No. 25-849

IN THE

Supreme Court of the United States

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
Petitioner,

v.

DAVID O'CONNELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF *AMICI CURIAE* LAW & RELIGION SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are legal scholars who research, write, and teach about the First Amendment's Religion Clauses and the interplay of law and religion. *Amici* write to explain that the church autonomy doctrine is best understood as an immunity from suit that courts should resolve at the first opportunity—including on interlocutory appeal—rather than exposing religious organizations to costly litigation before concluding that the doctrine applied all along.

Amici are the following 10 legal scholars:

Barclay, Stephanie	Lund, Christopher
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Clark, Elizabeth	Moreland, Michael P.
Garnett, Richard W.	Pushaw, Robert J.
Laycock, Douglas	Volokh, Eugene

Amici have written extensively on matters relevant to this case. An overview of *amici*'s relevant scholarship is included in the Appendix.

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief 's preparation or submission.

SUMMARY OF ARGUMENT

The church autonomy doctrine safeguards religious institutions' constitutional right to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions" without government interference. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981). This constitutional doctrine is not simply an affirmative defense; it creates a structural immunity from suit, and religious organizations must be able to take an interlocutory appeal from a trial court's refusal to dismiss a claim that implicates the doctrine. The Petition here presents both of these exceptionally important and recurring questions, and this Court should grant review to consider them.

First, the decision below deepens an acknowledged split among the lower courts on whether the church autonomy doctrine is a constitutional immunity from suit or merely an affirmative defense. The Court should grant the Petition and hold that it is an immunity from suit.

The justifications underlying the church autonomy doctrine are even more compelling than in the case of other well-recognized official immunities. The church autonomy doctrine is grounded in the Constitution and has a well-established history and tradition. Without it, courts would adjudicate fundamentally religious questions that they are not qualified to answer, chilling religious expression, impermissibly intruding into religious affairs, and substituting a secular court's opinions for religious decisions made by religious organizations.

Second, and relatedly, the decision below also deepens a split on whether the denial of church autonomy immunity is immediately appealable under the collateral-order doctrine. The Court should grant the Petition and hold that it is.

The denial of church autonomy immunity is immediately appealable because the church autonomy doctrine "protect[s] against the very process of litigation and judicial review." Lael Weinberger & Branton Nestor, *Church Autonomy and Interlocutory Appeals*, 102 Notre Dame L. Rev. __ (2026), https://tinyurl.com/mrw49fca (manuscript at 6–7). Because it is an immunity *from suit*, the church autonomy doctrine would be nullified if an order rejecting its application could not be appealed until final judgment—after intrusive and expensive discovery, depositions, and potentially trial. At that point, a religious institution has already suffered substantial harm to its autonomy—as a "'chorus of circuit-court dissenters'" have explained. Pet. App. 51a (Walker, J., concurring). For example, if the district court orders discovery into a priest's sermon notes to adjudicate a plaintiff's claim, the priest "cannot be made whole by a take-nothing judgment months or years later." *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 645 (5th Cir. 2025). The interests protected by the church autonomy doctrine, like those protected by official immunities, are "'effectively lost' ... [w]hen a case is 'erroneously permitted to go to trial.'" Pet. App. 91a (citation omitted) (Rao, J., dissenting).

The questions here are important and warrant this Court's review and reversal. Although *amici* share the concerns identified in the Petition regarding the third question presented on "neutral principles,"

this brief focuses on the need for immediate appellate review where trial courts reject religious organizations' assertion of their constitutionally protected autonomy. Unless the Court enforces the doctrine as an immunity that is immediately appealable, religious organizations will be subject to unconstitutional intrusion by civil courts into religious law and polity, will incur substantial costs of litigation, and will be forced to settle even vexatious claims. The Court should grant the Petition and reverse.

ARGUMENT

I. THE CHURCH AUTONOMY DOCTRINE GUARANTEES RELIGIOUS ORGANIZATIONS AN IMMUNITY FROM SUIT.

The D.C. Circuit below, and the four other courts it followed, have failed to consider the constitutional, historical, common law, and public policy concerns reinforcing that the church autonomy doctrine is an immunity from suit—not just a regular defense to liability. In fact, the immunity from suit provided by the church autonomy doctrine has a stronger underpinning than other immunities this Court has recognized.

A. The Church Autonomy Doctrine Is An Immunity From Suit.

The church autonomy doctrine is a "constitutional immunity from suit"—and should be treated like other "immunity" doctrines. *McRaney*, 157 F.4th at 641.

