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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A group of Respondent Alexander Belya's colleagues published statements to the media that falsely accused him of forging letters confirming his election as Bishop of Miami. After those public accusations spread, Belya brought a garden-variety defamation suit. On the pleadings, the district court determined that Belya's claims turned on secular issues of fact. But the court made clear that it could not and would not decide religious issues, should they arise.

Petitioners sought immediate appeal of three separate nonfinal orders: (1) an order denying a motion to dismiss, (2) an order denying a motion for reconsideration, and (3) an order denying a motion to bifurcate discovery. Petitioners did not explain why each was an immediately appealable collateral order. Instead, they argued, based on facts not in the record, that *every* order addressing the church-autonomy doctrine is a collateral order.

The Court has long "criticized and struggled to limit" the "judicial policy" of the collateral-order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 115 (2009) (Thomas, J., concurring in part and concurring in the judgment). Against that background, the Second Circuit declined Petitioners' request for a sweeping new rule of appellate jurisdiction and held that it did not have jurisdiction to hear Petitioners' appeals of nonfinal orders.

The question presented is:

Should the court of appeals have expanded the collateral-order doctrine to review three disparate interlocutory orders simply because each order addressed a church-autonomy defense?

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INTRODUCTION

When Respondent Alexander Belya's colleagues publicly labeled him a forger, he brought a defamation suit. Though Belya is a priest, his allegations have nothing to do with religious doctrine or discipline. What is at issue is whether he forged documents (he didn't).

Petitioners moved to dismiss the complaint. But rather than accepting all well-pleaded allegations, they relied on evidence not in the record. The district court denied the motion, concluding that the complaint presented secular issues. But the court also made clear that it could not and would not decide any religious issues should they arise. Petitioners moved for reconsideration, raising an entirely new argument. But the court denied the motion because Petitioners filed it two weeks late. Then, Petitioners moved to bifurcate discovery. The district court denied that motion too, yet again assuring the parties that it would confine litigation to purely nonreligious matters. The case should have continued in the trial court from there. Instead, Petitioners appealed all three orders.

Courts of appeals generally have jurisdiction to review only final decisions. Each of the decisions here was unequivocally nonfinal. So Petitioners had to explain why each should fall within the small class of immediately appealable nonfinal orders under the collateral-order doctrine.

Rather than explain why each order satisfies the strict collateral-order requirements, Petitioners argued that because they presented religion-based defenses, they had a right to appeal all three orders together. The upshot of their argument is that every time a defendant's church-autonomy argument isn't

immediately successful, the losing party could run directly to the circuit court for a second opinion.

That's not collateral-order review, it's *plenary* review.

The Second Circuit declined to remake the collateral-order doctrine so dramatically. Instead, it followed this Court's repeated admonitions that the doctrine should remain narrow, lest the circuit courts be flooded with interlocutory appeals.

Petitioners offer no reason to review that decision: No courts conflict with the Second Circuit's modest approach. The sparse record and disputes of fact that the petition ignores highlight why this is a bad vehicle—problems that would be compounded by reviewing the case together with *Faith Bible Chapel International v. Tucker*, No. 22-741. And the Second Circuit faithfully applied this Court's decisions.

The petition should be denied.

STATEMENT

A. Legal Background

1. The historical and textual grounding of the final-judgment rule

"From the very foundation of our judicial system," beginning with the Judiciary Act of 1789, Congress has limited appellate jurisdiction to review of only final judgments. *McLish v. Roff*, 141 U.S. 661, 665-66 (1891); *see* 1 State. 73 § 22 (1789). Final judgments are those "by which a district court disassociates itself from a case," *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995), ending the litigation on the merits and leaving "nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945).

This "historic federal policy against piecemeal appeals" preserves judicial and party resources and ensures the orderly, efficient administration of justice. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). It "save[s] the expense and delays of repeated appeals in the same suit" by having "the whole case and every matter in controversy in it decided in a single appeal." *McLish*, 141 U.S. at 665-66 (citing *Forgay v. Conrad*, 47 U.S. 201, 204 (1848)). And it respects district court judges, "who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

2. *Cohen* gives the word final a "practical" definition.

