21-1498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

HILARION KAPRAL, AKA METROPOLITAN HILARION, NICHOLAS OLKHOVSKIY, VICTOR POTAPOV, SERGE LUKIANOV, DAVID STRAUT, ALEXANDRE ANTCHOUTINE, GEORGE TEMIDIS, SERAFIM GAN, BORIS DMITRIEFF, EASTERN AMERICAN DIOCESE OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, MARK MANCUSO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York, No. 20-cv-6597

DEFENDANTS-APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Defendants Eastern American Diocese of the Russian Orthodox Church Outside of Russia and The Synod of Bishops of the Russian Orthodox Church Outside of Russia state that they have no parent corporation and do not issue stock.

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INTRODUCTION

This lawsuit strikes at the heart of the First Amendment's protection for church autonomy. The Supreme Court has long held that disgruntled clergy members cannot sue their churches over matters of church discipline or appointment to ecclesiastical office. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). Ever since, disgruntled clergy members have tried to evade this rule by repackaging ecclesiastical disputes as church property, breach of contract, or tort claims. Yet the result has been the same: Courts have repeatedly held that when a minister's claim implicates the authority of churches to handle matters of internal governance and selection of clergy, it is barred by the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976). That is this case.

Father Alexander Belya, the Plaintiff, was a Russian Orthodox Priest. He claims he was elected Bishop of Miami. But other priests and key leaders of the Russian Orthodox Church disagreed. As a matter of church procedure, they wrote a letter to church leaders asserting that Father Alexander had not been properly elected Bishop of Miami. The letter also called for investigation of serious allegations of priestly malfeasance, including breaking the seal of the confessional, manipulating parishioners, and financial improprieties. Church leadership responded

with an investigation, concluded Father Alexander had not been elected bishop, and removed him from all priestly duties.

Father Alexander has now sued the Russian Orthodox Church and its leaders, alleging that the letter—an ecclesiastical communication contesting his supposed election and calling for his investigation—constitutes defamation. And he seeks millions of dollars in damages for his alleged "loss of standing" within the Russian Orthodox Church.

This lawsuit, on its face, is barred by the First Amendment in two ways. First, it violates the church autonomy doctrine, which prevents courts from interfering in "ecclesiastical hierarchies, church administration, and appointment of clergy." *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008). Church autonomy also prevents courts from interfering in a church's right to "facilitate[] religious communication and religious dialogue" between a church and its flock, especially communications promoting transparency in the church community on matters of church leadership and discipline. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002). Second, it violates the ministerial exception, which protects the church's "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

The district court declined to engage with these constitutional barriers, determining in three separate opinions that it had the authority

to delve into the truth or falsity of Father Alexander's claims. But that means a court can weigh in on how a church communicates among its leadership and with its community about the selection of bishops. It also means allowing discovery of internal church documents, permitting depositions of church leadership—including Metropolitan Hilarion, the First Hierarch of the Church—about internal church procedures, judging the truth or falsity of church statements about disciplinary procedures, and ultimately passing judgment on Father Alexander's status within the church. These decisions are appealable under the collateral order doctrine because they deny the church the immunity from suit provided by the First Amendment. Without this Court's intervention, that immunity will be lost.

Finally, at a minimum, this Court should reverse the district court's order requiring the parties to immediately proceed to merits discovery before resolution of the Religion Clauses defenses. This Court has previously recognized that this path is appropriate, and other district and appellate courts to consider the question have uniformly required bifurcation to avoid church-state entanglement. And ruling otherwise would entangle civil courts in deeply sensitive matters by allowing disgruntled priests to depose their bishops any time a promotion doesn't go their way.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 and the collateral order doctrine. Plaintiff's claims, however, challenge church discipline and governance, matters on which civil courts lack subject matter jurisdiction under the First Amendment of the Constitution.

The district court denied the motion to dismiss on May 19, 2021. On June 17, the Church timely filed a notice of appeal. On July 6, 2021, the district court denied the Church's Rule 59(e) motion to alter or amend the May 19 judgment. The Church timely amended its notice of appeal to include that order on July 16. On July 27, 2021, the district court denied the Church's motion to bifurcate discovery or stay the case pending this appeal. The Church timely amended its notice of appeal to include that order on August 13. Father Alexander's motion to dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1291 is fully briefed and pending in this Court.

STATEMENT OF THE ISSUES

I. Is Father Alexander's suit arising from statements made during internal church disciplinary processes and regarding an ecclesiastical dispute barred by the church autonomy doctrine?

II. Is Father Alexander's suit as a minister against his former church implicating the church's selection and control of its ministers barred by the ministerial exception?

III. Are the district court's orders denying the motion to dismiss and the motion to bifurcate discovery immediately appealable under the collateral order doctrine?

IV. Did the district court err in refusing to limit discovery to resolution of the Religion Clauses defenses, and instead requiring the parties to start merits discovery?

STATEMENT OF THE CASE

This case involves a dispute between a priest and his former church over his failed appointment to the ecclesiastical office of Vicar Bishop. The case below is No. 1:20-cv-6597 in the Southern District of New York, before U.S. District Judge Victor Marrero. The decisions appealed are from a denial of a motion to dismiss, JA.67; a denial of reconsideration of that ruling, JA.114; and a denial of a motion to bifurcate discovery or stay proceedings, JA.146. Defendants-Appellants have appealed those orders under the collateral order doctrine. JA.112, 143, 149.

Defendants. Defendants-Appellants are the Synod of Bishops of the Russian Orthodox Church Outside of Russia, along with individual clergy, a diocese, and other senior leaders of the church (collectively, "the Church" or "ROCOR"). The lead Appellant is the ruling bishop and First Hierarch of the Church, Metropolitan Hilarion, whose legal name is Hilarion Kapral.

ROCOR is part of the Russian Orthodox Church. Founded in 1920 following the 1917 Bolshevik revolution, ROCOR exists to promote "the overall spiritual nourishment of the Orthodox Russian flock in the

diaspora[.]"[1] ROCOR's highest ecclesiastical body is the Sobor (Council) of Bishops. Regulations at ¶7; *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 96 n.1 (1952) ("A sobor is a convention of bishops, clergymen and laymen with superior powers" and aids "church officials [to] rule their dioceses"). The Sobor is ROCOR's controlling body, meeting every two years to make the Church's laws, carry out its ministry, adjudicate its internal disputes, and elect bishops. Regulations at ¶¶7-8. The Sobor's president is Metropolitan Hilarion. *Id*. ¶8.

The defendant Synod of Bishops is the Sobor's executive organ. *Id*. ¶16. The Synod consists of Metropolitan Hilarion, two of his deputies, and four members of the Sobor. *Id*. As relevant here, the Synod is also charged with several ecclesiastical responsibilities, including investigation of "serious disruption" in a diocese; activities involving the appointment, transfer, release, and retirement of bishops between Sobors; conducting an appellate court to defrock clergy; resolving matters involving church property; and among other things, "the resolution of questions concerning various aspects of church life and church administration." *Id*. ¶¶19, 29.

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[1] Regulations of the Russian Orthodox Church Outside of Russia ¶3, https://perma.cc/TN4H-FNSG. This Court can take judicial notice of a church's publicly available religious law. Fed. R. Evid. 201; *see, e.g.*, *Bouchard v. N.Y. Archdiocese*, No. 04 CIV. 9978, 2006 WL 3025883, at *5 (S.D.N.Y. Oct. 24, 2006).

Plaintiff. The Plaintiff-Appellee is Father Alexander Belya, an "Orthodox Christian archimandrite"—a monastic priest. JA.87. Father Alexander claims he was elected "by a majority of the Bishops" in the Church to the position of Bishop of Miami, Vicar of the Eastern Archdiocese of Florida, on December 6, 2018. JA.92.

According to the complaint, on September 3, 2019, after the Moscow leadership of the Church had recognized Father Alexander's supposed appointment as bishop, several ROCOR Clergy, including members of the Synod, wrote a letter (the Clergy Letter) to the Synod and Metropolitan Hilarion raising concerns about "irregular" aspects of the documents relating to Father Alexander's election as a bishop. JA.19-21. The documents with irregularities were letters allegedly sent by Metropolitan Hilarion and a Canadian archbishop to senior church officials regarding Father Alexander's candidacy and election to the bishopric. JA.19-20. The Clergy Letter also called on the Synod not to consider Father Alexander's candidacy in the future because of "the submission of so many serious complaints against him." JA.20. It described problems with Father Alexander's priestly performance, including him "breaking the seal of Confession," using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and failing to ensure proper accountability for church property and finances. JA.20. The Clergy Letter asked "the Synod to ascertain the circumstances of the confirmation of the non-existent 'election,'" and it closed by calling

on Metropolitan Hilarion to conduct an investigation into these complaints and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21.

