No. 22-824

In the Supreme Court of the United States

THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, ET AL.,
Petitioners,

v.

ALEXANDER BELYA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF STEWARDS MINISTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SCOTT W. GAYLORD
ELON UNIVERSITY SCHOOL OF LAW
APPELLATE CLINIC
201 North Greene Street
Greensboro, NC 27401
(336) 279-9331
sgaylord@elon.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTERESTS OF *AMICUS CURIAE*[1]

Stewards Ministries is an independent, non-profit organization that exists to support the Plymouth Brethren, an evangelical Christian movement. In general, the Plymouth Brethren do not have formal membership or pastors, meeting instead in independent, local assemblies. Stewards Ministries serves all the Plymouth Brethren assemblies in North America and is the officially recognized chaplain endorser for the United States Armed Forces. Stewards Ministries is concerned that the Second and Tenth Circuits' narrow reading of the ministerial exception will subject religious organizations, like the Plymouth Brethren, to "interference by secular authorities" in "matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060-61 (2020). Allowing courts to exercise authority over a church's employment decisions involving its "ministers" will invariably chill and limit the free exercise of religion by the Plymouth Brethren and other religious denominations.

SUMMARY OF ARGUMENT

Sometimes one loses sight of the forest by focusing exclusively on individual trees—or, as in

---

[1] Each party received notice of the filing of this *amicus* brief as required by Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

this case, individual claims. The overarching question here is whether a former priest, Alexander Belya ("Belya"), in the Russian Orthodox Church Outside of Russia ("ROCOR" or "Church") can maintain an action challenging the Church's decision not to appoint him as the Bishop of Miami, Florida. Because Belya was a "minister" and the dispute centers on church governance, the ministerial exception would seem to straightforwardly resolve this case: "Under [the ministerial exception], courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2060; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (prohibiting "government interference with an internal church decision that affects the faith and mission of the church itself."). The Religion Clauses leave matters of church governance to the Church, not the courts. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (explaining that religious organizations have "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

Not so fast, the Second Circuit says. Belya asserts only a secular defamation claim against ROCOR. And under the "neutral principles" approach developed in church property cases, courts can retain control over the secular components of a larger ecclesiastical dispute. *See Belya v. Kapral*, 45 F.4th 621, 630 (2d Cir. 2022) ("When a case can be resolved by applying well-established law to secular

components of a dispute, such resolution by a secular court presents no infringement upon a religious association's independence."). Moreover, given the "crucial questions of fact" upon which Belya's "defamation claims … hinge," the Church's invocation of the ministerial exception raises no question of law that the court can review under the collateral order doctrine. *Id.* at 633-34. In so holding, the panel erred in "categorically deny[ing] interlocutory appeals for church autonomy defenses and reduc[ing] the doctrine to a defense against liability only." *Belya v. Kapral*, 59 F.4th 570, 573 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc).

The Second Circuit's opinion not only deepens circuit splits on both issues, but also conflicts with two lines of Supreme Court precedent. First, this Court has never applied the neutral principles approach outside the property context—and for good reasons. *Jones v. Wolf* developed the doctrine in response to the unique features of church property disputes. 443 U.S. 595, 604-06 (1979). If a church structures its property relationships in specific, secular ways, a court can resolve a property claim without violating the Establishment Clause. *Id.* The same is not true for employment claims by former ministers against religious organizations. The ministerial exception precludes courts from interfering in church governance, *Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."), because authority over the church-minister relationship—"a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 195 (quoting *Kedroff*, 344 U.S. at 119).

Regardless of how secular a claim may appear, allowing courts to entertain certain claims by former ministers directly infringes on "a church's independence on matters of faith and doctrine [which] requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S.Ct. at 2020.