The Judiciary Act's successor, Section 1291, limits the jurisdiction of the courts of appeals to "final decisions." 28 U.S.C. § 1291.

In 1949, the Court gave Section 1291's finality requirement a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As a result, a certain "small class" of nonfinal orders were deemed final under Section 1291 and could be appealed immediately. *Id.* An order falls within that class only if it "(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment." *Mohawk*, 558 U.S. at 105.

If a category of orders is appealable under *Cohen*, every order in that category is immediately appealable, regardless of any given order's strengths or the

record's completeness. *See Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In other words, *Cohen* does not allow case-by-case analysis; the Court looks to the "entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice' averted." *Id.* (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)) (cleaned up).

The system of interlocutory appeals "has been subject to much criticism: 'hopelessly complicated,' 'legal gymnastics,' 'dazzling in its complexity,' 'unconscionable intricacy' with 'overlapping exceptions, each less lucid than the next,' 'an unacceptable morass,' 'dizzying,' 'tortured,' 'a jurisprudence of unbelievable impenetrability,' 'helter-skelter,' 'a crazy quilt,' 'a near-chaotic state of affairs,' [and] a 'Serbonian Bog.'"[1]

3. Congress intervenes and the Court corrects course.

In 1988, after years of patchwork collateral-order decisions, Justice Scalia diagnosed that "our finality jurisprudence is sorely in need of further limiting principles." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring).

Congress responded by amending the Rules Enabling Act to empower this Court to issue rules defining which orders should be considered final and appealable under Section 1291. *See* 28 U.S.C. § 2072(c) (1990). In doing so, Congress sought to address the "continuing spate of procedural litigation" that had resulted

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[1] Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1238-39 (2007) (collecting sources) (cleaned up).

from the "[c]onsiderable uncertainty" wrought by the Court's previous decisions. H.R. Rep. No. 101-734, at 18 (1990). And two years later, Congress again addressed the ways that the collateral-order doctrine had "blur[red] the edges of the finality principle, requir[ing] repeated attention from the Supreme Court." S. Rep. No. 102-342, at 24 (1992). It gave the Court power to specify through rulemaking which categories of nonfinal, interlocutory orders should be immediately appealable under Section 1292. *See* 28 U.S.C. § 1292(e) (1992).

Put plainly, Congress determined that any exceptions to the finality rule are to be established through the rulemaking process, not by common-law reasoning. *Swint*, 514 U.S. at 48. Rulemaking "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114 (citation omitted).

Since insisting that Congress's determination of jurisdictional rules "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, this Court has been extraordinarily hesitant to expand *Cohen*. In the last 30 years, it has done so only three times—and each case involved the government. *See Shoop v. Twyford*, 142 S.Ct. 2037, 2043 n.1 (2022); *Osborn v. Haley*, 549 U.S. 225, 238 (2007); *Sell v. United States*, 539 U.S. 166, 176 (2003).

B. Factual Background

The only facts before this Court are those plausibly alleged in Belya's complaint. That is because, in denying the motion to dismiss, the district court explicitly and correctly limited its analysis to those allegations. App.40a n.4. Petitioners did not challenge that ruling before the Second Circuit. So the only facts

before the panel were the plausible allegations in Belya's complaint, taken as true, with all reasonable inferences drawn in Belya's favor.

Belya was an Archimandrite—a monastic priest—in the Russian Orthodox Church Outside of Russia (ROCOR). App.106a ¶ 23. In December 2018, he was elected Bishop of Miami. App.107a ¶ 26.

On December 10, 2018, Hilarion Kapral, the head of ROCOR, sent a letter, which he signed and stamped with his official seal, to Kirill, the Patriarch of Moscow and All Russia, sharing the "joyful news" that Belya had been "elected as the Bishop of Miami." App.107a-108a ¶¶ 28-29. Because ROCOR Bishops must also be approved by the Moscow Synod, Kapral notified Kirill that a request to confirm Belya for his position was forthcoming. 108a ¶ 30. Separately, Kapral personally congratulated Belya on his election. App.107a ¶ 27. And Kapral informed Belya of practices that he should implement to ensure confirmation by the Moscow Synod. App.108a-109a ¶ 31.