As Father Alexander admits and the district court recognized, this letter—from a group of clergy to the governing Synod, contesting the supposed election of a bishop, describing problems of priestly performance, and requesting an ecclesiastical investigation—is the crux of Father Alexander's complaint and the source of each of the alleged "specific Defamatory Statements" at issue in this case. Mot. to Dismiss at 2, ECF 22-2; JA.71.[2]

Father Alexander's complaint discusses at length his alleged election, the Clergy Letter challenging that election, and the actions of the Church in response, *see* JA.91-99, including the Clergy Letter's alleged publication within the Church and, eventually, alleged publication on a website the Church uses to communicate with members and subsequent coverage by media outlets which cover the Church. JA.98.

The Clergy Letter was followed by a "public decree" from Metropolitan Hilarion instituting an investigation of Father Alexander and his activities and removing him from all ministerial duties. JA.99. Rather than submit to investigation or appeal internally, Father Alexander left the Church and sued for defamation. JA.99. Father Alexander claims

[2] Filings in this Court are cited as "ECF," and district court filings not included in the appendix are cited as "Dkt."

damages for the loss of income from members leaving his congregation, and for "severely impaired reputation and standing" within the Russian Orthodox Church Outside of Russia. JA.105-06, 108.

Proceedings in the district court. Father Alexander brought this lawsuit on August 18, 2020, alleging, as relevant here, defamation, defamation per se, and defamation by innuendo against Metropolitan Hilarion and nearly a dozen clergy and senior leaders of the Church, as well as vicarious liability against the Eastern American Diocese and the Synod of Bishops.[3]

On November 24, 2020, the Church sought permission to file a motion to dismiss and requested a hearing. It argued, *inter alia*, that the First Amendment prohibits judicial interference in ecclesiastical disputes, particularly those over the nomination, election, and confirmation of bishops. JA.17. The Church attached the full Clergy Letter to its letter brief to demonstrate the ecclesiastical context of the communication. JA.19-21. Although it had not been attached to Father Alexander's complaint, the Church argued that it should be incorporated by reference because it was integral to all the claims and the complaint quoted it repeatedly.

The district court's practice rules limited both sides to letter briefs of no more than three pages. *See* Individual Practices of United States

[3] Defendant Pavel Loukianoff has not appeared in this appeal as he was not properly served with a complaint.

District Judge Victor Marrero II.B, https://perma.cc/77NM-KKLH. The district court denied the Church's three-page request and directed Father Alexander to respond with a letter brief and an amended complaint, JA.30, which Father Alexander filed as a proposed complaint on January 14, 2021, Dkt. 42-1. The Church replied via three-page letter brief on January 22, explaining that the first amended complaint had the same constitutional flaws and requesting dismissal. JA.35-37.

On May 19, the court construed the Church's November 24 letter brief as a motion to dismiss and denied the motion without permitting full briefing or oral argument. JA.84. The court held that the First Amendment does not bar Father Alexander's defamation claims because the suit "may be resolved by appealing to neutral principles of law." JA.77.

On June 16, 2021, the Church filed a timely Rule 59(e) motion to alter the judgment. Dkt. 51; Fed. R. Civ. P. 59(e). On June 25, the Church filed a separate request that the district court certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. 54.

On July 6, the district court denied both motions in a single five-page order. JA.114-18. The court acknowledged that "the ministerial exception and the doctrine of ecclesiastical abstention" were "the controlling legal doctrines at issue," but reaffirmed its previous order denying the Religion Clauses as a defense and held that disputes "as to whether the factual

situation presented fits into the ministerial exception or ecclesiastical abstention" warranted denying certification. JA.117.

The Church sought to limit any discovery to resolution of the ministerial exception and church autonomy defenses, or, alternatively, a stay pending this appeal. Dkt. 62. The court denied that motion and ordered the parties to promptly commence and complete merits discovery. JA.146-48; 142.

On June 17, the Church timely filed this collateral order appeal of the order denying the motion to dismiss. JA.112. On July 16, the Church amended its notice of appeal to include the July 6 order denying the Rule 59(e) motion. JA.143. On August 13, the Church amended its notice of appeal to include the July 27 order denying the motion for bifurcated discovery or stay. JA.149.

Proceedings in this Court. Father Alexander moved to dismiss this appeal on July 15, 2021, and that motion remains pending. On August 14, the Church filed a motion to stay district court proceedings to prevent the Church and its leadership from being required to undergo intrusive discovery and depositions regarding the events and communications surrounding the election, confirmation, and suspension of a Bishop.

SUMMARY OF THE ARGUMENT

Father Alexander's defamation claims strike at the heart of the church autonomy doctrine. They seek to punish the Church for ecclesiastical communications about its internal religious policies and decisions about

choosing and disciplining its clergy. Adjudicating these claims would both violate the Church's right to choose its clergy and unconstitutionally entangle civil courts in ecclesiastical matters. Father Alexander's claims also call for intrusive discovery into the Church's decision-making process, including probing the mind of the highest Church officials regarding their decision to suspend a priest.

Father Alexander's defamation claims are also barred by the ministerial exception, because he is a priest challenging the manner in which his Church selected its bishops and controlled its clergy. Permitting his claims to proceed would undermine the ministerial exception's purpose of leaving the selection and control of ministers solely in the hands of their church.

This Court has jurisdiction over this appeal through the collateral order doctrine. As numerous courts have recognized, church autonomy is not only a defense to *liability*, but also a form of *immunity* protecting against entangling discovery and trial. Thus, the district court's orders rejecting the Religion Clauses defenses and speeding the case toward merits discovery and trial are subject to collateral order review. The district court's orders immediately expose the Church and its senior hierarchy to intrusive merits discovery, which will cause irreparable and unreviewable First Amendment harm if allowed to remain in place. The orders are accordingly conclusive as to the Church's claimed First

Amendment immunity and entirely separate from the merits of Father Alexander's defamation claim.

Finally, the district court abused its discretion by denying bifurcation of discovery and ordering the parties to commence merits discovery before resolution of the Religion Clauses defenses.

STANDARD OF REVIEW

The standard of review for orders on motions to dismiss and on the district court's interpretation of the Constitution is de novo. *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2015) (denial of qualified immunity on a motion to dismiss); *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir. 2013) (constitutional interpretation). The standard of review for the district court's denial of the motion to bifurcate discovery or stay proceedings is abuse of discretion. *Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 204 (2d Cir. 2014). Abuse of discretion includes "errors of law." *Id.*

ARGUMENT

I. Father Alexander's claims are barred by the church autonomy doctrine.

For over a century, courts have recognized that the First Amendment's Religion Clauses protect against government interference in internal church affairs, guaranteeing a heightened "independence" for churches "from secular control or manipulation." *Kedroff*, 344 U.S. at 116. Under this "general principle of church autonomy," the Religion Clauses protect

a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061.[4] "State interference" in such matters would "obviously" violate the Free Exercise Clause, and "any attempt" by the judiciary to "dictate or even to influence such matters" is an equally clear violation of the Establishment Clause. *Id.* at 2060.

This principle especially applies to disputes over "church discipline [and] ecclesiastical government." *Milivojevich*, 426 U.S. at 714-15. Those who "unite themselves to" a religious organization "do so with an implied consent to this government, and are bound to submit to it," "in all cases of ecclesiastical cognizance." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). As relevant here, that includes a church's selection and discipline of its clergy, as well as church communications about those internal matters. *See Gonzalez*, 280 U.S. at 16 ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Bryce*, 289 F.3d at 659 ("internal ecclesiastical dispute and dialogue [are] protected by the First Amendment").

[4] The term "church" in church autonomy is used generically to mean religious institutions in any faith tradition. Courts have also used "religious autonomy" and "ecclesiastical abstention" to signify the doctrine.

Based solely on the allegations in the complaint, this Court cannot adjudicate Father Alexander's claims without adjudicating the Church's decision to investigate and discipline its own clergy, interfering in matters of religious doctrine and church policy. Doing so would violate the separation between church and state set by the church autonomy doctrine. The district court erred by holding otherwise.

A. The church autonomy doctrine can bar defamation claims.

The church autonomy doctrine has been held to bar civil authorities from intervening in a broad range of internal church matters involving governance of the Church, including clergy appointment and church discipline. Courts have specifically held that the church autonomy doctrine bars defamation and other tort claims based on communications about clergy appointment, church discipline, and church policies and doctrine.

"Church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern," and courts thus routinely bar suits that interfere with churches' decisions involving clergy selection and discipline. *Milivojevich*, 426 U.S. at 717. For example, in *Gonzalez*, the plaintiff sued the Roman Catholic Archbishop of Manila for appointment to a chaplaincy under the terms of a trust, though "he was ineligible under the then existing canon law." 280 U.S. at 18. The Supreme Court held that since the chaplain's qualifications were "purely ecclesiastical,"

it must accept the decision of the Archbishop that the plaintiff was not qualified. *Id.* at 16.

