No. 25-849

In the Supreme Court of the United States

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
Petitioner

v.

DAVID O'CONNELL

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

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION IN SUPPORT OF PETITIONER

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

The petition should be granted because it raises the important and recurring question of whether the denial of a church-autonomy defense is immediately appealable. It is. Such a defense "bars * * * a suit." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012). And rightly so. The Constitution's Religion Clauses are offended not only by the "conclusions that may be reached" by government intrusion into religious issues, "but also [by] the very process of inquiry leading to" such "findings and conclusions." *NLRB* v. *Catholic Bishop of Chi.,* 440 U.S. 490, 502 (1979). The only way to safeguard against that constitutionally offensive inquiry is to allow religious organizations to invoke their immunity from suit at the start of a case and then, if that defense is rejected, to allow immediate appellate review.

But the D.C. Circuit here joined three other circuits and the Massachusetts Supreme Judicial Court in forbidding interlocutory appeals from the denial of church-autonomy defenses. That conclusion is wrong and enormously harmful to religious organizations. Even where a rejected church-autonomy defense would ultimately prevail on appeal from final judgment, much of the harm would have already and improperly occurred. The First

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus*' intent to file this brief.

Amendment forbids any judicial "trolling through" an "institution's religious beliefs," *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.), regardless of whether the court correctly interprets such beliefs or eventually is told that it should never have allowed the suit to proceed in the first place.

Amicus Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable areas of law, is interested in this case because it wants to prevent those constitutional harms. PT1 agrees with petitioner (at 19-23) that there is "a split over whether the denial of a dispositive church autonomy defense is immediately appealable." And it agrees that those circuits that refuse to consider interlocutory appeals—the D.C., Second, Seventh, and Tenth Circuits—ignore the harms that necessarily flow to religious organizations from a court's "detailed review of the evidence" of internal church procedures and decisions, whenever that review takes place. *Serbian E. Orthodox Diocese for U.S. & Can.* v. *Milivojevich,* 426 U.S. 696, 718 (1976).

PT1 writes separately to expand on petitioner's treatment (at 22) of the sharp split among judges even in circuits that do not allow collateral appeals from the denial of church-autonomy defenses. Those dissenting judges correctly recognize that the lack of interlocutory appellate review risks imposing irreparable injury on religious organizations. This Court's review is necessary now to prevent the continued tolerance of irreparable harm to the autonomy of religious organizations in those four circuits if the issue percolates further.

STATEMENT

Respondent David O'Connell, a parishioner at Sacred Heart Catholic Church, donated to Peter's Pence, App.50a, an offering made to the Pope for more than 1,000 years. See Pet.4-5 (collecting sources). He believed that his donation would be used exclusively for humanitarian purposes. App.6a.

When he later found out that donations to Peter's Pence are used in a variety of ways, O'Connell felt he had been misled and sued the United States Conference of Catholic Bishops (the Bishops), a group that provided promotional materials for the fund. App.6a-7a.

The Bishops moved to dismiss because, among other things, resolving O'Connell's claims would violate their First Amendment right to autonomy. App.7a. But the district court denied its defense on the theory that it could resolve the case purely on "neutral principles." App.3a.

The Bishops appealed, but the D.C. Circuit dismissed the appeal for a lack of jurisdiction. App.3a-5a. The panel explained that the Bishops could vindicate their First Amendment rights later, "after trial," and that the denial of their church-autonomy defense was therefore unavailable. App.22a-23a.

Over a dissent from Judge Rao, the D.C. Circuit denied en banc review. App.59a. Citing the D.C. Circuit's "exceedingly high" rehearing standard, Judge Walker concurred in the denial of review but maintained that the denial of church-autonomy defenses was immediately appealable for largely the same reasons as Judge Rao. App.50a-54a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. Judges are Deeply Split in the Circuits that Reject Interlocutory Appeals from the Denial of a Church-Autonomy Defense.