In early January 2019, Archbishop Gavriil of Montreal and Canada wrote to Kapral, confirming that Belya had implemented those suggested changes; and on January 11, Kapral sent a letter to Patriarch Kirill in Moscow asking for approval of Belya as Bishop of Miami. App.109a-110a ¶¶ 32-34. Again, Kapral signed and stamped the letter with his official seal. App.110a ¶ 35.

That summer, Belya was invited to Russia to meet with Kirill. App.110a ¶ 36. During that meeting they discussed, among other things, the changes that Kapral had suggested and Gavriil had overseen. App.110a ¶ 36. Kirill told Belya that Moscow would

approve his appointment. App.110a ¶ 36. And in August, the Moscow Synod confirmed the election held by ROCOR and published the approval on its official website. App.110a ¶ 37.

That day, Kapral congratulated Belya by telephone. App.111a ¶ 38.

Meanwhile, a group of detractors led by Petitioner Nicholas Olkhovskiy, head of the Eastern American Diocese, were plotting to thwart Belya's promotion. App.111a ¶ 39. Because they lacked the votes needed to stop the promotion, the group decided to sully Belya's name and pressure Kapral to remove him from his new position. App.111a ¶¶ 39-41.

On September 3, 2019, after Belya was promoted, the detractors wrote to the ROCOR Synod. App.112a-113a ¶ 42. Their letter falsely accused Belya of forging Kapral's signature on the December 10 letter to Moscow, App.114a ¶ 43, of falsifying the letter from Gavriil to Kapral and the January 11 letter from Kapral to Kirill, App.114a ¶¶ 44, 46, and of fabricating the results of his election as Bishop of Miami, App.114a ¶ 45. Some of the detractors published the defamatory letter to a host of other institutions and individuals. App.115a ¶¶ 49-50.

They didn't stop there. They also sent their letter to online media publications. App.115a ¶ 50. Unsurprisingly, "[n]umerous Internet posts and articles" repeating the defamatory statements soon followed. App.115a-116a ¶¶ 53-56. And some of those stories did not rely on the letter alone—they quoted "unnamed 'sources' at ROCOR" too. App.116a ¶ 56.

Petitioner Chancellor Serafim Gan then took to social media to publicly amplify the accusations. App.115a-116a ¶ 53. Gan wrote that Belya "had not

been elected by the ROCOR Synod" and that the letter informing Moscow of his nomination "was a forgery." App.115a ¶ 53.

When Kapral ultimately succumbed to the detractors and stripped Belya of his position, Belya left ROCOR. App.116a-117a ¶¶ 57-58. He became an Archimandrite of the Greek Orthodox Church of America. App.102a ¶ 1.

But the damage had been done: As a result of the widespread, published defamation, Belya's "reputation and good name" were "ruined." App.117a ¶ 58.

C. Procedural Background

1. In August 2020, Belya brought claims for defamation, defamation per se, defamation by innuendo, and vicarious liability against Kapral, Olkhovskiy, several of Olkhovskiy's coconspirators, Gan, the Eastern American Diocese of ROCOR, the Synod of Bishops of ROCOR, and John Does 1-100. App.118a-130a.

Belya's complaint explicitly avoided any "involvement whatever in religious dogma or practice." App.102a. He limited his claims to a "straightforward defamation action," challenging the public statements that he was a forger and a fraud. App.102a. He did not challenge his defrocking. App.102a. And he did not seek reinstatement. App.102a. In other words, Belya brought the same claims and sought the same relief that anyone else could in response to publicly being called a forger.

In a pre-answer letter motion, ROCOR asserted an ecclesiastical-abstention defense, arguing that reviewing Belya's allegations "would require the Court to interpret ROCOR's religious laws, rules, and regulations." CA2 JA17. ROCOR never mentioned any

ministerial-exception defense. CA2 JA16-18. ROCOR attached to its motion the September 3, 2019 letter from Olkhovskiy and his allies. App.95a-99a.