Second, the Second and Tenth Circuits take the fact-sensitive nature of the ministerial exception to preclude interlocutory review of the denial of ROCOR's church autonomy defense. In so holding, these Circuits ignore the teachings of *Bose*, *Dale*, and *New York Times*, and subvert the protection the Religion Clauses provide religious institutions when dealing with their ministers. Many fact-intensive First Amendment doctrines implicate questions of law that appellate courts routinely decide when expounding the scope of the constitutional right at issue. The ministerial exception is such a doctrine, being rooted in both the Free Exercise and Establishment Clauses. *Hosanna-Tabor*, 565 U.S. at 181. Supreme Court review is needed, therefore, to resolve these circuit splits and to stop courts from interfering with the autonomy over church governance that the Constitution reserves to religious organizations.

ARGUMENT

I. The Second Circuit's neutral principles analysis is inconsistent with the ministerial exception because church governance is inherently ecclesiastical and, therefore, beyond the authority of the courts.

As this Court has acknowledged, even within the context of church property disputes, "the First Amendment severely circumscribes the role that civil courts may play." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 449 (1969). Undeterred, the Second Circuit *expands* the neutral principles approach to church-minister relationships. This expansion is inapt for at least two reasons. First, the neutral principles analysis applies only when a church relies "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," enabling the church to "specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy." *Jones*, 443 U.S. at 603. If "States, religious organizations, and individuals … structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions," then a court can hear the dispute. *Presbyterian Church*, 393 U.S. at 450. If "the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Jones*, 443 U.S. at 604. The problem is that church-minister relationships are

inherently "matters of internal government," *Our Lady*, 140 S.Ct. at 2061, being "strictly ecclesiastical." *Kedroff*, 344 U.S. at 119. Courts, therefore, must defer to a church's employment decision whether it was made for religious reasons or not. *Hosanna-Tabor*, 565 U.S. at 194.

Second, whereas "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment," *Presbyterian Church*, 393 U.S. at 449, a decision regarding a minister's employment relationship with his church does. Unlike the property context, courts "do … inhibit free exercise of religion merely by opening their doors to disputes involving" churches and their religious leaders. *Id.* In permitting Belya's defamation claim to go forward, the Second Circuit ignored *Presbyterian Church*'s warning that "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Id.*

A. The Religion Clauses require courts to defer to religious organizations' employment decisions involving ministers.

The problem with the Second Circuit's extension of the neutral principles analysis to church-minister relationships is readily apparent. Drawing on the same body of church property cases, *Hosanna-Tabor* reached the opposite conclusion—taking these precedents to "confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers." 565

U.S. at 185. Following its own internal procedures, the Church determined that Belya should not serve as the Bishop of Miami. How it went about making that decision and whether the Church was "correct" in its assessment are components of an ecclesiastical dispute between Belya and ROCOR, one that falls outside the "severely circumscribe[d]" role of courts even when deciding church property disputes. *Presbyterian Church*, 393 U.S. at 449. Unlike the property context, courts cannot interfere with, let alone dictate, how religious organizations structure the relationships with their ministers. *Kedroff*, 344 U.S. at 116 (recognizing religious organizations' "power to decide for themselves free from state interference, matters of church government as well as those of faith and doctrine."). Such ecclesiastical matters are left entirely to the religious institutions. *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976) (describing the "general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them").

The Second Circuit's analysis loses sight of the overarching ecclesiastical nature of the church-minister relationship and, in the process, falls victim to the fallacy of composition—what is true of a part must be true of the whole. According to the Second Circuit, because Belya filed only a defamation claim and defamation is a secular legal concept, the overarching legal dispute is secular. A court's hearing the case, therefore, does not infringe the Religion Clauses any more than a court's application of "well-established concepts of trust and property law" to a church property dispute. *Belya*, 45 F.4th at

630 ("When a case can be resolved by applying well-established law to secular components of a dispute, such resolution by a secular court presents no infringement upon a religious association's independence."); *Belya*, 59 F.4th at 572 (Lohier, J., concurring in denial of rehearing en banc) (same).