The petition persuasively shows (at 20-22) a substantial split between and among state and federal courts on whether the denial of church-autonomy defenses is immediately appealable. But that split does not tell the whole story. As the petition (at 22) explains, "eleven appellate judges in five separate opinions" have challenged their respective circuit's position that religious organizations must wait until final judgment before seeking appellate review of their denied church-autonomy defenses. The petition (at 9-10) amply discusses the opinions of two such judges—Judge Rao and Judge Walker—in this case. PT1 writes to highlight and expand on the views of the judges in other circuits that likewise rejected the views of their own courts and have instead favored the holdings in the other side of the split involving interlocutory appeals related to church autonomy.

A. Three judges in the Tenth Circuit would allow interlocutory appeals from the denial of a church-autonomy defense.

The first federal judge to dissent from his circuit's position that the denial of church-autonomy defenses was not immediately appealable was Judge Bacharach in *Tucker* v. *Faith Bible Chapel International*, 36 F.4th 1021 (10th Cir. 2022). In *Tucker*, the panel dismissed an appeal from the denial of a ministerial-exception defense, holding that "any error" in denying the

defense can be "corrected through an appeal after final judgment is entered in the case." *Id.* at 1047.

Judge Bacharach dissented, explaining that, properly understood, the ministerial exception "*bars* * * * a suit." *Id.* at 1053-1054 (Bacharach, J., dissenting) (quoting *Hosanna-Tabor*, 565 U.S. at 196) (emphasis in original). He explained that just as with "other defenses like qualified immunity or absolute immunity," "deferral of the appeal could subject the religious body to burdensome discovery, trial, and post-judgment motions." *Id.* at 1059. Even if a religious body prevails on appeal after final judgment, it would at most be free "from liability," but would have lost the protections that the ministerial exception is supposed to afford from "the suit itself." *Ibid.*

Judge Bacharach, joined by Judges Tymkovich and Eid, reiterated these concerns in a later dissent from en banc review. *Tucker* v. *Faith Bible Chapel Int'l*, 53 F.4th 620, 622 (10th Cir. 2022). By treating the ministerial exception like other ordinary "affirmative defenses reviewed by appellate courts after final judgment," rather than like comparable immunities from suit, he explained, the panel betrayed "a fundamental misconception of the ministerial exception." *Id.* at 625 (Bacharach, J., dissenting from the denial of en banc consideration). Since the ministerial exception "protects a religious body from the suit itself," a religious body subjected to "protracted litigation over matters of religion" suffers an independent constitutional harm. *Ibid.* Worse, to avoid "burdens from the litigation itself," some religious bodies would simply "hesitate before deciding whether to suspend or fire renegade ministers." *Id.* at

627. This, in turn, would "limit[] the ability of religious bodies to make ministerial decisions based on ecclesiastical doctrine" rather than from the fear of litigation. *Id.* at 630. To prevent such "prolong[ed] judicial meddling in religious matters"—"the very evil that underlays recognition of the ministerial exception"—Judge Bacharach would have treated the application of the defense as an issue of law and allowed religious bodies to immediately appeal its denial. *Id.* at 627-630.

B. Five judges in the Second Circuit would allow such appeals.

The Second Circuit was the next to dismiss an appeal from the denial of a ministerial-exception defense in *Belya* v. *Kapral*, 45 F.4th 621 (2d Cir. 2022). There, the court held that "the church autonomy doctrine is a defense and not a jurisdictional bar from suit." *Id.* at 633. It thus concluded that the denials of such defenses were "not reviewable on interlocutory appeal." *Id.* at 634. Although there were no dissenters at the panel stage, when the Second Circuit denied en banc review, Judge Park, joined by Chief Judge Livingston, Judge Sullivan, Judge Nardini, and Judge Menashi, dissented. *Belya* v. *Kapral*, 59 F.4th 570, 573 (2d Cir. 2023) (Park, J., dissenting from the order denying rehearing en banc).