The district court treated the letter motion as a motion to dismiss and denied it. App.29a-44a. The court explained that, based exclusively on the statements in the complaint, App.40a n.4, Belya's claims raised "secular inquiries" that, at this early stage of the case, "may be resolved by appealing to neutral principles of law," App.37a-38a. Specifically, the court recognized that Belya did not ask the court "to determine whether his election was proper or whether he should be reinstated to his role as Bishop of Miami." App.37a. Instead, the claims presented straightforward issues of fact: whether the election happened at all, whether Kapral knew about it, and who sent letters to Moscow. App.40a. The district court made clear that "under the doctrine of ecclesiastical abstention," it could not and would not decide any religious issues should they arise. App.37a.

About four weeks later, ROCOR filed a notice of appeal. CA2 JA112-113. At the same time, it filed a Rule 59(e) motion to alter or amend the judgment. SDNY Dkt. 51. The motion rehashed ROCOR's ecclesiastical-abstention arguments and argued that the district court should have incorporated the September 3 letter when deciding the motion to dismiss. SDNY Dkt. 51 at 12-21. The motion also presented a new ministerial-exception argument, SDNY Dkt. 51 at 7-12, which the court had not yet considered because it had not been raised.

Nine days later, ROCOR asked the district court to certify for interlocutory appeal under 28 U.S.C. § 1292(b) the denial of its motion to dismiss. SDNY Dkt. 54. ROCOR's motion focused primarily on the

new and improperly raised ministerial-exception argument. SDNY Dkt. 54.

The district court denied as untimely the motion to alter the judgment. App.46a. Because no judgment had been entered, the purported Rule 59(e) motion was a motion for reconsideration. App.46a. And under the court's local rules, the filing was 14 days late. App.46a.

In the same order, the court also denied Section 1292(b) certification of the denial of ROCOR's motion to dismiss. App.48a. The court reasoned that "[i]nstead of presenting disagreement regarding the legal standards being applied," the motion asserted "factual disputes" that did not "merit certification for interlocutory appeal" at the motion-to-dismiss stage. App.48a.

ROCOR amended its notice of appeal to include that order. CA2 JA143-145.

The following month, ROCOR filed a motion in the district court requesting either bifurcated discovery on its church-autonomy and ministerial-exception defenses or a stay of the proceedings. SDNY Dkt. 62. The court denied the motion because the only issues raised by the complaint were purely secular ones, so discovery would be limited to fact-based inquiries about what occurred, App.53a, not "full discovery" about "internal matters" as ROCOR now insists, Pet. 1. The court again made clear that it would "not pass judgment on the internal policies and or determinations" of ROCOR, "nor would it be able to under the doctrine of ecclesiastical abstention." App.53a.

ROCOR amended its notice of appeal yet again, this time including the discovery order. CA2 JA149-151. Separately, ROCOR asked the Second Circuit to

stay proceedings. The court granted the stay without explanation or analysis. CA2 Dkt. 138.

2. In its briefing on appeal, ROCOR did not argue that each of the three appealed orders separately satisfies *Cohen*. Instead, it argued that the "Religion Clauses" writ large satisfy *Cohen*. CA2 Br. 51. ROCOR did not explain when, if ever, arguments under the Religion Clauses would *not* afford an immediate appeal as of right. *See* CA2 Br. 49-50.

Nor did ROCOR address two district-court conclusions critical to its petition now. First, it did not argue that the district court erred in refusing to incorporate by reference the September 3 letter, which was not attached to Belya's complaint. Instead, ROCOR simply treated the letter as part of the facts. CA2 Br. 7. Second, ROCOR did not challenge the district court's determination that its motion for reconsideration was untimely. Instead, ROCOR labeled its motion as "timely," without even acknowledging why the district court had denied it. CA2 Br. 10.

3. A unanimous panel dismissed the appeal, concluding that the district court's orders were not reviewable collateral orders, App.17a, so the court lacked jurisdiction to hear the case, App.24a.

As the panel explained, this Court has "rarely extended the collateral order doctrine to cover new categories." App.13a n.5. And ROCOR could not satisfy the "stringent" doctrine. App.13a.

First, the challenged orders were not conclusive: "[T]hey do not bar any defenses, they did not rule on the merits of the church autonomy defense, and they permit Defendants to continue asserting the defense." App.17a. Put simply, appellate review would require

the Second Circuit to "prematurely jump into the fray." App.17a.