Although church property disputes do not always involve issues of religious faith or polity, the selection, discipline, and retention of ministers do. And the ministerial exception recognizes a church's authority over the unique and varied roles that ministers serve within different religious organizations:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action 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. That a plaintiff may assert a secular claim does not alter the inherently religious nature of the church-minister relationship—the very relationship that the First Amendment insulates from "interference by secular authorities." *Our Lady*, 140 S.Ct. at 2060. The ministerial exception covers all facets of internal church governance because "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.*; *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th

968, 976-77 (7th Cir. 2021) ("The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between."). Having voluntarily united themselves to a particular religious organization, ministers are subject to its employment decisions; otherwise, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Watson v. Jones*, 80 U.S. 679, 728-29 (1872). This is why the Court rejected the ministers' secular claims in *Hosanna-Tabor* and *Our Lady*. Accordingly, if the Second Circuit is correct, *Hosanna-Tabor* and *Our Lady* must be wrong.

This deference to a church's decisions regarding appointment and discipline is necessary to safeguard its "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S.Ct. at 2061. Belya challenged only certain aspects of ROCOR's decision not to appoint him Bishop of Miami. While the elements of defamation may appear secular in the abstract, they implicate a decidedly ecclesiastical relationship, requiring a court to determine, at a minimum, why the Church concluded Belya had not been elected Bishop of Miami, how the Church went about making that determination, whether church leaders followed proper church procedures in informing the faithful of its determinations, what effect Belya's other conduct had on ROCOR's determinations, and whether the leaders of the Church acted in good faith. These questions implicate matters of "internal church procedures" that prevent courts from engaging in a "detailed

review" of the church's decisions. *Milivojevich*, 426 U.S. at 718. Given the "important religious functions" Belya performed, ROCOR "had the right to decide for itself whether [he] was religiously qualified to remain in [his] office." *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring).

In adopting the neutral principles analysis, the Second, Fifth, and Eighth Circuits[2] ignore *Jones*'s admonition that the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." 443 U.S. at 602; *Milivojevich*, 426 U.S. at 724-25 ("When … ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them."). "Civil courts" exercise no control over matters that are "strictly and purely ecclesiastical in [their] character," which include such things as "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733; *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017) ("[I]n determining whether the ministerial exception bars an employment discrimination claim against a religious organization, the only question is whether the employee qualifies as a 'minister' within the meaning of the exception."); *Lee v. Sixth Mt. Zion*

---

[2] *See McRaney v. N. Am. Mission Bd. of S. Baptist Conv., Inc.*, 966 F.3d 346, 349-50 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 2852 (2021); *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993).

Baptist Church of Pitt., 903 F.3d 113, 123 (3d Cir. 2018) ("[W]e are not aware of any court that has ruled on the merits (i.e., not applied the ministerial exception) of a breach of contract claim alleging wrongful termination of a religious leader by a religious institution.").

The deference given religious organizations in relation to their ministers is even greater than the independence the First Amendment safeguards in the "similar context" of expressive associations, which is itself quite extensive. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). The right of expressive association ensures the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). This right "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). Absent such a right, the government could "intru[de] into the internal structure or affairs of an association," going so far as to "force[] the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. Such forced association, though, "may impair the ability of the group to express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648.

As *Our Lady* and *Hosanna-Tabor* demonstrate, these considerations apply even more strongly to religious organizations. Religious groups "are the archetype of associations formed for expressive purposes" and have "the freedom to choose who is qualified to serve as a voice for their faith." 565 U.S. at 200-01 (Alito, J., concurring). As a result, just as

courts must "give deference to an association's assertions regarding the nature of its expression … [and] to [its] view of what would impair its expression," *Dale*, 530 U.S. at 653, courts also must defer to a church's decisions regarding its ministers. *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) (explaining that, when considering whether a state law burdened the Democratic Party's associational rights, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party."). This deference is "important" when determining whether an individual is a minister, *Our Lady*, 140 S.Ct. at 2066, but is required when someone, like Belya, qualifies as a minister under *Our Lady* and *Hosanna-Tabor*. *Our Lady*, 140 S.Ct. at 2060 ("[C]ourts are bound to stay out of employment disputes involving [ministers]."); *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909)) ("The 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs,' Madison explained, prevented the Government from rendering an opinion on the 'selection of ecclesiastical individuals.' "); *Demkovich*, 3 F.4th at 975 ("Supreme Court precedent reflects repeated engagement with that boundary [between religious and civil authority] and teaches that avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance.").