The Supreme Court later elaborated on *Gonzalez* in its *Milivojevich* decision. There, the Court considered the Serbian Orthodox Church's decision to discipline and remove a bishop. 426 U.S. at 713. Instead of participating in the church's appeal process, the Bishop sued in Illinois state court, arguing that control of his diocese was a property matter that could be determined by neutral principles of law. *Id.* at 706-07. The Supreme Court held that even though the mother church's decision affected who had control over church property, "the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation." *Id.* at 720. It also found that the Illinois Supreme Court's "detailed review of the evidence" regarding the bishop's claims, including "conflicting testimony concerning internal church procedures," was "impermissible." *Id.* at 718.

Courts have long interpreted this line of cases to bar judicial interference in the selection or discipline of clergy. *See, e.g.*, *Rweyemamu*, 520 F.3d at 204-05 ("Since at least the turn of the century, courts have declined to interfere with ecclesiastical hierarchies, church administration, and appointment of clergy." (cleaned up)); *Bryce*, 289 F.3d at 658 ("letter[] to other church leaders [that] discussed an internal church personnel matter and the doctrinal reasons for . . . proposed personnel decision" protected by church autonomy doctrine); *Eglise*

Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla., 824 F. App'x 680, 683 (11th Cir. 2020) (claim rejected involving "whether [defendant] was the rightful successor to the church's leadership").

Recognizing the "independence from secular control" granted to churches in ecclesiastical matters, *Kedroff*, 344 U.S. at 116, courts "generally do not permit [defamation and other] tort claims arising from internal processes by which religious organizations discipline their members." *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1214 (D.N.M. 2018); *cf. Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (rejecting common law claim seeking to transfer control of cathedral). Statements made by clergy as part of a disciplinary process and based on religious concerns "may be incorrect, but they are not actionable." *Bryce*, 289 F.3d at 658.

Those statements include criticism of religious leaders. For instance, in *Moon v. Moon*, the Southern District of New York considered a succession dispute following the death of the Unification Church's leader. 431 F. Supp. 3d 394, 400 (S.D.N.Y. 2019), *aff'd as modified* 833 F. App'x 876 (2d Cir. 2020). The plaintiff argued that statements made by church leadership "disput[ing] [his] proper authority to lead" the church were defamatory. *Id.* at 401. But in a decision affirmed by this Court, the district court held that it could not consider the "truth or falsity of statements concerning [parties'] purported religious standing." *Id.* at 413.

And in *In re Diocese of Lubbock*, the Texas Supreme Court barred defamation claims based on public church discipline. A deacon of the Catholic Church brought defamation claims against a Catholic diocese for including his name on a public list of "clergy against whom credible allegations of sexual abuse of a minor" had been made. 624 S.W.3d 506, 510 (Tex. 2021). The deacon claimed neutral principles could apply to determine whether a woman "with a history of mental and emotional disorders" was a minor under canon law. *Id.* at 509, 514. When the lower courts were going to allow the claims to proceed, the Texas Supreme Court granted mandamus and held that even if the truth or falsity of the deacon's claim could be determined by a factfinder, the suit "ultimately challenge[d] the result of a church's internal investigation into its own clergy," and "[i]nvestigations that relate to the character and conduct of church leaders are inherently ecclesiastical" and off-limits to civil courts. *Id.* at 517-18.

For the reasons articulated in these cases, courts around the country have often barred defamation and other tort claims arising from communications about clergy appointment and church discipline. For example:

- *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928-29 (11th Cir. 2018) (tort claims against religious institution were barred because they "required an examination of doctrinal beliefs and internal church procedures");

- *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 541 (Minn. 2016) (defamation claim that involved statements made during disciplinary proceeding was barred);
- *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 294 (Ind. 2003) (defamation claim to "penalize communication and coordination among church officials . . . on a matter of internal church policy and administration" would violate church autonomy doctrine if adjudicated);
- *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-37 (Mass. 2002) (defamation claim based on letter accusing priest of adultery as part of ecclesiastical disciplinary proceedings was barred);
- *Maize v. Friendship Cmty. Church, Inc.*, No. E201900183COAR3CV, 2020 WL 6130918, at *7 (Tenn. Ct. App. Oct. 19, 2020) (communications "inextricably linked to the termination process" of a pastor were barred by church autonomy);
- *Dermody v. Presbyterian Church*, 530 S.W.3d 467, 474 (Ky. Ct. App. 2017) (a civil court "cannot" "review the determinations of an ecclesiastical body applying its own . . . rules");
- *Thibodeau v. Am. Baptist Churches of Conn.*, 994 A.2d 212, 221 (Conn. App. Ct. 2010) (defamation claim regarding letter discussing ordination candidate's fitness for ministry was barred);
- *Jackson v. Presbytery of Susquehanna Valley*, 686 N.Y.S.2d 273, 275 (N.Y. Sup. Ct.), *aff'd*, 697 N.Y.S.2d 26 (N.Y. App. Div. 1999) (defamation allegations related "to a dispute over the plaintiff's fitness or suitability to act as a clergyman" barred);
- *Downs v. Roman Catholic Archbishop of Balt.*, 683 A.2d 808, 812 (Md. Ct. Spec. App. 1996) ("Questions of truth, falsity, malice, and the various privileges that exist [in defamation claims] often take on a different hue when examined in the light of religious precepts and procedures.").

B. The church autonomy doctrine bars Father Alexander's defamation claims.

In this case, Father Alexander's claims seek to penalize the church for "the incidental effect of an ecclesiastical determination," *Milivojevich*, 426 U.S. at 720, namely: to deny him a bishopric and suspend his priestly duties. Civil courts do not have the authority to intervene in that ecclesiastical process and second-guess those determinations.

The district court erred by holding otherwise. After sharply limited briefing and no oral argument, the court addressed the church autonomy defenses at issue here in just two paragraphs, holding that the complaint "raise[d] secular inquiries" that did not involve "weighing matters of ecclesiastical concern." JA.77. Those inquiries included "whether . . . Defendants made the alleged statements, the truth of the alleged statements, [and] Defendants' knowledge of the alleged statements' falsity . . . ." *Id.* But each of those inquiries involves not just finding out "what occurred," JA.147; they render judgment upon the Church's very process of selecting and disciplining its clergy.

Father Alexander's claims interfere in that process and violate church autonomy in at least four ways: they interfere with church discipline, entangle the court in doctrine and Church policy, require adjudication of a minister's religious standing, and necessitate intrusive discovery.

1. Father Alexander's claims interfere with Church discipline.

First, Father Alexander asks this Court to impose liability on the Church for two of its "ecclesiastical determinations" regarding clergy discipline: whether Father Alexander was properly appointed to be a bishop, and whether he was qualified for his ministry role.

The Clergy Letter is an internal church communication from diocesan leadership, including members of the ROCOR Synod, to the Synod and Metropolitan Hilarion, the church leadership responsible for disciplining and selecting clergy. The Letter pointed out "irregular" aspects of the documents submitted to demonstrate Father Alexander's alleged election and confirmation as a bishop, JA.19, and described problems with Father Alexander's priestly performance, including his "breaking the seal of Confession" and using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and a "total lack of financial (and other) accountability" and "a whole range of unseemly behavior . . . requiring specific investigation," JA.20. The Letter closed by asking the Metropolitan to conduct an investigation into these "serious complaints against him," including "the circumstances of the confirmation of the non-existent 'election'" to the bishopric, and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21. As Father Alexander admits, Metropolitan Hilarion responded by suspending Father Alexander from his priestly duties

pending an investigation. JA.99. For his part, Father Alexander chose not to pursue the Church investigation, but instead left ROCOR and filed this lawsuit. *Id.*

Holding the Church liable for statements made by its clergy regarding internal church processes and the character of other clergy would chill all manner of religious exercise across religious institutions. It would hinder religious organizations' ability to carry out their most basic functions, including selecting clergy, and would expose religious organizations to the "significant burden" of having to "predict which of its activities a secular court will consider religious." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). In response, religious organizations would either refrain from speaking altogether, or would refrain from implementing directives that require transparent communication between clergy and with the broader church. But the "church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely," including on "internal church disciplinary procedures" and matters. *Bryce*, 289 F.3d at 658. Allowing this case to proceed further would uproot those rights.