Second, "the district court's orders d[id] not involve a claim of right separable from the merits of the action." App.20a. After all, "one of Defendants' principal defenses" on the merits "is the church autonomy doctrine." App.20a.

Finally, the church-autonomy doctrine functions as a "defense to liability," not an immunity from suit. App.21a (quoting *Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1090 (7th Cir. 2014)). So ROCOR could seek appellate review when the decision is final. App.22a.

Additionally, the panel explained that even if the court accepted ROCOR's principal argument—that the church-autonomy doctrine functioned like qualified immunity—there still wouldn't be jurisdiction. For a denial of qualified immunity is a collateral order only "to the extent that it turns on an issue of law." App.23a (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). When, like here, the defense turns on resolution of factual questions, the court lacks appellate jurisdiction. App.23a-24a.

The court's reasoning was based exclusively on the church-autonomy doctrine because that is all that was properly raised and decided in the district court. Although the panel acknowledged the ministerial exception's relationship to church autonomy, App.21a n.9, it did not review whether the exception applied here.

4. ROCOR petitioned for rehearing en banc. Like its briefing before the panel, ROCOR's petition called its motion for reconsideration "timely" without acknowledging that it was denied as being *un*timely.

CA2 Pet. 5. Likewise, ROCOR again treated the September 3 letter as properly before the Second Circuit and did not acknowledge that the district court declined to consider it when deciding a motion to dismiss. *See* CA2 Pet. 4.

Without requesting a brief in opposition from Belya, *see* Fed. R. App. P. 36(e), the Second Circuit denied ROCOR's petition in a six-to-six vote. App.59a.

In dissent, Judge Park did not disagree with the majority that the case raised secular fact questions. App.73a. But he argued that, regardless, churches have the "right not to face the . . . burdens of litigation." App.72a. According to him, the neutral-principles doctrine, which allows courts to resolve disputes involving religious bodies as long as they do not entangle themselves in ecclesiastical questions, applies to property disputes only. App.78a.

In a separate one-paragraph opinion, Judge Cabranes encouraged review by this Court because he viewed the issues as important. App.63a. He did not explain which issues he considered important or why he thought them worthy of review. App.63a.

Judge Lohier wrote in support of the denial and reiterated that the majority answered an extremely narrow procedural issue and expressly avoided generating a circuit split. App.60a. "Judge Park's dissent, by contrast, proposes a significant judicial expansion of the collateral order doctrine and the circumstances under which application of the doctrine is warranted under *Cohen v. Beneficial Industrial Local Corporation*, 337 U.S. 541, 545-46 (1949), and it does so without offering any limiting principle." App.60a. Judge Lohier also corrected the dissent's argument that

Belya's complaint was "merely 'styl[ed]' as a defamation claim to avoid the church autonomy doctrine and 'questions of religious doctrine.'" App.61a (quoting App.81a). "[A]t this stage, Belya's claim *is* a genuine defamation claim that, as the dissent's refusal to take it at face value suggests, would not implicate church autonomy." App.61a.

Judge Chin, writing separately, rejected the dissent's attempts to broaden the issues posed by the case. He emphasized the district court's narrow and reasonable decisions, which "allow the litigation to proceed with respect to non-ecclesiastical factual questions that would not require a fact-finder to consider matters of faith or internal church government." App.88a. At this stage in the proceedings, when the court must assume that Belya's allegations are true, the complaint presented straightforward defamation questions and "not a case over religious matters." App.84a. Judge Chin explained that church autonomy does not create an immunity from suit and it "surely does not give church officials free rein to falsely accuse someone of forgery and fraud." App.88a.

REASONS FOR DENYING THE PETITION

The Second Circuit decided a single issue: Did the court of appeals have collateral-order jurisdiction under *Cohen* to review three disparate interlocutory orders that raised different legal arguments because they all touched on a church-autonomy defense?

The Second Circuit's decision is not worthy of review. There is no split on the issue that the court of appeals decided—nor on the issues that ROCOR did not properly present. ROCOR's reliance on extra-record assertions of fact and unreviewed legal arguments make this a bad vehicle for determining whether to

expand the collateral-order doctrine. And the Second Circuit was correct in declining to expand *Cohen* to consider "premature" rulings of the sort here.