Supreme Court review is necessary, then, because the Second Circuit's extension of the neutral

principles approach to the church-minister relationship divests religious organizations of their authority over internal church governance, which the Religion Clauses scrupulously protect.

B. Allowing courts to hear claims involving church governance undermines the Free Exercise and Establishment Clause principles that gave rise to the ministerial exception.

Presbyterian Church identified a second reason for allowing courts to play a "severely circumscribe[d]" role in church property disputes—the fact that "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment." 393 U.S. at 449. The same is not true when courts adjudicate employment-related disputes between churches and their ministers. Whereas "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property," entertaining secular claims arising from the termination of a ministerial relationship has that effect. *Id*. As Justice Alito explained in his *Hosanna-Tabor* concurrence:

> [W]hatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really

> believes, and how important that belief is to the church's overall mission.

565 U.S. at 205-06. Regardless of the outcome, authorizing courts to hear such church-minister disputes pressures religious groups to avoid any procedures or decisions that *might* give rise to a secular claim. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that … may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *Milivojevich*, 426 U.S. at 718 (finding the Illinois Supreme Court's " 'detailed review' impermissible under the First and Fourteenth Amendments" because, among other things, it "concern[ed] internal church procedures"). Simply by entertaining actions involving internal church government, courts undermine the general First Amendment principle "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

Several Circuit Courts have sharp internal divisions over whether the church autonomy doctrine shields "religious institutions from the litigation process itself where the dispute concerns 'matters of church government as well as those of faith and doctrine.' " *Belya*, 59 F.4th at 577 (Park, J., dissenting from denial of rehearing en banc) (citation omitted); *McRaney v. N. Am. Mission Bd. of S. Baptist Conv., Inc.*, 980 F.3d 1066, 1074 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) ("[F]orcing religious institutions to defend themselves on matters of internal governance is itself a tax on religious liberty."); *Tucker v. Faith*

Bible Chapel Int'l, 53 F.4th 620, 627 (10th Cir. 2022) (Bacharach, J., dissenting from denial of rehearing en banc) ("By deferring the chance to appeal, the panel majority subjects religious bodies to time-consuming and expensive litigation over the religious importance of the roles occupied by countless employees. However the courts weigh these roles in individual cases, the litigation itself enmeshes the courts in ecclesiastical disputes."). Others directly conflict with the Second, Fifth, and Tenth Circuits. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (describing how "a lengthy [Title VII] proceeding would subject "Church personnel and records … 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"); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that "the EEOC's two-year investigation …, together with the extensive pre-trial inquiries and the trial itself constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution").

Religious organizations in the Second, Fifth, and Tenth Circuits confront the threat of litigation over the merits of secular claims arising from disciplining or firing their ministers. Both the threat of such litigation and the litigation itself violate the Religion Clauses. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("Fear of potential liability might affect the way an organization carrie[s] out what it underst[ands] to be its religious mission."); *Tucker* 53 F.4th at 627 (Bacharach, J., dissenting from

denial of rehearing en banc) ("Given these burdens from the litigation itself, religious bodies will undoubtedly hesitate before deciding whether to suspend or fire renegade ministers."); *Rayburn*, 772 F.2d at 1171 ("There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members."). This Court should grant the petition to stop this interference with the free exercise of religion.

II. Whether courts can hear secular claims by former ministers is a question of law subject to interlocutory review.

The Second Circuit's opinion also sharpens the Circuit split regarding when interlocutory review of the denial of church autonomy defenses is available. Judges on the Second Circuit are evenly split on the issue. *Belya*, 59 U.S. at 572. The Second Circuit panel, consistent with the Tenth Circuit, denied such review, while the dissenters from the denial of en banc reconsideration argued that the ministerial exception warranted interlocutory consideration because it was similar to qualified immunity. Although a discussion of qualified immunity goes beyond the scope of this brief, one facet of that issue raises another significant question in need of Supreme Court review—whether the ministerial exception raises an issue of fact or law.

