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,

PAVEL LOUKIANOFF, JOHN DOES 1 THROUGH 100,
Defendants.

On Appeal from the United States District Court for the Southern District of New York, No. 1:20-cv-6597-VM

BRIEF *AMICI CURIAE* OF RELIGIOUS DENOMINATIONS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REHEARING

GORDON D. TODD
Counsel of Record
DANIEL J. HAY
JOHN L. GIBBONS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Tel.: (202) 736-8000
Fax: (202) 736-8711

Counsel for Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each of the *amici curiae* states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF *AMICI*[1]

Amici curiae are denominational organizations representing multiple faiths and faith traditions, each of which is entrusted by its members to declare doctrine, discipline leaders who violate the teachings of the faith, and to protect the faithful from false teachers and unworthy leaders. *Amici* rely upon the constitutional rights of faith communities to govern their own ecclesiastical matters and submit this brief out of concern that the panel opinion will encourage end-runs around these rights. Worse, by categorically deferring review of erroneous ministerial-exception rulings until appeal from final judgment, the panel decision will render these defenses toothless.

Amici are the Roman Catholic Archdiocese of New York, the Jurisdiction of the Armed Forces and Chaplaincy of the Anglican Church in North America, the General Conference of Seventh-day Adventists, the Lutheran Church–Missouri Synod, the International Society for Krishna Consciousness (ISKCON), and the Serbian Orthodox Diocese of New Gracanica–Midwestern America.

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[1] No party's counsel authored this brief in whole or part; no party nor party's counsel contributed money intended to fund preparing or submitting it; and no person—other than *amici*, their members, or their counsel—contributed money intended to fund preparing or submitting it.

SUMMARY OF ARGUMENT

The panel's errors will reverberate far beyond this particular dispute. The case presents "a question of exceptional importance," Fed. R. App. P. 35(a)(2), for Appellant, *amici*, and all religions: whether procedure may hollow out the substantive protections the First Amendment offers to churches.

Declaring and enforcing church doctrine, policy, and organization are indispensable elements of religious liberty. This necessarily includes the freedom to hire and discipline ministers without seeking government approval or risking costly, disruptive litigation. And correctly applying the ministerial exception early in litigation—including through interlocutory review, if needed—is essential to ensure that litigation itself does not chill those freedoms. En banc rehearing is urgently needed.

ARGUMENT

I. Declaring and Enforcing Church Doctrine Are Indispensable Elements of Religious Liberty.

For centuries, institutional religious liberty—each congregation's freedom to determine its doctrine, organization, and policy—has played a key role in our conception of religious freedom. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182-85 (2012). The Religion Clauses reflect that tradition. The Free Exercise Clause protects individuals'

rights to organize and operate institutions that declare and practice their preferred doctrine. The Establishment Clause prohibits government interference with a church's selection, retention, and discipline of ministers entrusted to "personify its beliefs." *Id.* at 188. Selecting ministers thus is "a 'core matter of ecclesiastical self-governance' at the 'heart' of the church's religious mission," and represents "the most spiritually intimate grounds of a religious community's existence." *Hankins v. Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting); *see also McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) ("The minister is the chief instrument by which the church seeks to fulfill its purpose ....").

Hiring ministers also creates the concomitant need to discipline and fire ministers. Just as the First Amendment grants houses of worship autonomy in selecting ministers, it also guarantees the right to "remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Otherwise, "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." *Id.*

When religious institutions make the difficult choice to censure or expel a leader, it is "more than a mere employment decision." *Hosanna-Tabor*,

565 U.S. at 188. It is an ecclesiastical determination of fitness to lead the faithful. For example, churches have removed ministers who committed grievous crimes[2] or white-collar offenses.[3] Other ministers have been expelled for non-criminal offenses, such as marital infidelity, that violate church teaching.[4] Churches also use these tools to police doctrine and supervise rites. For example, in 2020, the former Episcopal Bishop of Albany was found to have violated church rules when he prohibited clergy from performing same-sex weddings. *In re Title IV Disciplinary Matter* (Oct. 2, 2020), https://bit.ly/385HYWv. Other churches, taking different views on the marriage rite, censured or dismissed ministers who officiated same-sex weddings. *See* Mark Memmott, *Methodist Minister Who Officiated at Gay Wedding Is Defrocked*, NPR (Dec. 19, 2013), https://n.pr/3sDDT5z. Other examples, on numerous issues, abound.

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[2] *See* Grace Finerman, *Church removes pastor from role after charges of possession of child sexual abuse images*, WMUR (Mar. 18, 2022), https://bit.ly/3cBJO7G.

[3] *See* Leonardo Blair, *Summit Church fires pastor for stealing $1K from Christmas Eve offering*, Christian Post (Jan. 13, 2022), https://bit.ly/3CSFGdR.

[4] *See* Leanne Italie, *Megachurch Pastor Carl Lentz Fired, Admits Cheating on Wife*, AP (Nov. 5, 2020), https://bit.ly/3sJ462z.