I. There is no split in authority.

A. There is no split on the one question that the Second Circuit decided.

The Second Circuit refused to expand *Cohen* review to every order that denies a church-autonomy defense (or simply holds that it's too early to rule on the defense). On that question, there is no split to review.

1. No circuit has taken the drastic step ROCOR demanded of the Second Circuit. Quite the opposite.

The Seventh Circuit has made clear that it has not expanded *Cohen* to include every denial of a church-autonomy defense. *See Herx*, 772 F.3d at 1091. Instead, it has limited interlocutory review to the unusual case when a district court submits an explicitly religious question to the jury. *Id.* (citing *McCarthy v. Fuller*, 714 F.3d 971, 973-75 (7th Cir. 2013)). Belya does not challenge his defrocking or any other religious decision—his claims turn on secular questions. And when addressing secular questions, the Seventh Circuit held that it did not have jurisdiction under *Cohen* to review issues that could be resolved by neutral principles of law. *McCarthy*, 714 F.3d at 979.

Further disproving ROCOR's argument that the Seventh Circuit treats all Religion Clause issues as immediately appealable, in a recent case in which ROCOR's counsel here represented the defendant, the court (Easterbrook, Kanne, and Wood, JJ.) dismissed an interlocutory appeal of defendants' ministerial-exception defense. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, No. 20-3265, 2021 WL

9181051 (7th Cir. July 22, 2021). The court did not look to church autonomy at all. Instead, it concluded that the appeal was premature because there remained disputes of fact. *See id.* (citing *Johnson v. Jones*, 515 U.S. 304 (1995)). And it recognized as an open question whether the ministerial exception is appealable as a collateral order when there *aren't* disputes of fact. *Id.*

Likewise, the Fifth Circuit has not held that *Cohen* categorically allows appeals whenever First Amendment rights are implicated. Instead, *Whole Woman's Health v. Smith* considered the First Amendment rights of third parties who are subject to discovery orders and who "cannot benefit directly" from post-final-judgment relief. 896 F.3d 362, 367-68 (5th Cir. 2018).

ROCOR argues that subsequent Fifth Circuit cases rejected the view that *Whole Woman's Health* was confined to the "predicament of third parties." Pet. 25 n.5. But the Fifth Circuit has made clear that *Whole Woman's Health* was limited to collateral-order review of decisions that raise First Amendment issues in the unique context of court-ordered "discovery against a *nonparty*." *Leonard v. Martin*, 38 F.4th 481, 487 (5th Cir. 2022) (emphasis added); *see also Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 n.2 (5th Cir. 2019). That is not what happened here.

2. With no circuit split, ROCOR points to a handful of state cases. But as the reasoning of those cases demonstrates, the jurisdiction of state courts is governed by *state* law.[2] There cannot be a split between

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[2] *See Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1198 (Conn. 2011); *United Methodist Church, Balt. Ann. Conf. v.*

state courts' interpretation of state appellate procedure and federal courts' interpretation of federal appellate procedure.

ROCOR insists, though, that this Court's interpretation of underlying rights informs how state courts apply their procedural rules. Pet. 27. But states aren't bound by Article III, Congress's definition of finality, or this Court's interpretation of *Cohen*. So if review were granted here, the states could lawfully ignore whatever this Court might conclude. *See Johnson v. Fankell*, 520 U.S. 911, 917 n.7 (1997) (citing state-court cases that "reject the limitations this Court has placed on § 1291").

B. There are no splits on the questions that the petition describes but that the case doesn't present here.

1. ROCOR expands its argument beyond appellate-jurisdiction cases and beyond the Second Circuit's limited church-autonomy holding. Relying on stray language about immunities and "structural" rights, ROCOR concludes that thirteen courts have held that the Religion Clauses provide an immunity "against the burdens of litigation." Pet. 17. Not so.

Errant uses of "immunity" do not mean "immunity *from trial*." *Herx*, 772 F.3d at 1091. Instead, "[w]ords like 'immunity,' sometimes conjoined with 'absolute,' are often used interchangeably with 'privilege'" or "affirmative defense." *Id.* (quoting *Segni v. Com. Off. of Spain*, 816 F.2d 344, 346 (7th Cir. 1987)).