Judge Park explained that the "panel misapplied each prong of the collateral order doctrine" that allows interlocutory appellate review of (1) "conclusive" orders (2) on issues "separate from the merits" (3) that will be "unreviewable on appeal from the final judgment." *Id.* at 576-577 (quoting *Swint* v. *Chambers*

Cnty. Comm'n, 514 U.S. 35, 42 (1995)). Denying a church autonomy defense is *conclusive* because it "subjects Defendants to litigation over religious matters" even though the "church autonomy doctrine protects religious institutions from the litigation process itself." *Id.* at 577. Denying the defense is *separate from the merits* because it involves "a claim of right separable from, and collateral to, rights asserted in the action that is too important to be denied review." *Id.* at 578 (cleaned up). And denying the defense is *not effectively reviewable after final judgment* because, by then, "the harm from judicial interference in church governance will be complete." *Id.* at 578. Indeed, because the First Amendment forbids any "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow," Judge Park showed that the inquiry leading to a final judgment is itself a First Amendment harm. *Ibid.* (quoting *Milivojevich*, 426 U.S. at 713). Judge Park thus wrote that courts should treat the denial of a church-autonomy defense like the denial of other immunities from "the burdens of litigation itself." *Id.* at 579. Because "subjecting churches to litigation and trial over matters of church government itself infringes their First Amendment rights," Judge Park concluded that the only effective means of avoiding that harm is to allow interlocutory appeals of any denial of such an immunity defense. *Id.* at 579-580.

And while Judge Cabranes did not join Judge Park's opinion, he also dissented from the denial of en banc review in a one-paragraph opinion calling on this Court to review this issue of "exceptional importance."

Id. at 573 (Cabranes, J., dissenting from the order denying rehearing en banc).

C. One judge in the Seventh Circuit would also allow such appeals.

Citing both *Tucker* and *Belya*, the Seventh Circuit similarly rejected claims that the denial of a church-autonomy defense "satisf[ies] the stringent * * * factors to gain interlocutory review." *Garrick* v. *Moody Bible Inst.*, 95 F.4th 1104, 1114, 1116 (7th Cir. 2024).

Judge Brennan dissented. He explained that "[a] claim concerning a religious organization's faith, doctrine, or internal governance opens up that organization to litigation" and "implicates church autonomy"—a defense that "operates as a complete immunity, or very nearly so," "where it applies." *Id.* at 1121 (Brennan, J., dissenting) (quoting *Korte* v. *Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013)). And like Judges Bacharach and Park before him, Judge Brennan recognized that this immunity would be "effectively lost" if an issue potentially subject to a church-autonomy defense is allowed to go to trial. *Ibid.* And he concluded that it would "do no good to address" at final judgment "a pre-judgment order about whether the immunity conferred by church autonomy applies" because—by that time—such immunity from suit itself would have been irrevocably violated. *Id.* at 1122.

Because "[l]itigation and its related costs create a hardship that the church autonomy doctrine was meant to avoid," continuing the litigation "process is part of the injury against which the First Amendment protects." *Id.* at 1122-1123. Where plaintiffs seek a

secular forum for intrusive litigation into matters of faith and differences in religious understanding, "[a]ppellate jurisdiction exists" to resolve church-autonomy defenses before final judgment. *Id.* at 1130.

And that conclusion held for Judge Brennan even though other paths of appellate review, such as a certified interlocutory appeal under 28 U.S.C. §1292(b), were hypothetically available. The religious college in that case asked to appeal under §1292(b), and the "district court denied this request in one sentence of reasoning." *Garrick*, 95 F.4th at 1127 (Brennan, J., dissenting). Given this, Judge Brennan rightly concluded that section "1292(b) is too arbitrary of a vehicle for review when constitutional rights are at stake." *Id.* at 1124.

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The considered, persuasive views of these dissenting judges in courts on the wrong side of the split provide further grounds to resolve the split now.

II. Certiorari Should Be Granted Now Given the Irreparable Harm of Unnecessary Further Percolation.

The deep split between states, circuits, and judges alike should be resolved here because allowing it to percolate further threatens to irreparably harm religious organizations in circuits that do not allow immediate appeals.