Father Alexander attempts to cherry-pick parts of the Clergy Letter—concerning whether the election happened and the irregularities in the letters central to his appointment to bishop—that he claims a secular court can review. But even these narrowly quoted sections do not help

him. As a part of an internal ecclesiastical process concerning both discipline and the church's selection of its leadership, the Clergy Letter cannot be divided up by secular and religious claims because "courts are ill-equipped" to determine whether a "dispute between a minister and his or her religious group is premised on religious grounds" as opposed to "secular considerations." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017) (recognizing "judicial incompetence with respect to strictly ecclesiastical matters"). In holding otherwise, the district court "glosse[d] over core Establishment Clause issues" in "significant ways," including by "cross[ing] the permissible constitutional line and . . . defining 'Church policy, administration, and governance'" in a way that was inconsistent with the Church's own judgment of those matters. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 429 (2d Cir. 2018).

Further, the district court mistakenly considered *only* the portions of the Clergy Letter quoted in the complaint. JA.79 n.4. In doing so, it ignored the ecclesiastical context of the Letter omitted by Father Alexander, including charges of abuse of doctrine and Church policy. Because the complaint "relie[d] heavily" on the "terms and effect" of the Clergy Letter, the court should have considered it in its entirety. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230-31 (2d Cir. 2016).[5]

[5] Father Alexander has never objected to consideration of the entire Clergy Letter. *See* Dkts. 39, 42, 45 (no opposition to attached Letter); 53 (no response to argument that court erred in ignoring it).

But even the allegedly "secular" components Father Alexander points to relate to the entirely ecclesiastical determination of whether Father Alexander had been properly appointed as bishop. The Church's highest authority determined that he had not, which is a determination that "legal tribunals must accept . . . as binding on them." *Kedroff*, 344 U.S. at 113. For a court to intervene in that determination by parsing the communication involved in it would be to overturn the highest authority in the Church in a "matter[] of church government." *Id.* at 116.

In sum, Father Alexander's claims against Metropolitan Hilarion, the Eastern American Diocese, and the Synod are all premised on contesting their disciplinary decisions. Father Alexander attacks those decisions as intentionally erroneous ecclesiastical determinations of his status as bishop. *See*, *e.g.*, JA.104 ("intentional and malicious conduct"). He wants not only a civil court's review of "ecclesiastical decisions made by a church body *created to* make those decisions," *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *7 (D. Md. Mar. 4, 2019) (emphasis added), but also civil liability on the decision-making church bodies themselves. Neither is permissible.

2. Father Alexander's claims require courts to interpret Church policy and answer religious questions.

Father Alexander's claims require the court to answer religious questions, including those about the Church's internal religious procedure. They do so in three ways: they ask the court to interpret

proper ROCOR ecclesiastical election procedures; they ask the court to determine Father Alexander's standing as a minister; and they ask the court to resolve matters of church membership and authority in order to determine damages.

First, Father Alexander has repeatedly argued that the Clergy Letter will be shown false if he proves the authenticity of the Metropolitan's signature on the documents the Clergy Letter addresses. ECF 22-2 at 7. Not so. The Clergy Letter claims irregularities were present in letters sent from the Metropolitan regarding Father Alexander's election. Therefore, even if the signature were proper, that would not resolve the question of the irregularities in the *letters*. Thus, a court would still have to rule on the truth or falsity of the *actual* statements in the Clergy Letter in order to determine whether the appointment communications to Moscow were in fact "drawn up in an irregular manner." JA.19. And "irregularity" is determined by ROCOR and its policies, not civil courts.

Moreover, the irregularities actually identified by the Clergy Letter all involved matters of internal church procedure—including whether appointment communications "contain[ed] the appropriate citation from the decision of the Synod of the Bishops," whether the letter from Archbishop Gabriel was "issued" according to ROCOR custom, and whether it was properly produced "on the official letterhead of the Most Reverend Gabriel." JA.19-20. Whether the Church "complied with church laws and regulations" in executing and communicating about these

procedures "is exactly the inquiry that the First Amendment prohibits." *Milivojevich*, 426 U.S. at 713; *see also Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 252 (S.D.N.Y.), *aff'd*, 578 F. App'x 24 (2d Cir. 2014) (defamation claim challenging press release describing church discipline would require the court to consider "the truth or falsity of the Catholic Church's characterization of its own law and doctrine"). Such "[r]eligious questions" must be "answered by religious bodies," not juries or judges. *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).

As Father Alexander admits, and the district court recognized, the Clergy Letter is "the heart" of Father Alexander's complaint and each of the alleged "specific Defamatory Statements" are contained within it. ECF 22-2 at 2; *see* JA.71. Thus, because the heart of his claims turns on interpreting Church policy, his claims must fail.

Father Alexander alleges that one defendant—Archpriest Gan, the rector of St. Seraphim of Sarov Memorial Church and Chancellor of the ROCOR Synod—used the word "forgery" outside the Clergy Letter in a statement on St. Seraphim's website. JA.98. The church denies Father Alexander's account, but even taking it as true, his claims of publication implicate the Church's ability to communicate with its members about the status and character of its ministers. Indeed, "communication of the results of" an internal church investigation and disciplinary process "cannot be severed from" the religious requirements that invoke the investigation "in the first place." *Diocese of Lubbock*, 624 S.W.3d at 509.

A church's efforts to maintain transparency with its membership through its own website and social media channels cannot be second-guessed by a court. And First Amendment defenses do not depend "on whether a publication goes beyond church walls but rather whether the substance and nature of the plaintiff's claims implicate ecclesiastical matters." *Id.* at 516.[6]

Second, Father Alexander ultimately asks this Court to adjudicate his "religious standing" as a minister. *Moon*, 431 F. Supp. 3d at 413. Father Alexander's complaint is built around his failed elevation from "an Orthodox Christian archimandrite" to the "Bishop of Miami." JA.87. Father Alexander admits that the whole purpose of the Clergy Letter was to contest his claimed "appointment as Bishop of Miami." JA.101-02. He likewise admits that the Clergy Letter was issued in response to a public statement by the Church just days earlier announcing "the decision of the ROCOR Synod appointing [Father] Alexander as Bishop of Miami," and was part of an effort by the Synod to "undo" this statement. JA.94-95. On that ground alone, his attempt to claim defamation from the

[6] In any event, "forgery" under the Model Penal Code is defined as "the act of fraudulently altering, authenticating, issuing, or transferring a writing *without appropriate authorization*." Black's Law Dictionary (11th ed. 2019) (emphasis added). And whether the letters were authenticated, issued, or transferred with the "appropriate authorization" is a religious question governed by Church law.

Clergy Letter is inextricably intertwined with the Church's internal ministerial selection and his standing as a bishop.

Further, Father Alexander's complaint makes clear that he wishes the court to recompense him for losing standing in the eyes of his congregation based on whether his appointment to the role of bishop was correct. Father Alexander claims the Church's disciplinary action was "damaging to [his] reputation [as] a religious leader" because it was communicated to the Synod, "parishes, churches, monasteries, and other institutions within ROCOR," and to "parishioners in the Orthodox Christian community." JA.87, 97, 103. He alleges this resulted in him having "severely impaired . . . standing in the community" and a "drastic decrease of the membership in his church," and left him "no future within ROCOR and, more importantly, . . . unable to serve his parish as a ROCOR priest." JA.99, 105-06, 108. But this all goes to his "standing" as a "religious leader." Civil courts cannot adjudicate a priest's claims against his church over his diminished status as a religious leader. This is a quintessential "religious thicket." *Milivojevich*, 426 U.S. at 719.

Third, Father Alexander asks the court to answer religious questions by claiming damages based on his "severely impaired reputation and standing" in the ROCOR community and the resulting "decrease of the membership in his church." JA.105-06.

Even if the court could award damages on those bases, it could not answer the religious questions asked by the damages claim. Father

Alexander claims that he has lost income as a result of people leaving his church because of the Clergy Letter and its aftermath. But when it comes to a congregant's religious decision whether to attend church or give an offering, for a court to even consider "decreased giving and reduced membership in the Church . . . and how that translates into donations and attendance" would "impermissibly entangle the court in religious governance and doctrine." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 121 (3d Cir. 2018).

Here, the Clergy Letter itself, in statements that Father Alexander does not challenge, identifies several religious reasons congregants might wish to leave his church unrelated to the allegedly defamatory statements: his "breaking of the seal of Confession," "his use of information obtained during Confession and confidential discussions for the purpose of denigrating parishioners and of controlling them," and his failure to organize his cathedral and monastery "according to the norms of the Russian Church Abroad." JA.20. How is a civil court supposed to determine which church members left because of the unchallenged statements in the letter, and which left because of the statements Father Alexander contests?

* * * *

In sum, if allowed to proceed, every stage of the litigation would entail inquiries into internal Church communications and decision-making, with damages based upon Father Alexander's reputation as a Bishop and

predicted future earnings as a Bishop. Each jurisdictional fact alleged against the non-domiciliary defendants is based upon internal communications among church leadership, and each of the defamatory statements alleged was made in official communications among senior church leadership. JA.99-101. These inquiries are the antithesis of "purely secular," and they are not permitted by the First Amendment. *Kavanagh*, 997 F. Supp. 2d at 251.

