreme courts.

Respondent opines at length on the "patchwork" of collateral-order cases, apparently hoping to suggest that this case involves the outer boundaries of that doctrine. BIO.3-6. It does not. The church autonomy doctrine, including its ministerial exception, sits in the heartland of interlocutory appeal precedent because it is a constitutional immunity to suit. Muller Br.4-9. As such, orders denying church autonomy defenses "generally fall within the collateral order doctrine" because they won't be reviewable after entry of final judgment. *Plumhoff* v. *Rickard*, 572 U.S. 765, 771-772 (2014). Defenses against "subjection to an unconstitutionally structured decisionmaking process" are "'effectively lost'" if "deferred until after trial." *Axon*, 143 S.Ct. at 904 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)).

Respondent fails to identify a single court or scholar that, before *Faith Bible*, categorically rejected church autonomy defenses as eligible for interlocutory appeal. Prior cases and scholarship went the other way. See Scholars Br.6-23. The closest he comes is *Herx*, but Judge Sykes emphasized the case-specific narrowness of her holding and confirmed *McCarthy*'s precedent that church autonomy defenses *can* be eligible for interlocutory appeal. Pet.26-28.

Similarly, Respondent's characterization of *Whole Woman's Health* as solely about third-party subpoenas ignores the Fifth Circuit's analysis and twists courts' subsequent treatment. BIO.16. Simply reciting a case's facts does not "make clear" its reasoning was limited to third-party discovery. Pet.25.

Respondent concedes four states have found Religion Clauses defenses immediately appealable, BIO.16-17, but asserts those cases don't matter because they arise under state procedures. Again, the issue is whether the Religion Clauses provide an appealable immunity from merits litigation. Each state held they do. And Connecticut just confirmed that an order denying a motion to dismiss based on the ministerial exception is an "appealable final judgment," since "the discovery and trial process itself" would violate the Religion Clauses. *Smith*, 2023 WL 3214149, at *9.

This case is not, as Respondent claims, about whether "*every* order addressing the church-autonomy doctrine" is immediately appealable. BIO.i. Courts may take some threshold steps before resolving a dispositive church autonomy defense. Pet.36. But that resolution must still occur *before* the irreparable harm of merits litigation, a principle rejected by the decisions at issue. The question here is whether *any* dispositive Religion Clauses defense can *ever* be appealed before merits discovery and trial. Three courts say no; six say yes. That warrants review.[1]

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[1] Respondent complains about the timeliness of the Church's motion to reconsider. But the motion complied with the federal rules, and the district court's timeliness ruling turned on its mistaken view that the dismissal order wasn't appealable. App.46a.

II. Courts are divided over whether the "neutral principles" approach can be used to adjudicate church leadership disputes.

Respondent agrees that the Second Circuit joined the Fifth and Eighth Circuits to import the "neutral principles" approach from property law to govern ministerial disciplinary matters. He leaves uncontested that Alaska and South Carolina did too. He also fails to say a word about the eight judges joining two dissents from the Fifth Circuit's ruling, Pet.33, or respond to the five Second Circuit dissenters who warned the panel's approach will "eviscerate the church autonomy doctrine." App.81a.

Respondent likewise makes no answer to the point that this Court has never used the "neutral principles" approach outside the property context, and both *Milivojevich* and *Hosanna-Tabor* rejected its imposition for church governance. Pet.30-31; States' Br.10-14. Not that there's much he could say. Under the Second Circuit's rule, cases like *Milivojevich*, *Hosanna-Tabor*, and *Gonzalez* should have been governed by corporate, nondiscrimination, and trust law, not the First Amendment. Pet.30-31. As the dissenters warned, the panel's rule "swallow[s] the church autonomy doctrine altogether," App.79a, since *any* religious dispute can be reframed as controlled by "neutral principles," JCRL Br.9-13.

Straining to distinguish the six courts on the other side of the split, Respondent says those courts—and church autonomy principles more generally—foreclose using neutral principles "only" when a claim "would require the court to answer ecclesiastical questions." BIO.20-22. But in fact those courts have repeatedly re-

jected that narrow view. Rightly so: the church autonomy doctrine's guarantee of "independence from secular control or manipulation" extends to "*matters of church government as well as* those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (emphasis added) (quoting *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952)).

The lead case is *Hutchison* v. *Thomas*, 789 F.2d 392, 396 (6th Cir. 1986), which Respondent mischaracterizes as concerning only competing interpretations of church policies. In fact, as here, the "essence" of the defamation claim was that church officials intentionally sabotaged the minister's pastoral role by engaging in "fraud and misrepresentation." *Id.* at 393. That claim was barred because courts cannot "interfere with the internal ecclesiastical workings and disciplines of religious bodies," and must defer to the church. *Ibid. Hutchison* emphasized that "[t]he 'neutral principles' exception to the usual rule of deference applies *only* to cases involving disputes over church property," and "has *never* been extended to religious controversies in the areas of church government, order, and discipline, *nor should it be*." *Id.* at 396 (emphases added). When it comes to "the fundamental question of who will preach from the pulpit," churches are "immune from * * * subjection to the authority of the civil courts." *Id.* at 394.