In sum, selecting, promoting, and removing church leaders—as well as regulating what leaders do and preach, and warning of those who stray—are matters of inescapable importance for faith communities. Indeed, "the right to choose ministers without government restriction underlies the well-being of religious communities," *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008) (cleaned up); therefore, "discipline and the composition of the church hierarchy are at the core of ecclesiastical concern," *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976); *see McClure*, 460 F.2d at 558 ("The relationship between an organized church and its ministers is its *lifeblood*.") (emphasis added).

This case should present an easy ministerial-exception case. Father Alexander, disappointed that his church did not make him a bishop, did what disaffected ministers will do with increasing frequency if the panel's decision stands: he sued, threatening the church with costly and invasive litigation and asking secular courts to second-guess an ecclesiastical decision. The matters at issue in this case are thus neither peripheral nor incidental questions of religious freedom; Father Alexander's lawsuit seeks to enter the Holy of Holies. And absent rehearing en banc, he will succeed.

II. Applying the Ministerial Exception Early and Correctly Is Essential.

The church-autonomy doctrine and ministerial exception protect religions' decisions to hire, promote, censure, or fire clergy, as well as decisions to warn the faithful of wayward ministers. Any federal or state claim, regardless of label, intruding into that "private sphere" cannot proceed. *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Accordingly, federal courts stress that resolving ministerial-exception defenses "early in litigation" is essential to "avoid excessive entanglement in church matters." *Bryce v. Episcopal Church*, 289 F.3d 648, 654 n.1 (10th Cir. 2002).

1. The panel erred in concluding that Appellants' constitutional defenses would not be "destroyed if [they] were not vindicated before trial." Op.23. Because the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar," the panel reasoned that "[t]he church autonomy doctrine provides religious associations neither an immunity from discovery nor an immunity from trial on secular matters." Op.23-24.[5]

[5] Compounding its error, the panel reasoned that "[a] recent Supreme Court denial of certiorari clearly suggests that the church autonomy doctrine does not provide immunity from discovery or trial." Op.24. But denial of certiorari "imports no expression of opinion upon the merits of the case, as the bar

This is simply not correct. The church-autonomy doctrine, when applicable, *must* provide immunity from discovery and trial; permitting claims against ecclesiastical leaders would coerce rational actors within religious organizations to alter behavior to avoid lawsuits, thus "chilling religious-based speech in the religious workplace." *Demkovich v. St. Andrew*, 3 F.4th 968, 981 (7th Cir. 2021) (en banc). Shielding churches not only from liability but from the expense and disruption of civil litigation is therefore essential to both the ministerial exception and the broader church-autonomy doctrine. Indeed, absent rehearing, litigating these claims will itself harm ROCOR's interest in self-government, because that process will inevitably inquire into church doctrine and policy.

For this reason, *NLRB v. Catholic Bishop of Chicago* held that the NLRB could not investigate religious schools because the sponsoring church's rights would be violated not only by NLRB's "findings and conclusions" but also by "the very process of inquiry leading to" them. 440 U.S. 490, 502, 507 (1979). Likewise, the Fourth Circuit has warned that minister-termination claims create constitutional issues because "[c]hurch personnel and

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has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.).

records ... inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). And "[a] church is not truly free to manage its affairs, practice its faith, and publicly proclaim its doctrine if lawyers and judges lie in wait to pass human judgment on whether the church should have chosen its words more carefully." *In re Lubbock*, 624 S.W.3d 506, 521 (Tex. 2021) (Blacklock, J., concurring).

Even if the threat of legal action does not halt church discipline, it encourages clergy to resolve matters behind closed doors—and thus fail to warn other congregations. This risk goes far beyond esoteric debates about doctrine. Many religions have taken steps in recent years to publicly address clergy sexual abuse. This reckoning has involved not only punishing priests but also alerting the public of individuals credibly accused of misconduct. *See* Rick Rojas, *New York Archdiocese Names 120 Catholic Clergy Members Accused of Abuse*, N.Y. Times (Apr. 26, 2019), https://nyti.ms/3kkx4BY. It is not difficult to imagine a church's reasonable efforts to right these wrongs resulting in a defamation lawsuit—in fact, *Lubbock* involved precisely those circumstances. 624 S.W.3d at 509-12. Churches must be free to alert other

congregations when ministers misused church funds, mistreated staff, or failed to live up to a religion's expectations.

Discounting these First Amendment interests the way the panel did is also inconsistent with precedent on qualified immunity—which is also an affirmative defense, not a jurisdictional bar. This Court recognizes that qualified immunity's protection is effectively lost if discovery and trial erroneously proceed. *Bryant v. Egan*, 890 F.3d 382, 386 (2d Cir. 2018). Without immediate appeal, the reasoning goes, public officers (who, unlike religious leaders, are almost always indemnified) will make decisions based on litigation risk, rather than public safety. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The same is true here; religious leaders will consider, and perhaps act upon, litigation exposure when deciding church governance and doctrine. They may even retain a wayward minister because the risk of getting sued is too great.

Worse still, smaller congregations often lack the resources to defend against frivolous lawsuits, and so victory following trial, judgment, and appeal would be Pyrrhic at best. Some would be forced to settle or dissolve; others would decide the risk is too great and make core religious decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than

upon the basis of their own personal and doctrinal assessments." *Rayburn*, 772 F.2d at 1171. Those who stand on principle will devote resources to litigation that would otherwise go towards their religious mission.