3. The discovery process necessary to adjudicate Father Alexander's claims will itself violate church autonomy.

Putting the Church through the discovery that will be necessary to resolve Father Alexander's claims will itself violate the Religion Clauses. The district court asserted that it has the ability to conduct a "fact-based inquiry into what occurred" without "pass[ing] judgment on the internal policies and or determinations of the" Church. JA.147. But in the inherently religious context of internal church discipline of church leaders, the "very process of inquiry" itself will "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *see also Milivojevich*, 426 U.S. at 718 ("detailed review of the evidence" of church policy was "impermissible"). Indeed, it is well established that courts must "refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)).

This principle was illustrated in *Whole Woman's Health v. Smith*, where the Fifth Circuit accepted a collateral order appeal to prevent the Catholic Church from having to turn over internal documents in a civil lawsuit. 896 F.3d 362 (5th Cir. 2018). The Fifth Circuit held that courts should "protect the inner workings" of religious organizations and "maintain their internal organizational autonomy intact from ordinary discovery." *Id.* at 372, 374. For this reason, church autonomy defenses are "similar to a government official's defense of qualified immunity" and must be "resolved at the earliest possible stage of litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 & n.1; *see* Part III.A.1 *infra*.

Here, discovery beyond document production of the already-public documents mentioned in the complaint would entangle civils courts in internal Church deliberations, including:

- A deposition of Metropolitan Hilarion as to whether he "went along, consented to, authorized and participated in the scheme to deny his authorship of" letters, and his "willingness to falsely deny that he had authored the letters," JA.97, 101;
- Depositions of fellow ministers in the search for malice and hostility in their religious judgments regarding Father Alexander's election, *see, e.g.*, JA.104;
- Depositions of clergy on such matters as Father Alexander's suspension, internal clergy communications, and the validity of Father Alexander's alleged election in the Synod; *see, e.g.*, JA.99-101;

- Document requests involving internal church communications, including church discipline, church procedure, or church organization and polity, *e.g.*, JA.94-96;
- Interrogatories demanding clergy opinions on internal church procedures; *see, e.g.*, JA.95-97, 100; and
- Evidence regarding the "drastic decrease of the membership" in Father Alexander's church, JA.105.

This kind of entangling discovery is forbidden by the First Amendment. The Constitution bars the "onerous" burden of "depositions of fellow ministers and the search for a subjective motive behind the alleged hostility" to Father Alexander. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc). It also forbids "attempting to parse the internal communications [of a church] and discern which are 'facts' and which are 'religious' [as] tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause." *Whole Woman's Health*, 896 F.3d at 373. And it does not permit investigation into damages flowing from reduced tithes and church membership related to religious leadership disputes. *Lee*, 903 F.3d at 121; Part I.B.2 *supra*.

If this case is allowed to proceed, it would proliferate defamation lawsuits between ministers and their churches where an employment claim would be barred. Following Father Alexander's footsteps, for instance, a Catholic nun could gain the right to depose her Archbishop, Cardinal, or even the Pope, by appointing herself to a mother superior role and suing the Vatican for de-recognizing her position in a church

disciplinary document. *Contra McCarthy*, 714 F.3d at 976. That is not the kind of separation of church and state contemplated by the First Amendment.

C. The neutral principles doctrine does not apply in this case.

For the reasons explained above, Father Alexander's claims cannot be resolved by "neutral principles of law," as he claims and as the district court held. JA.32, 77. Where, as here, a lawsuit is brought by a minister against his Church for statements made as part of a disciplinary proceeding involving his candidacy and suitability as a bishop and priest, it cannot be removed from the realm of the Religion Clauses and brought into the secular jurisdiction of this Court.

The "neutral principles" doctrine was developed for church property disputes, and the Supreme Court has never applied it outside that context. *Compare Jones v. Wolf*, 443 U.S. 595 (1979) (applying neutral principles to property dispute), *with Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (no mention of neutral principles doctrine), *and Our Lady*, 140 S. Ct. 2049 (same). Indeed, even when a matter "affects the control of church property," the Supreme Court has explicitly rejected application of neutral principles to cases where the matter is one of "internal [church] discipline and government." *Milivojevich*, 426 U.S. at 709, 724. In *Milivojevich*, for instance, the lower court held that it could determine the bishop's

property claims based on neutral principles. *Id.* at 721. But the Supreme Court reversed, concluding that the claims could not be resolved "without engaging in a searching and therefore impermissible inquiry into church polity." *Id.* at 723.

Many courts have recognized that "neutral principles" cannot be applied to religious disputes about internal church discipline and procedures. Indeed, even where "a civil court might be able to avoid questions of religious beliefs or doctrines," it cannot consider "questions of church discipline and the composition of the church hierarchy [that] are at the core of ecclesiastical concern." *Crowder v. S. Baptist Convention*, 828 F.2d 718, 726 (11th Cir. 1987).

Diocese of Lubbock is directly on point. There, the plaintiff deacon sued for defamation, claiming that neutral principles could apply to determine whether the church was factually incorrect to include his name on a list of "clergy credibly accused of sexual abuse of a minor." 624 S.W.3d at 509. The court squarely rejected this argument, finding that exercising jurisdiction over the dispute would "invade the Diocese's internal management decision to investigate its clergy consistent with its own norms and policies." *Id.* at 518. The neutral principles doctrine, the court held, must be "narrowly drawn to avoid inhibiting the free exercise of religion or imposing secular interests on religious controversies." *Id.* at 513 (citing *Jones*, 443 U.S. at 603-05; *Milivojevich*, 426 U.S. at 710); *see also Brazauskas*, 796 N.E.2d at 294 (rejecting argument that the court

could apply neutral principles to resolve defamation and other tort claims involving "communication" about church procedure).

So too here. The district court held that it could determine "what occurred" without "pass[ing] judgment on the internal policies or determinations" of the Church. JA.147. But in order for the litigation to proceed, the court *must* "pass judgment" on the truth or falsity of ecclesiastical judgments made by clergy in the church discipline process, "probe the mind of the church" through intrusive discovery about its internal procedures, *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.), and ultimately decide whether the Church should be held liable for how it rejected Father Alexander's appointment as bishop and later removed him from ministry. None of those things can be done by neutral law and without violating the First Amendment.

II. Father Alexander's claims are barred by the ministerial exception.

This case presents a straightforward application of the ministerial exception. Neither of the more commonly disputed elements of the exception are in question: Father Alexander is undisputedly a minister, and the defendants are undisputedly a church and its senior hierarchy.

So the narrow issue here is whether the ministerial exception bars Father Alexander's defamation claims. It does.

Courts have long and repeatedly recognized that defamation claims by a minister against a church can be barred, especially when they are intertwined with a church's selection or discipline of its ministers. Here, Father Alexander's claims are inextricably wrapped up in both the Church's decision whether to select him as a Bishop and its investigation and discipline of him. And Father Alexander's counterarguments are meritless.

A. The ministerial exception bars defamation claims that interfere with a church's selection and supervision of its ministers.

The ministerial exception is an aspect of the church autonomy doctrine that specifically safeguards churches' "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. This rule prohibits civil adjudication of a minister's claims against religious bodies that would interfere with "the authority to select and control who will minister to the faithful," since that is a "strictly ecclesiastical" matter for a religious body "alone" to decide. *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff*). Thus, "where a defendant is able to establish that the ministerial exception applies, the 'First Amendment has struck the balance for us' in favor of religious liberty" and a civil claim is barred from proceeding. *Fratello*, 863 F.3d at 199 (quoting *Hosanna-Tabor*, 565 U.S. at 196).

The rule is required by both Religion Clauses of the First Amendment. Adjudication of a civil claim that interferes in a ministerial relationship "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and it "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89.

This foundation in both Clauses is related to its role in "ensur[ing] the separation of church and state," *Fratello*, 863 F.3d at 199, which means both church and state have independent interests in maintaining its vitality. That is, "this constitutional protection is not only a personal one" for a religious body; "it is a structural one" that is "imposed on the government by the Religion Clauses" and "categorically prohibits . . . governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015); *accord Lee*, 903 F.3d at 118 n.4 (the "exception is rooted in constitutional limits on judicial authority").

While some civil claims may survive this structural bar because they are unrelated to ministerial selection or control—such as a slip-and-fall on the church steps, *Rweyemamu*, 520 F.3d at 208—"*any* federal or state cause of action" that would "impinge on the Church's prerogative to choose its ministers" is barred. *Werft v. Desert Sw. Ann. Conf.*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004) (emphasis added); *see also id.* at 1103 ("The

ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy, termed the 'lifeblood' of the religious institution."). This is because such claims, "whatever their 'emblemata,'" will "inexorably entangle [courts] in doctrinal disputes." *Rweyemamu*, 520 F.3d at 208 (quoting *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577 (1st Cir. 1989)).