The D.C. Circuit also rejected "neutral principles" in a ministerial dispute, concluding "'[c]ivil courts should not be entangled in such disputes.'" *Catholic Univ.*, 83 F.3d at 466. Contrary to Respondent's claim that the court allowed "purely secular" second-guessing, BIO.23, *Catholic University* said that the trial court rightly found that it was "neither reasonably

possible nor legally permissible" to resolve the case under the "neutral principles" rubric. 83 F.3d at 465-466.

State courts likewise reject using "neutral principles" in ministerial discipline cases. *El-Farra* v. *Sayyed* rejected the "neutral principles" approach and held that the defamation claim at issue was barred *both* because it would require answering religious questions *and* because it arose "in the context of a dispute over appellant's suitability to remain as Imam." 226 S.W.3d 792, 796-797 (Ark. 2006). *Heard* v. *Johnson* found "neutral principles" inapplicable to a minister's defamation claim because clergy discipline is "a core matter of ecclesiastical self-governance" and—even when alleged defamation "did not overtly express any religious principles"—the claim was "impossible to consider * * * apart from the church's decision to terminate the plaintiff's employment." 810 A.2d 871, 881-884 (D.C. 2002) (quoting *Cha* v. *Korean Presbyterian Church*, 553 S.E.2d 511, 516 (Va. 2001)).[2] And *Hiles* v. *Episcopal Diocese* held that where, as here, a minister's defamation claim "arises out of the church-minister relationship in the religious discipline context," it is not governed by "established rules of common law," but rather "comes within the category of the freedom to believe," which is "entitled to absolute protection." 773 N.E.2d 929, 935-938 (Mass. 2002). Indeed, allowing such claims would punish houses of worship for holding wayward clergy accountable. *In re Diocese of Lubbock*, 624 S.W.3d 506, 519 (Tex. 2021); Denominations Br.9-15. See also *St. Joseph*, 449 S.W.3d at 739.

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[2] Respondent says *Heard* and *Cha* were silently overruled. BIO.22. His cited cases don't say that. *Meshel* is about arbitration, *Bowie* about assault. Neither concerned minister discipline.

Finally, Respondent leaves undisputed that "most courts" reject clergy defamation claims, *Cha*, 553 S.E.2d at 516, but quibbles over *how* they do so. BIO.22-23. That is irrelevant to the split. Under the panel's two-paragraph analysis—built on a single unpublished case—*all* church autonomy defenses fall under the neutral-principles approach. App.15a-16a. That ruling is what "eviscerate[s]" religious independence, App.81a, and deepens an important split.[3]

III. This appeal is an excellent vehicle to resolve these important questions.

This case presents issues of "exceptional importance" at the heart of the Religion Clauses. App.63a. And it is an excellent vehicle to decide them.

Respondent claims that this case is a poor vehicle because of supposed "factual disputes." BIO.24-25. But his counsel just told this Court that, at the motion-to-dismiss stage, "the question is always a purely legal one." BIO.22, *Faith Bible*, No. 22-741 (Apr. 10, 2023). That was correct. Pet.34-35; Muller Br. 20-21. The complaint supplies everything needed to dismiss this case. As Judge Park explained, Father Alexander's defamation claim will require a court to judge "the reasons for the church's decisions, including whether Defendants correctly determined that [Father Alexander] was never elected Bishop of Miami and whether they acted in good faith—all matters of 'internal

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[3] Respondent claims the Church did not challenge that the district court ignored the clergy letter—the undisputedly authentic "heart" of his complaint. BIO.11; C.A.Dkt. 22-2 at 2. But if it was even necessary to brief the issue (given that the trial court did not *exclude* the letter, which would have been plain error), both parties did so. C.A.Br.23, C.A.Resp.46, C.A.Reply.4-5.

church procedures.'" App.80a (quoting *Milivojevich*, 426 U.S. at 718). And Father Alexander's own undisputed actions—threatening to sue in defamation most of the domestic leadership of Orthodox denominations—shows he sees the panel's holding as far from fact-bound. Pet.8.

Moreover, permitting the Second Circuit's neutral-principles holding to stand would undermine the tools lower courts have developed to resolve ministerial cases without entanglement. Pet.35-36; EPPC Br.15 & n.3. Indeed, in this very case, the district court denied bifurcated discovery and 1292(b) certification because it believed it could adjudicate the case under "neutral principles" without interfering with church autonomy. App.45a-49a, 52a-54a; see also App.22a (showing, *contra* BIO.34, mandamus unavailable until collateral-order appeal fails). Leaving these errors uncorrected will invite enforcement agencies to also try their hand at "neutral" interference in church affairs. *Catholic Univ.*, 83 F.3d at 465-466 (rejecting EEOC's attempt to subject ministerial dispute to "neutral principles"); Former EEOC Officials Br.15-18, *Faith Bible*, No. 22-741 (Mar. 10, 2023).

Finally, considering this case alongside *Faith Bible* would enhance this Court's review. The cases provide complementary paths to resolving the same question: whether the Religion Clauses offer protections from judicial intrusion into church leadership decisions.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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