This Court in *Hosanna-Tabor* established that the First Amendment "*prohibits* government involvement in … ecclesiastical decisions," thereby making it "*impermissible*" for a court to contradict a church's selection of its ministers—accordingly, it "*bars*" covered suits. *Hosanna-Tabor Evangelical Lutheran Church*

& Sch. v. EEOC, 565 U.S. 171, 185, 189, 196 (2012) (emphases added); *see also* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1507 (1998) (discussing the "impropriety of getting secular courts involved in religious disputes"). Similarly, *Our Lady of Guadalupe* instructed that courts are "bound to stay out of employment disputes" implicating the church autonomy doctrine. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020). The doctrine therefore reflects "a structural constitutional protection implicating the separation of powers and the competency of courts." *McRaney*, 157 F.4th at 644 (collecting cases); *see also* Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. 705, 709–712 (2025).

This church autonomy analysis tracks how the Court has treated other immunities. When it recognizes immunity from suit, this Court has been guided by the Constitution, "history," "common law," and "concerns of public policy." *Nixon v. Fitzgerald*, 457 U.S. 731, 747–48 (1982). The Court has relied on these considerations in fashioning an *absolute immunity* from suit in analogous contexts.

For example, legislators are entitled to immunity for their speech that falls within the Constitution's Speech or Debate Clause. U.S. Const. art. I, § 6, cl. 1. The Supreme Court has referred to the Clause as "an absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). Dating back to the sixteenth century, it embodies a "privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *see also*

Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 419 n.124 (1996). That "privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial" or "to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, 341 U.S. at 377.

Similarly, "a former President … is entitled to absolute immunity from damages liability predicated on his official acts." *Nixon*, 457 U.S. at 749. That immunity is a "functio[n]" of his "office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* In fact, "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32; *see also Trump v. United States*, 603 U.S. 593, 613 (2024).

Judges, too, enjoy immunity "for acts done … in the exercise of their judicial functions," a principle that has "'a deep root in the common law.'" *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (citation omitted); *accord Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978). This Court has expressed concern that "[i]mposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Prosecutors likewise enjoy a "common-law immunity … based upon the same considerations that underlie the common-law immunities of judges." *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976). They receive an immunity from civil suits regarding official actions because of the "concern that harassment by

unfounded litigation would cause a deflection of the prosecutor's energies from his public duties," raising "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

All of these immunities have been held to be "*immunit*[*ies*] *from suit*," not "mere defense[s] to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Immunities generally give rise to "an entitlement not to stand trial or face the other burdens of litigation." *Id.* This Court has thus "'repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). Courts must be "'alert'" to prevent harassment, including by "'quickly terminat[ing]'" lawsuits at the motion-to-dismiss or summary-judgment stage when presented with a valid immunity claim. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (citation omitted).

B. The Church Autonomy Doctrine Rests On Even Stronger Foundations Than Other Immunities.

The church autonomy doctrine is firmly grounded in the Religion Clauses of the First Amendment. And, like other immunities, the church autonomy doctrine is also supported by common law and history, along with practical policy concerns.

1. Constitutional Text and Structure. The Court has recognized that "the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 591 U.S. at 746 (cleaned up). "State interference in that

sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id*.

The church autonomy doctrine is thus both a substantive guarantee of individual rights and "a structural limitation imposed on the government by the Religion Clauses." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *see also Billard v. Charlotte Catholic High Sch.*, 101 F.4th 316, 325 (4th Cir. 2024). The doctrine prohibits any "[s]tate interference" in the "sphere" of religious institutions' internal governance. *Our Lady of Guadalupe*, 591 U.S. at 746. And it reflects the foundational "limit[s] [on] the role of civil courts" that prevent them from "entangle[ment] in essentially religious controversies." *Serbian E. Orthodox Diocese for United States & Canada v. Milivojevich*, 426 U.S. 696, 709–10 (1976); *see NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979); *see also* Stephanie H. Barclay, *Untangling Entanglement*, 97 Wash. U. L. Rev. 1701, 1708–10, 1720–22 (2020). Courts deciding questions of faith and doctrine "risk judicial entanglement in religious issues." *Our Lady of Guadalupe*, 591 U.S. at 761.

It is precisely for this reason that the church autonomy doctrine operates as an immunity and not merely as a defense from suit. As this Court recently explained, a defense from suit "advances some reason why [a party's] conduct was not unlawful," whereas a claim for immunity "does not turn on [the] conduct's legality." *Geo Grp., Inc. v. Menocal*, No. 24-758, 607 U.S. ___, 2026 WL 513536, at *5 (Feb. 25, 2026). A

defense "runs out when the [party] may have violated the law." *Id.* at *6.