"However a suit may be labelled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal*, 878 F.2d at 1576-78. Thus, the operative question is not whether the action sounds in tort, contract, or statute, but whether it "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188.

Accordingly, courts have barred not only Title VII and other employment discrimination claims under the ministerial exception, as in *Fratello*, but also contract and tort claims. *See*, *e.g.*, *Lee*, 903 F.3d at 122 (rejecting minister's contract claim against church; noting that "sister circuit courts have repeatedly" done the same); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009) (barring contract claim); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997) (rejecting claims for "breach of contract and various torts"); *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940 (6th Cir. 1992)

(rejecting tort and contract claims). Indeed, such common-law claims are often part and parcel to a standard wrongful termination claim, all of which can be subject to the ministerial exception. 2 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 14:54 (2020) ("Wrongful termination claims are often joined with claims of common law torts such as defamation and intentional or negligent infliction of emotional distress.").

Courts have thus long and repeatedly applied the ministerial exception to bar defamation and similar claims. *See Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *34 (W.D. Pa. Aug. 22, 2017), *aff'd*, 903 F.3d 113 (3d Cir. 2018) (collecting cases where courts have "clearly held that the ministerial exception applies to . . . defamation claims"). Thirty-five years ago, the Sixth Circuit rejected a defamation claim that was "really seeking civil court review of subjective judgments made by religious officials and bodies that he had become 'unappointable,'" reasoning that "secular authorities may not interfere with the internal ecclesiastical workings and disciplines of religious bodies." *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986). Three years later, the First Circuit affirmed a ruling barring libel and slander claims that were "inextricably intertwined" with an "ecclesiastical dispute" over a church's decision to terminate its minister. *Natal v. Christian & Missionary All.*, No. 88-0676, 1988 WL 159169 (D.P.R. 1988),

aff'd, 878 F.2d 1575 (1st Cir. 1989) (affirming the district court and praising its "opinion [a]s a scholarly piece of work").

Other federal courts and state supreme courts have consistently arrived at the same result ever since. Indeed, "most courts that have considered the question" have broadly concluded that "a pastor's defamation claims against a church and its officials" is barred. *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 (Va. 2001) (collecting cases, rejecting defamation claim that would "substitute [the court's] secular judgment for a church's judgment . . . regarding the selection or retention of its pastor"). The basic rule is that where the "plaintiff's claims of . . . defamation are essentially tied to" a ministerial dispute, the claim is barred. *Kraft v. Rector, Churchwardens & Vestry of Grace Church*, No. 01-CV-7871, 2004 WL 540327, at *6 (S.D.N.Y. Mar. 17, 2004). Thus:

- *Ogle v. Church of God*, 153 F. App'x 371, 375-76 (6th Cir. 2005) (rejecting defamation claim by minister arising from statements made as "part of church disciplinary proceedings" as "squarely within the class of cases" barred by the ministerial exception).
- *Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church in Am.*, 64 F.3d 664 (6th Cir. 1995) (Table) (affirming dismissal of minister's defamation claim concerning statements made during internal church investigation to "resolve an in[ternal] church conflict" and which "concerned the minister's current and future employment relationship with the church").
- *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 613 (N.D. Tex. 2008) (barring defamation claim that was "intimately related to the employment action taken" against minister);

- *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 218-19 (D. Conn. 2000) (barring defamation and libel claims regarding defendants' statements to "the press and the public that [minister] had misrepresented his priestly status");
- *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (minister's defamation claim barred because it "challenges [church's] authority to request [internal] records pursuant to its internal procedures and to comment on [his] actions and abilities as a [church] minister");
- *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *9 (D. Md. Mar. 4, 2019) (barring false-light claim because the "claim is rooted in the [church's] disciplinary review of Plaintiff and decision that Plaintiff should be placed on administrative leave");
- *Baker v. Afr. Methodist Episcopal Church*, No. 3-01-CV-2485, 2002 WL 1840931, at *2 (N.D. Tex. Aug. 8, 2002) (barring defamation claim since constitution "prohibits judicial encroachment into church decisions concerning the employment of ministers").
- *El-Farra v. Sayyed*, 226 S.W.3d 792, 796 (Ark. 2006) (dismissing defamation claims involving whether appellant's conduct "contradicts the Islamic law," in part because the challenged "statements were made in the context of a dispute over [minister's] suitability to remain as Imam");
- *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader").[7]

[7] *See also Paul v. Watchtower Bible & Tract Soc. of N.Y.*, 819 F.2d 875, 877 (9th Cir. 1987) (barring defamation claim by church member against church arising from church disciplinary actions, since "religious activities which concern only members of the faith are and ought to be free") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)); *Kaufmann v. Sheehan*, 707 F.2d 355, 357-59 (8th Cir. 1983) (barring under the First Amendment due-process claims arising from

Nor could it be otherwise, since virtually all religious leadership disputes barred as employment actions could easily be re-cast as defamation cases. *Cha*, 553 S.E.2d at 516 ("[I]f our civil courts enter upon disputes between bishops and priests because of allegations of defamation . . . it is difficult to conceive the termination case which could not result in a sustainable lawsuit."). That would burden internal church management in ways the Religion Clauses forbid. "[T]he prospect of future investigations and litigation would inevitably affect to some degree" ministerial decisions, and pressure churches, synagogues, mosques, and temples to make those decisions "'with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (quoting *Rayburn*, 772 F.2d at 1171).

For instance, knowing that communications with and about ministers could be made the basis of a defamation case—to include being "deposed, interrogated, and haled into court," *id.*—cannot help influencing how church hierarchy chooses and controls the shepherds of its flock. Among other things, it will pressure religious bodies to either immediately terminate wayward ministers instead of rehabilitating them, or to overlook clergy misconduct for fear that disciplining problematic

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allegedly defamatory statements because the statements "relate[d] to his status and employment as a priest").

ministers will lead to lawsuits. *Cha*, 553 S.E.2d 511, 517 (noting "chilling effect" of defamation suits). This distortion of ministerial relationships, church doctrine, and discipline, is impermissible: "any attempt . . . even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady*, 140 S. Ct. at 2060.

B. The ministerial exception bars Father Alexander's defamation claims because they interfere with the Church's selection and control of its priests and bishops.

The ministerial exception bars Father Alexander's defamation claims. Indeed, this is a heartland case, meaning there's no need to "delineate the boundaries of the ministerial exception," because the claims here "easily f[all] within them." *Fratello*, 863 F.3d at 202 (quoting *Rweyemamu*, 520 F.3d at 209). There are three ways to see that adjudicating Father Alexander's claim would unconstitutionally interfere with the Church's internal ministerial selection and control.

First, the Clergy Letter at the "heart" of the complaint is a church disciplinary communication between the senior leadership of Father Alexander's church concerning whether to select him as bishop or to discontinue his priestly duties. ECF 22-2 at 2. Thus, the "heart" of his claims is literally a matter of ministerial "selection and control," which means that they concern issues that courts cannot adjudicate. *See* Part I.B.2 *supra*.

Second, proving up his claims will necessarily intrude into the minister-church relationship. The ministerial exception exists in part to prevent "Church personnel" from "becom[ing] subject to subpoena, discovery, cross-examination, [and] the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Compelling "depositions of fellow ministers" in "the search for a subjective motive" regarding ministerial decisions is an "onerous" and "prejudicial" burden the ministerial exception forbids. *Demkovich*, 3 F.4th at 982-83. But here, that's exactly the point: Father Alexander's claims seek to compel the deposition of the head of his former church, Metropolitan Hilarion, to try to prove that he "intentional[ly] and malicious[ly]" lied to prevent Father Alexander from becoming a bishop. JA.101-02, 104 (alleging the Metropolitan was "the key and willing participant" in the Clergy Letter, and "but for" him "the [Clergy] letter would not have gotten off the ground"). That he cannot do.

Third, the measure of damages Father Alexander claims is "loss of income, resulting from the drastic decrease of the membership in his church," JA.105-06, and the damage is based upon his standing and reputation within the church community. JA.105-08. "[A]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister and would be no less prohibited by the First Amendment than an order overturning the termination." *Hosanna-Tabor*, 565 U.S. at 194.

Father Alexander is a minister who is suing his church for over $5,000,000 to penalize it for internal communications among senior church hierarchs about whether he was qualified to be appointed to one of the highest offices of the church. The ministerial exception bars such claims.

C. The district court erred by refusing to dismiss the complaint under the ministerial exception.

Father Alexander has argued that the district court "properly rejected" this defense because the ministerial exception *only* applies to employment discrimination claims, and *only* to paid employees of a church. ECF 22-2 at 8-10. He also suggests that "neutral principles" analysis should control. He is wrong.