So too here, determining whether the bishops' letter to Metropolitan Hilarion is factually correct would require probing ROCOR's internal records, including sensitive complaints from congregants, and likely deposing ministers and senior ROCOR officials about their ecclesiastical decisionmaking.

2. The panel opinion permits ministers challenging their termination to circumvent churches' constitutional defenses by manufacturing unimportant factual disputes. The panel determined that Father Alexander's defamation claims "hinge on crucial questions of fact," and identified "numerous disputes as to whether the factual situation presented fits into the church autonomy doctrine." Op.26-27. The panel even characterized those fact disputes as "[d]ecidedly non-ecclesiastical":

> [D]id the purported signatories actually sign the letters? Were the December 10 and January 11 letters stamped with Metropolitan Hilarion's seal? If so, who stamped them? Was the early January letter on Archbishop Gavriil's letterhead? More broadly, did Belya forge the letters at issue?

Op.27.

But this factual nitpicking loses the forest for the trees. There is no fact dispute relevant to the elements of the ministerial exception: this case involves a minister asking a secular court to overturn a church's promotion decision. All of the supposed fact issues identified by the panel go to the *merits* of Father Alexander's defamation claim, but the ministerial exception is concerned with the threshold question of whether secular courts can adjudicate that claim. After all, if Appellants' church-autonomy defenses turned on whether the Defendants' statements were actually defamatory, as the panel opinion suggests, then it would be no defense at all. Rather, what matters is whether the dispute asks a secular court to review church decisionmaking; if so, then peripheral disputes about the nature of the disciplinary action cannot stave off the church-autonomy doctrine. That is the case here.

In his own words, "the heart" of Father Alexander's defamation claim is a letter by several clergy to senior ROCOR leaders disputing Father Alexander's assertion that he was elected Bishop of Miami. Dkt. 22-2, at 2. This letter pointed out "irregular[ities]" in the documents evidencing his election,

and described complaints about his ministerial conduct. JA19-21. As a result of the letter, Metropolitan Hilarion "suspend[ed] Alexander from his priestly duties," pending an "investigation." JA99.

Whether the allegations are true and justified, ROCOR's actions fall squarely within the church-autonomy doctrine's core. The letter was an internal communication from ROCOR ministers to ROCOR's governing body, expressing concerns over two matters—whether Father Alexander's bishopric was improper as a matter of church government and whether he was fit to be a minister at all—that lie entirely within the church's exclusive authority. *See Milivojevich*, 426 U.S. at 711-12 ("[I]t is the function of the church authorities," not a federal court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *Watson v. Jones*, 80 U.S. 679, 730-31 (1871) (emphasizing it is beyond the judicial role "to inquire ... whether [the minister's] conduct was or was not in accordance with the duty he owed to the synod or to his denomination"). This lawsuit would therefore inevitably result in a federal judge acting as a super-Hierarch, passing judgment on how Metropolitan Hilarion resolved the issues.

In short, notwithstanding the immaterial factual disputes that the panel pointed to, interference is *unavoidable*. At its heart, Father Alexander's claim is that he was harmed by internal church statements challenging the validity of his appointment, and so seeks to "punish[]" ROCOR "for failing" to "accept ... an unwanted minister." *Hosanna-Tabor*, 565 U.S. at 188. He asserts "an enforceable right to be considered or accepted by the church hierarchy as a minister," which (per the ministerial exception) "[n]o member of a church may claim." *Rayburn*, 772 F.2d at 1168 n.5.

A secular court cannot evaluate Father Alexander's fitness to be a bishop without depriving ROCOR of its right "to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). The First Amendment shields both the hiring and firing of ministers *as well as*, just as importantly, the internal church deliberations that underlie those decisions. For this reason, *Hosanna-Tabor* held courts could not decide a terminated pastor's claim that the "asserted religious reason ... was pretextual," because judges have no business parting the veil that shields churches' internal workings. *Id.* at 194; *see also Rayburn*, 772 F.2d at 1169 ("[T]he state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.").

Our constitutional order demands that entirely ecclesiastical matters be entirely resolved by ecclesiastical authorities. And because allowing the lawsuit to proceed would inevitably violate churches' First Amendment rights, interlocutory appeal must be available to correct lower-court error.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing.

September 7, 2022

Respectfully submitted,

/s/ *Gordon D. Todd*
Gordon D. Todd
Counsel of Record
Daniel J. Hay
John L. Gibbons
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
Tel.: (202) 736-8000
Fax: (202) 736-8711
gtodd@sidley.com
dhay@sidley.com
jgibbons@sidley.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. In compliance with Federal Rule of Appellate Procedure 29(b)(4), the foregoing brief contains 2,596 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

Dated September 7, 2022.

/s/ *Gordon D. Todd*
Gordon D. Todd

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 September 7, 2022.

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.

Dated September 7, 2022.

/s/ *Gordon D. Todd*
Gordon D. Todd