The church autonomy doctrine does not turn on the legality of a church's conduct. Instead, it is a structural constitutional limitation on a state's ability to regulate the religious sphere. That is why, for example, the ministerial exception—which is derived from the church autonomy doctrine—protects a church in making its employment decisions without considering whether those decisions are considered "lawful" under relevant employment laws. *Hosanna-Tabor*, 565 U.S. at 196 (holding that the ministerial exception "bars" a suit "challenging [a] church's decision to fire [a minister]"). A church invoking the ministerial exception—and the church autonomy doctrine by extension—is not arguing that it "did nothing wrong" but rather that it is "shield[ed]" from suit entirely. *Menocal*, 2026 WL 513536, at *5.

This is not a new idea. John Locke, an "indispensable part of the intellectual backdrop" for the founding generation, supported a structural limit on courts deciding religious questions. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 130 Harv. L. Rev. 1409, 1431 (1990). For Locke, "the whole jurisdiction of the magistrate reaches only to … civil concernments," and "all civil power, right, and dominion, is bounded and confined to … promoting these things," such that "it neither can nor ought in any manner to be extended to the salvation of souls." John Locke, *A Letter Concerning Toleration* (1689), *reprinted in* 5 *The Founders' Constitution* 52, 52 (Philip B. Kurland & Ralph Lerner eds., 1987).

The founding fathers also "embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2011-2012 Cato Sup. Ct. Rev. 307, 313. For example, when the Ursuline Sisters of New Orleans were concerned about the impact of the Louisiana Purchase on their school for orphaned girls, Thomas Jefferson assured them that "your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority." *Id.* at 312–13. Likewise, James Madison—"the leading architect of the religion clauses" (*Hosanna-Tabor*, 565 U.S. at 184 (citations omitted))—publicly rejected the idea that "the Civil Magistrate is a competent Judge of Religious Truth," and argued that "Religion" was "exempt from the authority" both of "Society at large" and "that of the Legislative Body." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* 5 *The Founders' Constitution* 82, 82–83 (Philip B. Kurland & Ralph Lerner eds., 1987).

Madison emphasized this point with respect to religious organizations' selection of their leaders: "[t]he 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs' … prevent[s] the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63–64 (1909)). Any attempt by the state to control "'the election and removal of [a] Minister,'" Madison believed, "'exceeds the rightful au-

thority to which Governments are limited, by the essential distinction between civil and religious functions.'" *Id.* at 184–85 (emphasis omitted) (quoting 22 Annals of Cong. 982–83 (1811)).

These principles were confirmed in practice. When the Vatican sought congressional approval of a Bishop-Apostolic for America, Benjamin Franklin replied that sending that request to Congress "would be absolutely useless" because Congress "can not … intervene in the ecclesiastical affairs of any sect." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011) (citation omitted). Congress, in turn, responded that it had "no authority to permit or refuse" the appointment, and the Pope could appoint whomever he wished because "the subject … being purely spiritual … is without the jurisdiction and powers of Congress." *Id.* (citation omitted).

2. Common Law and History. This Court's first church autonomy decision—*Watson v. Jones*—involved a dispute between two church factions that had split into "distinct bodies" over the issue of slavery, each claiming to be the real "church." 80 U.S. (13 Wall.) 679, 717 (1871). The highest governing body of the denomination determined that the anti-slavery faction was the authorized church. The Court refused to disturb that conclusion, explaining that "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" is "a matter over which the civil courts exercise no jurisdiction." *Id.* at 733.

The Court treated this limitation as structural. By "inquir[ing] into" such matters, the "civil courts"

"would deprive [religious] bodies of the right of construing their own church laws." *Id.* Thus, based on "a broad and sound view of the relations of church and state under our system of laws," the Court held "that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories," then "the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

Watson reflected a broader understanding that "church autonomy principles limited the power of civil courts over ecclesiastical matters reserved to ecclesiastical institutions"—and that church autonomy principles operated as a structural limitation that protected church-state relations from incursion by secular authorities, including civil courts. Branton Nestor, *Judicial Power and Church Autonomy*, 100 Notre Dame L. Rev. 101 (2026), https://tinyurl.com/yc8pwm4r (manuscript at 12–22 (collecting cases)); *see* Lael D. Weinberger, *The Origins of Church Autonomy: Religious Liberty After Disestablishment*, ___ Va. L. Rev. ___, https://tinyurl.com/3k5yhrza (manuscript at 13) (early decisions recognized a "sphere of ecclesiastical authority with which the civil courts ought not to interfere"); *see also*, *e.g.*, *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (S.C. App. Eq. 1843) ("It belongs not to the civil [authority] to enter into or review the proceedings of a Spiritual Court."); *State ex rel. Watson v. Farris*, 45 Mo. 183, 198 (Mo. 1869) ("total disconnection between church and state"—and "neither will interfere with the other when acting within their appropriate spheres"); *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 259 (Ky. 1842) ("judicial eye of the civil authority … cannot penetrate the veil of the Church, nor can the arm of this Court

either rend or touch that veil"). Early decisions "recogniz[ed] a sphere of church autonomy for religious institutions"—which "protected certain religious matters from judicial interference." Pet. App. 79a, 81a (Rao, J., dissenting).