As the Fifth Circuit—echoing Judges Bacharach, Park, and Brennan—recently acknowledged, the church-autonomy doctrine forbids *any* "judicial intrusion into [a religious organization's] ecclesiastical

affairs—even brief and momentary ones." *McRaney* v. *North Am. Mission Bd. of S. Baptist Convention, Inc.*, 157 F.4th 627, 644 (5th Cir. 2025). Yet where church-autonomy defenses are denied, church "personnel and records" "become subject to * * * the full panoply of legal process designed to probe the mind of the church" on issues of church government, faith, and doctrine. *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Such "breaches of [the church-autonomy doctrine] impose irreparable injuries on religious organizations" and should thus be immediately appealable. *McRaney*, 157 F.4th at 644.

But in four circuits and Massachusetts, those irreparable harms to religious organizations have now continued for half a decade without this Court's intervention. In those jurisdictions, district courts continue denying church-autonomy or ministerial-exception claims before trial. See, *e.g.*, *Bell* v. *Judge Mem'l Cath. High Sch.*, No. 22-CV-829-RJS-JCB, 2023 WL 3585247, at *1 (D. Utah May 22, 2023) (denying ministerial exception at summary judgment); *Califano* v. *Roman Cath. Diocese of Rockville Ctr.*, 751 F. Supp. 3d 42, 54-55 (E.D.N.Y. 2024) (same at motion-to-dismiss stage). Religious organizations in those jurisdictions are barred from appealing and must continue to endure the very harms the defense was designed to prevent. And although many of those religious organizations may well ultimately prevail on the merits or even in an after-the-fact reconsideration of their church-autonomy defense, by that point, the First Amendment harm is complete. Indeed, in *Belya*, lengthy discovery led the court to conclude what the church had alleged all along—that resolving Belya's

claims "would drag the Court and jury into matters of faith, spiritual doctrine, and internal church governance—precisely what the church-autonomy doctrine is designed to prevent." *Belya* v. *Kapral*, 775 F. Supp. 3d 766, 769 (S.D.N.Y. 2025).[2]

Churches and other religious organizations should not have to face injury to one constitutional right—to be free from the burdens of litigation—before they can vindicate another—the right to be free from liability based on secular construction of religious doctrine. As this Court recently reiterated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud* v. *Taylor*, 606 U.S. 522, 569 (2025) (quoting *Roman Cath. Diocese of Brooklyn* v. *Cuomo,* 592 U.S. 14, 19 (2020) (per curiam)). That religious organizations in jurisdictions on the "wrong" side of the split have faced such injuries for years and will continue to suffer them without this Court's granting review, severely compounds the problem.

Religious organizations have a right "to decide for themselves, free from state interference," not only matters of "faith and doctrine," but also—critically for this case and so many others—"matters of church government." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116

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[2] This Court's review is especially necessary given the short shrift that some judges give the church-autonomy doctrine at the start of a case. In *Belya*, for example, the district court required the church to distill its entire church-autonomy argument into "a three-page pre-motion letter" rather than a full-length motion to dismiss. *Belya* v. *Kapral*, 59 F.4th 570, 574 (2d Cir. 2023) (Park, J., dissenting from the order denying rehearing en banc).

(1952). The Court should grant the petition to prevent these irreparable harms.

CONCLUSION

In each of the federal appellate courts that forbid interlocutory appeals of the denial of church-autonomy defenses, dissenting judges have thoughtfully and persuasively explained that the benefits of church autonomy are lost if a case proceeds through discovery and trial. Because the issue has been thoroughly considered both as between courts on opposite sides of the split and even within circuits denying interlocutory appeals, there is no need to wait further and ample need to remedy the irreparable harms caused when a church-autonomy defense is erroneously denied yet interlocutory appeal is unavailable. The petition should be granted to ensure that religious organizations are not forced to face the burdens of litigation before they obtain appellate review of their right to be free from such burdens.

Respectfully submitted,

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