White, 571 A.2d 790, 791-92 (D.C. 1990); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014); *Harris v. Matthews*, 643 S.E.2d 566, 568-69 (N.C. 2007).

Again citing *Whole Woman's Health*, 896 F.3d at 367, and *McCarthy*, 714 F.3d at 975, ROCOR argues that the Fifth and Seventh Circuits broadly treat the church-autonomy doctrine as an immunity. Pet. 18-19. But in a decision that ROCOR glosses over, the Fifth Circuit recently reversed a district court's dismissal of a defamation suit against a religious defendant. *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 349-50 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 2852 (2021). The court refused to interpret the church-autonomy doctrine in a way that would "effectively immunize" religious defendants from suit. *Id.*

Meanwhile, the Seventh Circuit has explicitly declined to conclude that "the First Amendment more generally provides an immunity *from trial*, as opposed to an ordinary defense to liability." *Herx*, 772 F.3d at 1090. Indeed, the Second Circuit quoted this very language as supporting its conclusion. App.21a.[3]

For its part, the D.C. Court of Appeals concluded that discovery was necessary to "ensure that the doors to the civil courthouse are not closed prematurely." *Fam. Fed'n for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 251 (D.C. 2015). And when faced with a church-autonomy argument, the Supreme Court of Texas focused on whether the lawsuit would impose *liability* on a religious institution. *See In re Diocese of Lubbock*, 624 S.W.3d 506, 519 (Tex. 2021).

2. ROCOR also pulls language from ministerial-exception cases (again, an issue that was not properly

[3] ROCOR quotes the panel's *Herx* quotation but uses the "cleaned up" parenthetical to omit that the panel was citing the Seventh Circuit, Pet. 24, which, on the very next page, ROCOR says "go[es] the other way," Pet. 25.

presented or decided) to support its immunity argument. But quotes stripped of context are not holdings.

For example, ROCOR points to language from the Seventh Circuit that adjudicating a minister's claim might allow "impermissible intrusion" into a church's inner workings. Pet. 18 (quoting *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980-82 (7th Cir. 2021) (en banc)). But ROCOR does not square its reading with the fact that two weeks after *Demkovich*, two members of the *Demkovich* majority explained that it's an open question whether the ministerial exception is an immunity from trial "or only a right to prevail." *Starkey*, 2021 WL 9181051, at *1.

Take the Third Circuit as another example. ROCOR cites (at 22) the court's passing language in *Petruska v. Gannon University*, 462 F.3d 294, 302 (3d Cir. 2006), comparing the ministerial exception to qualified immunity. But the court's analysis focused on "remedies," not immunities. *Id.* at 303, 305 n.8. *Petruska*, like *Starkey*, shows that vague uses of the term "immunity" cannot be read to hold that the ministerial exception provides immunity *from trial*.[4]

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[4] *Compare* Pet. 17 (citing *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)) *with Goldfarb v. Mayor and City Council of Balt.*, 791 F.3d 500, 508 (4th Cir. 2015) (describing the exception as concerning a plaintiff's entitlement to relief, and saying nothing about a defendant's immunity from trial); *compare also Presbyterian Church v. Edwards*, 566 S.W.3d 175, 179-80 (Ky. 2018) (describing the ministerial exception as an immunity) *with Kirby*, 426 S.W.3d at 619 (precluding liability on certain claims but allowing others to go forward). *See also Nation Ford Baptist Church Inc. v. Davis*, 876 S.E.2d 742, 753-54 (N.C. 2022) (precluding a pastor's claims that required answering religious questions, but allowing others to continue); *Gregorio v. Hoover*, 238 F.Supp.3d 37, 48-49 (D.D.C. 2017) (citing

Similarly, decisions from the Third and Sixth Circuits about waiver present no split with the panel's holding. *See* Pet. 19 (citing *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) and *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015)). Waiver is "the intentional relinquishment or abandonment of a known right," *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1713 (2022) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)), a different issue altogether than immunity from trial.[5]

C. There is no split on whether courts may hear claims against religious defendants based on neutral legal principles.

ROCOR insists that the decision here deepens a supposed split over when courts can resolve disputes between religious parties. But the split is false. The courts identified by ROCOR grant church-autonomy defenses only when litigation would require the court

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Minker v. Balt. Ann. Conf. of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990)) (explaining the D.C. Circuit's rule that some claims by a minister can proceed).