3. Practical Concerns. The church autonomy doctrine also reflects practical concerns similar to other immunity doctrines.

First, courts are "ill equipped to resolve" issues of religious doctrine—which are "not within the judicial function and judicial competence." *Thomas v. Rev. Bd.*, 450 U.S. 707, 715–16 (1981). That is not to say that courts and juries lack "technical or intellectual capacity." Berg et al., *supra*, at 176. But "matters of faith" may not be strictly "rational or measurable by objective criteria" of the sort that courts and juries are used to applying. *Milivojevich*, 426 U.S. at 714–15. And "[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes." *Id.* at 714 n.8 (citation omitted); *see also Thomas*, 450 U.S. at 716. Thus, there is a high risk of error when courts or juries weigh in. And therefore, courts are often prone to underenforce the church autonomy doctrine. *See*, *e.g.*, *Billard*, 101 F.4th at 333 (reversing denial of ministerial exception defense); *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 985 (7th Cir. 2021) (en banc) (same).

For example, a religious institution's employment decisions present such practical challenges. Revisiting a religious institution's selection of its leadership and membership would require courts to probe and evaluate specific religious views. The factfinder would need to "si[t] in ultimate judgment of what the accused church really believes, and how important

that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

Suppose that a church fired its pastor because his sermons violated church doctrine and he was not meeting the religious needs of the congregation. A court has no tools to adjudicate that dispute without running afoul of the church autonomy doctrine. It cannot resolve questions of church doctrine. Nor can a civil court resolve questions of fitness for religious leadership. Civil courts are "ill-equipped" to answer those questions. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017); Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 850 (2012). And even the "mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring).

Second, even a brief inquiry into church governance or doctrine can chill the free exercise of religion. This Court has recognized the "significant burden" that religious organizations face if made to "predict which of [their] activities a secular court will consider religious." *Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). Beyond any actual penalties imposed by the courts, "[f]ear of potential liability" has a profound chilling effect on "the way an organization carrie[s] out … its religious mission." *Id.*

That fear is compounded by the enormous monetary costs associated with litigation. Even if a religious institution is ultimately successful on the merits, it would incur enormous attorneys' fees without any possibility of reimbursement. In fact, it would face the threat of paying the *plaintiff's* attorneys' fees

depending on the result. *See* Garnett & Robinson, *supra*, at 329 (noting the organizational "distraction" of enduring "extensive and costly litigation"); *cf. Coinbase v. Bielski*, 599 U.S. 736, 743 (2023) ("[P]arties also could be forced to settle to avoid the district court proceedings"). That resulting chilling effect is one of the "dangers that the First Amendment was designed to guard against," making it essential to protect "religious organizations['] autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring). In short, the "process is the punishment." Weinberger & Nestor, *supra* (manuscript at 29).

II. DENIAL OF CHURCH AUTONOMY IMMUNITY SHOULD BE IMMEDIATELY APPEALABLE.

Because church autonomy is an immunity from suit, not just a defense in litigation, application of the doctrine should be determined at the earliest possible point in litigation, and denial of the immunity should be immediately appealable under the collateral-order doctrine. Otherwise "the district court's decision is effectively unreviewable on appeal from a final judgment." *Mitchell*, 472 U.S. at 527.

First, denials of other analogous immunities are subject to immediate appeal under the collateral-order doctrine, and there is no reason for treating church autonomy immunity any differently.

This Court has recognized that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment" because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525; *see, e.g.*, *Nixon*, 457 U.S. at 742–43 (presidential immunity); *Helstoski v.*

Meanor, 442 U.S. 500, 507 (1979) (legislative immunity). Denials of official immunities are immediately appealable because they satisfy the collateral-order doctrine established in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). And they have been deemed "an entitlement not to stand trial under certain circumstances" (*Mitchell*, 472 U.S. at 525), based on a "substantial public interest" in preserving a "value of a high order" (*Will v. Hallock*, 546 U.S. 345, 352–53 (2006)). As this Court recently recognized, once a doctrine is identified as an "immunity from suit," that provides a "ready way of determining" whether it can satisfy the test for interlocutory review. *See Menocal*, 2026 WL 513536, at *5.