First, as shown above, the ministerial exception has regularly been applied to bar common-law claims, including by this Court. Father Alexander cites no contrary case holding that the ministerial exception applies "only" to "employment discrimination claims." ECF 22-2 at 11. There are none. Indeed, the first Supreme Court ruling that barred courts from second-guessing a church's religious leadership decision arose in the context of a claim sounding in trust. *Gonzalez*, 280 U.S. at 16 (rejecting trust claim to chaplaincy position because "church authorities"—not government officials or judges—"determine what the essential qualifications of a chaplain are").

Second, the ministerial exception is not restricted to paid positions. While courts take into account various "considerations" to determine ministerial status, the "focus" is "primarily" on the religious functions they perform. *Fratello*, 863 F.3d at 205. None of the relevant considerations turn on whether the position is paid.

Further, limiting the First Amendment's protections only to formal paid employment would raise serious problems. It would once again turn fundamental church-state separation into a pleadings game, incentivizing plaintiffs to skip over their employers and instead sue any deeper-pocketed ministry partners that allegedly exercised religious influence over the employer.

Courts have avoided this obvious issue by routinely protecting non-employer ministries from similar suits. *Fratello* applied the exception in a suit against both the employer school and the non-employer archdiocese. *Compare* 863 F.3d at 192 ("Fratello was employed by St. Anthony's School"), *with id.* at 206 ("[T]he ministerial exception bars Fratello's . . . claims against the Archdiocese, the Church, and the School, all of which are religious groups within the meaning of the ministerial exception."). In *Cannata v. Catholic Diocese of Austin*, the Fifth Circuit relied on the ministerial exception to dismiss a suit against the employer church and the non-employer diocese. 700 F.3d 169 (5th Cir. 2012). And in *Bell*, the Fourth Circuit dismissed a lawsuit by a minister against religious denominations that contributed to his former religious

employer. 126 F.3d at 332.[8] These outcomes are correct. Otherwise, in *Fratello* for example, the school would have been protected but the archdiocese would not, even though the core issue—whether a religious body must allow a particular person to hold a religiously significant role—is the same.

Father Alexander's paid-ministers-only rule would also risk "privileging religious traditions" with more formal employment structures "over those that are less formal." *Our Lady*, 140 S. Ct. at 2064. Moneyed religious bodies which could afford to pay their leaders would be protected, while the less well-heeled would be more vulnerable to suit by their unpaid deacons, elders, Sunday School teachers, and worship leaders. Moreover, leaders in many faith bodies are also volunteers, such as the bishops of the Church of Jesus Christ of Latter-day Saints.[9] Thus,

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[8] *See also Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008) ("Ministers of the Salvation Army receive no wages"); *EEOC v. Roman Catholic Diocese of Raleigh*, 48 F. Supp. 2d 505, 513-14 (E.D.N.C. 1999), *aff'd,* 213 F.3d 795 (4th Cir. 2000) (position that could be filled by "an employee or volunteer" was ministerial); *InterVarsity Christian Fellowship/USA v. Bd. of Governors*, ---F. Supp. 3d---, No. 19-10375, 2021 WL 1387787 (E.D. Mich. Apr. 13, 2021) (ministerial exception applies to unpaid volunteer leadership roles).

[9] *See Lay Priesthood*, ChurchofJesusChrist.org, https://perma.cc/GQ7T-YLQ9 ("the bishop . . . receives no pay of any kind for his service in the Church"); *see also* G. Jeffrey MacDonald, *As denominations decline, number of unpaid minsters rise*, Religion News Service (Sept. 17, 2013), https://perma.cc/Y7ES-UXSX ("The unpaid cleric model is gaining traction among Episcopalians.").

treating payment as dispositive would undermine "the purpose of the ministerial exception": ensuring religious organizations alone have "the authority to select and control" those who lead a church's faith. *Penn*, 884 F.3d at 423.

Third, neutral-principles doctrine is "simply not applicable" to claims that relate to a plaintiff's "status and employment as a minister of the church," including in the defamation context. *Hutchison*, 789 F.2d at 396. A minister's claims cannot generally "be resolved . . . by invoking 'neutral principles of law,'" since the inherently religious ministerial relationship makes inquiries "in themselves" too entangling and thus "forbidden by the First Amendment." *Catholic Univ.*, 83 F.3d at 465-67; *accord El-Farra*, 226 S.W.3d at 795 (rejecting defamation claim under ministerial exception, finding that the "narrow" neutral-principles doctrine applies "only with regard to real-property disputes"). Hence this Court's ruling in *Fratello* that, in the employment discrimination context, courts cannot try to use neutral principles to navigate their way around "excessive entanglement . . . in [a] particular case," since courts are "ill-equipped to assess" such matters in the ministerial context. 863 F.3d at 202-03.

In sum, Father Alexander provides no reason for this Court to split from five circuits and state courts of last resort by setting entangling new precedent allowing ministers to sue their churches in defamation over internal church election and disciplinary communications. His claims are barred by the ministerial exception.

III. This Court has jurisdiction over this appeal under the collateral order doctrine.

This Court has jurisdiction to hear appeals of "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This includes collateral orders resolving rights that are "too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For an order to be collateral, it must "[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." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

Qualifying collateral orders include those that involve a party's "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and those that implicate compelling interests of a constitutional dimension, Opp'n to Mot. to Dismiss at 8, ECF 41 (collecting cases). Rights "originating in the Constitution" receive solicitude under the collateral order doctrine. *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 179 (2d Cir. 2008) (denials of "constitutional immunities" immediately appealable). This includes orders causing irreparable harm to First Amendment rights, such as

rights to church autonomy. *See* ECF 41 at 9; *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696 (2020) (accepting interlocutory appeal in church autonomy case arising under 28 U.S.C. § 1258); *McCarthy*, 714 F.3d at 976 (immediate appeal permitted because "harm of . . . governmental intrusion into religious affairs would be irreparable").

This appeal falls squarely within the collateral order doctrine, as it involves the denial of a First Amendment immunity from discovery and trial. It thus fulfills all three criteria of the collateral order doctrine: The district court's orders denying dismissal and ordering merits discovery (1) irreparably harm the Church absent immediate review, making it effectively unreviewable after a final judgment; (2) conclusively reject the Church's immunity from merits adjudication under the church autonomy and ministerial exception doctrines; and (3) implicate the Church's constitutional right to autonomy in its internal religious affairs, an issue collateral to the merits.

A. The Church's First Amendment defenses will be effectively unreviewable after merits discovery.

The central characteristic of an appealable collateral order is that, if the order is not "reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell*, 472 U.S. at 525 (cleaned up). Here, the Church has raised defenses that are akin to an immunity in that they protect the Church not only from liability, but also from entanglement in

merits litigation over its internal religious affairs. Now that these defenses have been denied and merits discovery ordered, only immediate appeal can avoid the constitutional injury the Church faces from the district court's refusal to dismiss this case and to limit discovery.

1. The Religion Clauses provide protections akin to immunity.

It is "well-settled" that denials of immunity from suit are proper collateral-order appeals. *Coollick v. Hughes*, 699 F.3d 211, 217 (2d Cir. 2012). The immunities are meant both "to avoid 'standing trial'" and "also to avoid the burdens of 'such *pretrial* matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996). Courts have recognized that the Religion Clauses provide protections to churches "similar to" such immunities. *Bryce*, 289 F.3d at 654; *accord Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238, 1242 (10th Cir. 2010) (the "ministerial exception, like the broader church autonomy doctrine, can be likened 'to . . . qualified immunity'"). Like qualified immunity, church autonomy questions must be resolved "early in litigation" to avoid harm to the protected right. *Bryce*, 289 F.3d at 654 n.1; *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016) (immunity "should be resolved 'at the earliest possible stage in litigation"). And like qualified immunity, the Religion Clauses' rule against interference in internal religious affairs provides "immunity from the travails of a trial and not just from an adverse judgment." *McCarthy*, 714 F.3d at 975.

Unlike qualified immunity, though, the legal interest is much stronger: the constitutional command that "courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Obeying this command protects not just one but two "substantial public interest[s]" of "a high order." *Will*, 546 U.S. at 352-53. It protects both the church's Free Exercise interest in the autonomy of its religious affairs and the judiciary's Establishment Clause interest in avoiding improper entanglement in those affairs. Indeed, a "federal court" has an independent duty "not [to] allow itself to get dragged into a religious controversy," *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), a duty which reflects the weighty constitutional "structural limitation[s]" that "categorically prohibit[]" the judiciary "from becoming involved in religious leadership disputes." *Conlon*, 777 F.3d at 836.