The Second and Tenth Circuits hold that the ministerial exception poses a question of fact, even

though "every federal or state appellate court to address the issue" had "characterized ministerial status as a question of law." *Tucker*, 53 F.4th at 628 (Bacharach, J., dissenting from denial of rehearing en banc). *See*, *e.g.*, *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("The status of employees as ministers … remains a legal conclusion for this court."); *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (noting that "whether the [ministerial] exception attaches at all is a pure question of law"). According to the Second Circuit, because this case "involve[d] the existence of many genuinely disputed fact questions," interlocutory appeal was precluded. *Belya*, 45 F.4th at 634; *Belya*, 59 F.4th at 583 (Chin, J., statement in support of denial of rehearing en banc) ("These are factual questions that a fact-finder could answer without delving into matters of faith and doctrine."). The Tenth Circuit shares this view. *Tucker*, 53 F.4th at 623 (Ebel, J., statement supporting order denying en banc review) ("Contrary to this Supreme Court authority, the dissent … incorrectly insists that this case presents only a legal issue.").

Given that Belya is unquestionably a minister, though, the central issue is a legal one—whether the ministerial exception prohibits courts from hearing employment-related claims arising from the church-minister relationship. The ministerial exception either safeguards churches from the litigation process or it does not. The facts of a particular claim are relevant only if the exception does not apply. In the Second and Tenth Circuits, however, the Free Exercise and Establishment Clause rights of religious organizations are mercurial, depending on

when, if ever, a lower court decides to "jump into the fray." *Belya*, 45 F.4th at 631; *id.* ("It is possible that at some stage Defendants' church autonomy defenses will require [the court to] limit[] the scope of Belya's suit, or the extent of discovery, or even dismiss[] the suit in its entirety.").

As discussed above, the Second Circuit's position is in direct tension with this Court's formulation of the ministerial exception: "Under [the ministerial exception], courts are bound to stay out of employment disputes involving those holding certain important positions with churches and religious organizations." *Our Lady*, 140 S.Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."). The Second Circuit's assurance that ROCOR "may continue to raise a church autonomy defense" throughout the legal proceedings provides little comfort (and no protection) to the Church now that it must endure discovery and a possible trial related to its decision not to appoint Belya as Bishop of Miami. Once discovery and the trial commence, a core component of the constitutional protection afforded by the ministerial exception is lost.

Moreover, taking the ministerial exception to raise questions of fact is inconsistent with this Court's treatment of "comparable First Amendment claims." *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018). In the speech context, this Court has repeatedly confirmed its "constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court" where a party has claimed that its activity amounts to protected speech. *Hurley v. Irish-*

American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (explaining that the "requirement of independent appellate review … is a rule of federal constitutional law"); *Lilly v. Virginia*, 527 U.S. 116, 136 (1999) (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)) ("[A]s with other fact-intensive, mixed questions of constitutional law, … '[i]ndependent review is … necessary … to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."). This independent review is necessary in the speech context "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley*, 515 U.S. at 567. That is, "whether a given course of conduct falls on the near or far side of the line of constitutional protection" is for a court to decide as a matter of law. *Id.*; *Dale*, 530 U.S. at 649 ("Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obliged to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression."). As a result, although the lower court found that the "factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct," *Hurley* concluded that "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

The fact-intensive nature of many First Amendment rules, such as the expressive nature of

the activity in *Hurley* and the actual malice standard discussed in *Bose*, does not obviate the appellate courts' obligation to determine where the constitutional "line is drawn." *Bose*, 466 U.S. at 501 n.17. Appellate courts routinely determine the scope of First Amendment protections where:

> the common-law heritage itself assigns an especially broad role to the judge in applying it to specific factual situations[,] … the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law[, and] the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.