Denials of church-autonomy immunity should be immediately appealable. As explained, church autonomy protects churches from invasive inquiries into their internal governance (*supra* 8), and any erroneous ruling on the immunity embedded within the church autonomy doctrine invades the defendant's "entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526; *see Belya v. Kapral*, 59 F.4th 570, 578–79 (2d Cir. 2023) (Park, J., dissenting) ("Denial of a church autonomy [immunity] should be an appealable collateral order in light of its strong resemblance to [government official] immunity."). Intrusive discovery and trial will result in the "interfer[ence] with the internal governance of [a] church" that the Religion Clauses forbid. *Hosanna-Tabor*, 565 U.S. at 188; *see also* Lael D. Weinberger, *Is Church Autonomy Jurisdictional?*, 54 Loy. U. Chi. L. J. 471, 503–05 (2022). In short, the church autonomy doctrine is "analogous to other orders that have satisfied the collateral-order doctrine" (Weinberger & Nestor, *supra* (manuscript at 35–53))—as a "chorus of

circuit-court dissenters" has explained (Pet. App. 51a (Walker, J., concurring)).

Second, absent interlocutory review of the denial of church autonomy immunity, the immunity is "effectively lost." *Mitchell*, 472 U.S. at 526. After full discovery or trial, the court of appeals cannot put the cat back in the bag; "the district court's decision is effectively unreviewable" (*id*. at 527), because much of the harm has already occurred by the "very process of inquiry" (*Catholic Bishop*, 440 U.S. at 502). Improper discovery and expensive litigation imposed by unconstitutional claims cannot be remedied "by a take-nothing judgment months or years later." *McRaney*, 157 F.4th at 644–45 ("[A]s with any other immunity from suit ... such intrusions cannot be remedied after the district court renders final judgment."). That litigation—with mounting legal bills, cumbersome civil discovery, and expensive lawyers—will often be substantial. And, in some instances, the church will not even reach final judgment because it will be forced to settle to avoid costly discovery.

The chilling effect of the burdens and expense of litigation imposes severe threats to religious liberty: The church will be hesitant to risk such expenses again and will be pressured to tailor its internal governance with an eye to litigation risk and government preferences. As with official immunities, immediate appellate review is necessary to vindicate the interests that the church autonomy doctrine and the collateral-order doctrine combine to protect—intrusive and burdensome secular scrutiny of a church's internal governance. *See id*. at 644. And unlike a government official with immunity, who will nearly always be indemnified by the government that employs her, the church must bear these costs and risks itself.

This Court has cited "substantial social costs"—like "harassing litigation"—that may "unduly inhibit officials in the discharge of their duties" in holding that decisions denying official immunity are immediately appealable. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The same is true for the church autonomy doctrine: Litigation and the burdens of suit threaten the First Amendment's bar on judicial meddling in the church's "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 591 U.S. at 746. And "[f]orcing the parties through years of expensive litigation ... is precisely the kind of equitable consideration, coupled with the importance of the threshold constitutional question, that warrants an immediate appeal." Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 First Amend. L. Rev. 233, 294 (2012).

Third, unique First Amendment implications counsel especially in favor of interlocutory review. It is indisputable that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (citation omitted). As such, there are even *stronger* reasons to permit immediate appellate review in church autonomy cases than in cases involving other judge-made immunities. At the very least, there is no basis for treating a First Amendment right that is as "fundamental" as the "right to religious liberty" less favorably than official immunities. *Fulton v. City of Philadelphia*, 593 U.S. 522, 575 (2021) (Alito, J., concurring in the judgment).

Because the church autonomy doctrine provides an immunity from suit, it should be subject to immediate interlocutory appellate review; otherwise, its protections will be irretrievably lost and religious institutions will be irreparably harmed. *Trump*, 603 U.S. at 636.

The consequences of adopting a looser approach to the church autonomy doctrine—and making religious institutions wait for the end of district court proceedings before they can appeal—are grave: "[E]xtensive inquiry by civil courts into religious law and polity" is not permitted by "the First and Fourteenth Amendment," which "mandate that civil courts shall not disturb the decision of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them." *Milivojevich*, 426 U.S. at 709.

Given the strong constitutional foundation for the church autonomy doctrine, it should be treated no less favorably than other immunities, and denials of this immunity should be immediately appealable.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the D.C. Circuit's decision.

Respectfully submitted,

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APPENDIX

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