The "harm of such a governmental intrusion into religious affairs would be irreparable." *McCarthy*, 714 F.3d at 976. And the harm starts with "the beginnings of discovery" into the merits of a minister's claims, since those beginnings can have "prejudicial effects" on "rights guaranteed by the Religion Clauses." *Demkovich,* 3 F.4th at 982-83 (resolving certified interlocutory appeal); *Rayburn*, 772 F.2d at 1171 ("rights guaranteed by the Religion Clauses" limit courts from allowing discovery to "probe the mind of the church in the selection of its ministers"); *see also* Parts I & II *supra*. Thus, "the consequence of forced

discovery" into internal religious affairs "is 'effectively unreviewable' on appeal from the final judgment." *Whole Woman's Health*, 896 F.3d at 367. For this reason, federal courts have found that this harm to church autonomy rights is just as irreparable as "the other types of case[s] in which the collateral order doctrine allows interlocutory appeals." *McCarthy*, 714 F.3d at 976; *see also Liberty Synergistics, Inc.*, 718 F.3d at 150-51 (finding that harm to First Amendment rights from subjugation to litigation would be effectively unreviewable post-trial).[10]

State courts too have repeatedly found that "the denial of a religious institution's assertion of the ministerial exception . . . is appropriate for interlocutory appeal." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014). This is because "once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated." *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990); *see also Dayner v. Archdiocese of Hartford,* 23 A.3d 1192, 1199-1200 (Conn. 2011)

[10] *See also* Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) ("the ministerial exception closely resembles qualified immunity for purposes of the collateral-order doctrine," making "immediate appeal" appropriate); *see also* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) ("equitable consideration[s], coupled with the importance of the threshold constitutional question," warrant "immediate appeal").

("[L]itigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy . . . ."). And the Supreme Court of Texas recently accepted and resolved an interlocutory appeal because allowing lower courts to "exercis[e] jurisdiction" over a defamation case challenging a church's publication of an internal investigation into clergy "would necessarily encroach on the church's ability to manage its internal affairs." *Diocese of Lubbock*, 624 S.W.3d at 518 (cleaned up).

2. The Church's Religion Clauses immunities will be irreparably lost absent immediate appeal.

The Church's Religion Clauses defenses thus fit neatly within this Court's recognition that "a later recognition of immunity" against enduring litigation cannot possibly "mitigate the harm" absent an immediate appeal. *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017). And that is precisely the kind of "irreparable" harm the district court's orders will cause. *McCarthy*, 714 F.3d at 976. The district court denied the Church's Religion Clauses defenses, JA.84, refused to certify them for appeal, JA.118, denied a motion to bifurcate discovery to allow resolution of the Religion Clauses defenses, JA.146-48, and ordered the parties to complete merits discovery by the end of the year, JA.142. Meanwhile, Father Alexander insists that he is entitled to full discovery, including the ability to depose bishops and the Metropolitan. Dkt. 63. These are exactly the kinds of intrusion into

internal religious governance on matters of church discipline and selection of clergy that the Seventh Circuit has just found—on interlocutory appeal—impermissible under the Religion Clauses. *Demkovich*, 3 F.4th at 983; *see* Part I.B.3 *supra*.

Thus, as with qualified immunity, the district court's orders are immediately appealable because the Church's "entitlement not to . . . face the . . . burdens of litigation" will be "effectively lost if a case is erroneously permitted to" proceed. *Mitchell*, 472 U.S. at 526.

B. The order below conclusively determined the Church's immunity from trial and merits discovery.

This Court has repeatedly recognized that, when a claimed immunity from suit applied, a court's denial of the immunity on a motion to dismiss conclusively determines the issue. *See, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119-20 (2d Cir. 2019); *Edrei v. Maguire*, 892 F.3d 525, 531-32 (2d Cir. 2018); *Garcia*, 779 F.3d at 91. This is because where the "essence of the claimed right" at issue includes "a right not to face the . . . burdens of litigation," then "a denial of that right 'conclusively determines' the disputed issue by ensuring that 'the defendant must bear the burdens of discovery.'" *Liberty Synergistics*, 718 F.3d at 147 (cleaned up). As shown above, the district court's denial of the motion to dismiss conclusively foreclosed the Church's claimed immunity from merits discovery. *Behrens*, 516 U.S. at 308 ("denial of a motion to dismiss is conclusive as to this right."). And the combination of the court's denial of

bifurcation and ordered merits discovery means this immunity will soon be irreparably lost.

C. The Church's immunity against merits discovery is collateral to the merits of Father Alexander's defamation claims.

Finally, an issue "is 'separate' from the merits" if "it turns on matters 'significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.'" *Liberty Synergistics*, 718 F.3d at 148; *see also Britt v. Garcia*, 457 F.3d 264, 271-72 (2d Cir. 2006) (finding jurisdiction because the issue raised was a purely legal question that could be "decided with reference only to undisputed facts and in isolation from the remaining issues of the case"). Whether the Religion Clauses preclude Father Alexander's claims is "a pure question of law." *Conlon*, 777 F.3d at 833; *see also Bryce*, 289 F.3d at 654 (application of the church autonomy doctrine is a "question of law"). And the First Amendment's prohibition on "governmental intrusion into religious affairs" gives rise to an immunity that is "'conceptually distinct' from the merits." *McCarthy*, 714 F.3d at 975-76 (quoting *Mitchell*, 472 U.S. at 527). Because an immunity from trial inheres in these First Amendment

defenses, they are separate "from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

IV. The district court erred by failing to limit initial discovery to resolution of the Religion Clauses defenses.

The district court denied the Church's motion to limit initial discovery to resolution of the Religion Clauses defenses, and instead ordered the parties to commence and complete merits discovery before the end of the year. This order was an abuse of discretion and will cause irreparable harm both to the Church's First Amendment rights and the corresponding structural limitations on judicial authority.

As explained above in Parts I.B.3 and III.A.2, the Supreme Court "established the rule of *Hosanna-Tabor*" "precisely to avoid . . . judicial entanglement" such as "subjecting religious doctrine to discovery." *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019). Thus, in cases where discovery is necessary to resolve Religion Clauses defenses, this Court has recognized that it is "appropriate[]" to "order[] discovery limited to" those defenses before allowing merits proceedings. *Fratello*, 863 F.3d at 198.

Other courts likewise routinely "limit discovery to the applicability of the ministerial exception" "[b]efore launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid." *Sterlinski v. Catholic Bishop of Chi.*, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017); *see*

also Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2017) (court "directed the parties to engage in limited discovery on the [ministerial exception]"); *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) ("Plaintiff was permitted to conduct limited discovery" on the ministerial exception defense); *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d. 730, 735 (N.D. Ill. 2016) (where a ministerial exception defense is asserted, "the scope of the issue subject to discovery is narrow," limited to whether the role "was ministerial"); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (allowing "limited discovery to determine whether the ministerial exception applies").[11] Requiring merits discovery before resolution of the threshold Religion Clauses defenses has been recognized as "result[ing] in a substantial miscarriage of justice." *Presbyterian Church v. Edwards*, 566 S.W.3d 175, 178 (Ky. 2018) (allowing merits discovery before resolving a church's ministerial exception defense).

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[11] *Stabler v. Congregation Emanu-El of the City of New York*, No. 16 CIV.9601, 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (authorizing discovery "limited to the ministerial exception defense" and specifically whether plaintiff performed religious functions); *Sterlinski*, 2017 WL 1550186, at *5 ("limit[ing] discovery to the applicability of the ministerial exception"); *Lishu Yin v. Columbia Int'l Univ.*, No. 3:15-CV-03656, 2017 WL 4296428, at * 4 (D.S.C. Sept. 28, 2017) (same); *Miller v. InterVarsity Christian Fellowship/USA*, No. 09-CV-680, 2010 WL 2803123, at *2 (W.D. Wis. July 14, 2010) (same); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) (court authorized "very limited discovery" as to whether job functions were ministerial in nature).

Against this uniform practice and such significant First Amendment considerations, neither Father Alexander nor the district court identified any reason, or any precedent, against delaying merits discovery until resolution of the threshold defenses. Rather, after briefing limited to three-page letters, the district court again deemed the matter adequately briefed and denied bifurcation based solely on its perceived ability to decide whether the Clergy Letter was defamatory without offending the "doctrine of ecclesiastical abstention." JA.147. As demonstrated above, that conclusion is incorrect. Further, it failed to consider the Church's additional argument under the ministerial exception for granting bifurcation.

Because allowing merits discovery to proceed will cause irreparable harm to First Amendment rights, and do so entirely unnecessarily, the district court abused its discretion. At a minimum, then, this Court should remand and require bifurcation.

CONCLUSION

The district court's decisions below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the requirements of 2d Cir. R. 32.1(a)(4) because it has 13,619 words.

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August 26, 2021

/s/ Diana M. Verm
Diana M. Verm

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 26, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

August 26, 2021

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