Id. at 502; *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (confirming that where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

These considerations apply with equal or greater force to the ministerial exception. *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (quoting *Bose*, 466 U.S. at 503-04) ("Freedom of religion, no less than freedom of speech, is a promise of the 'First

Amendment …essential to the common quest for truth and the vitality of society as a whole.' "); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line drawing; no fixed *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application."); *A.H. v. French*, 985 F.3d 165, 175 (2d Cir. 2021) (explaining how this Court's "purpose in requiring an independent examination of the record in First Amendment free speech cases logically extends to review of claims under the same amendment's Free Exercise Clause"). *Hosanna-Tabor* detailed the history of the ministerial exception, including the "extensive experience" the Courts of Appeals "have had … with this issue." 565 U.S. at 188. While the Free Exercise and Establishment Clauses provide the constitutional mooring for the exception, the scope of the exception is not express in the text of the First Amendment; rather, its contours continue to be determined through specific cases, including *Hosanna-Tabor* and *Our Lady*. In this way, the ministerial exception's "reaches … are ultimately defined by the facts it is held to embrace." *Hurley*, 515 U.S. at 567.

Whether the ministerial exception safeguards churches from some or all claims (such as defamation) requires the appellate courts to determine whether a specific case "falls on the near of far side of the line of constitutional protection." *Id.*; *Bose*, 466 U.S. at 503 ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special

importance."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."); *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) ("[W]e reaffirm the principle that, [in First Amendment speech cases], this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.").

In permitting Belya's claim to go forward, the Second Circuit undermined the protections afforded ROCOR under the Religion Clauses. *Bose*, 466 U.S. at 510-11 ("The requirement of independent appellate review … reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."); *id.* at 507-08 (quoting *New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982)) (noting "that an 'independent examination' of the allegedly [defamatory statements] may be necessary 'to assure ourselves that the judgment … "does not constitute a forbidden intrusion on the field of free expression" ' "). Interlocutory review is needed because subjecting religious organizations to discovery and litigation related to internal church government influences how such decisions are made and possibly the ultimate decisions themselves. As this Court recognized in *Bose*, "[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501

n.17. Even the threat of litigation related to the supervision of a ministerial relationship—which involves myriad decisions that are "strictly ecclesiastical," *Kedroff*, 344 U.S. at 119—can directly impact a religious organization's determination to discipline or remove a minister. This Court previously has recognized the problem in both the free speech, *Bose*, 466 U.S. at 505 (describing how general descriptions of unprotected categories of speech have not "served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas") and religion contexts:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carrie[s] out what it underst[ands] to be its religious mission.

Amos, 483 U.S. at 336; *Catholic Bishop*, 440 U.S. at 502; *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring). Facing the threat of secular claims by disgruntled ministers, religious organizations in the Second Circuit now must consider whether their procedures for and decisions about disciplining, promoting, and firing a minister will subject them to discovery and trial. This case provides the Court with a clean vehicle to determine "whether the [ministerial] exception bars [these] types of suits"

and whether "the First Amendment has struck the balance for us," leaving the decision as to "who will guide [a church] on its way" to the church or the courts. *Id*. at 196.

CONCLUSION

In support of extending *Jones*'s neutral principles approach to a dispute between a minister and his former church, the Second Circuit notes that "simply having a religious association on one side of the 'v' does not automatically mean a district court must dismiss the case or limit discovery." *Belya*, 45 F.4th at 630. While this general proposition is undoubtedly true in cases involving the property disputes discussed in *Jones* or many secular claims brought by non-ministers, the lower courts are deeply divided over its truth in the context of suits by ministers against their former religious institutions relating to hiring, discipline, and firing. The Plymouth Brethren, ROCOR, and all other religious groups in the Second and Tenth Circuits now face protracted discovery and possible trials over decisions directly involving church governance despite this Court's holding that "courts are bound to stay out of employment disputes involving" ministers. *Our Lady*, 140 S.Ct. at 2060. This Court should grant certiorari to resolve the circuit split on this important issue of internal church governance.

Respectfully submitted,

SCOTT W. GAYLORD
ELON UNIVERSITY SCHOOL OF LAW
APPELLATE CLINIC
201 North Greene Street
Greensboro, NC 27401
(336) 279-9331
sgaylord@elon.edu

Counsel for Amicus Curiae

March 31, 2023