[5] ROCOR also contends that decades-old cases about the ministerial-exception somehow are relevant. *See* Pet. 17, 18, 20 (citing *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991), and *United Methodist Church v. White*, 571 A.2d 790 (D.C. 1990)). But those cases were decided before *Hosanna-Tabor*, which clarified that the question under the ministerial exception is "'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010)).

to answer ecclesiastical questions. That's not this case.

1. The Second Circuit concluded that the questions raised by Belya's complaint—including "did Belya forge the letters at issue?"—were decidedly non-religious and could be answered without "delv[ing] into matters of faith and doctrine." App.24a. Like the district court, the panel also recognized that the church-autonomy doctrine might eventually require the court to "limit[] the scope of Belya's suit" or even dismiss it entirely. App.17a. Until then, if a court can rely "'exclusively on objective, well-established [legal] concepts,' it may permissibly resolve a dispute even when parties are religious bodies." App.16a (quoting *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979)).

As ROCOR acknowledges, other courts have treated defamation claims similarly. Pet. 33. For example, the Fifth Circuit rejected a defendant's church-autonomy defense to a former minister's defamation claim, recognizing that there were no religious issues at that early point in the litigation. *McRaney*, 966 F.3d at 349. Holding otherwise, the Fifth Circuit warned, "could effectively immunize [religious entities] from judicial review of claims brought against them." *Id*. at 351.

The Third Circuit came to the same conclusion for a fraudulent misrepresentation claim, holding that when adjudication turns on secular questions like the "truth or falsity" of a statement, resolution of the claim "would not violate the Free Exercise Clause." *Petruska*, 462 F.3d at 310.

2. To manufacture a split, ROCOR describes cases as conflicting with the Second Circuit's neutral-prin-

ciples analysis. But ROCOR does not address later decisions from those same courts that align with the Second Circuit.

For example, ROCOR cites *Heard v. Johnson* to argue that the D.C. courts have found the "'neutral principles' approach inapplicable to [a] minister's defamation claim." Pet. 32 (citing 810 A.2d 871, 880-82 (D.C. 2002)). But *Heard* held only that the court could not consider statements "confined within the church" about the plaintiff's fitness to serve as a minister. *Id.* at 885-87. And in a later case that ROCOR ignores, the D.C. Court of Appeals cited *Heard* and explained that the court "readily applied" the "neutral principles of law" doctrine to defamation suits. *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 357 (D.C. 2005). The court explicitly rejected the narrow property-specific view of the neutral-principles doctrine that ROCOR ascribes to it. *Id.* ROCOR ignores similar clarifications from the Virginia and Texas courts.[6]

3. For the rest of the supposed split, ROCOR relies on decisions dismissing claims based on alleged violations of religious doctrine or statements that arose exclusively in internal church conversations. Those

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[6] *Compare Cha v. Korean Presbyterian Church*, 553 S.E.2d 511, 516 (Va. 2001), *with Bowie v. Murphy*, 624 S.E.2d 74, 79-80 (Va. 2006) (refusing to dismiss a deacon's defamation claim because it could "be decided without addressing issues of faith and doctrine"); *compare also In re Diocese of Lubbock*, 624 S.W.3d at 517, *with Doe v. Roman Cath. Diocese of Dallas*, 659 S.W.3d 448, 449 (Tex. 2022) (Lehrmann, J., concurring in denial of petition for review) (citing *Lubbock* and explaining that the court will decide non-ecclesiastical issues "based on the same neutral principles of law applicable to other entities") (quoting *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 596 (Tex. 2013)).

cases say nothing about challenges to religious defendants' public accusations of fraud that can be resolved by neutral doctrines.

For example, the Sixth Circuit rejected a minister's defamation claim because the minister raised "contentions that defendants had improperly applied" the church's own internal code. *Hutchinson v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986). The court explained that it could not apply neutral principles to a religious dispute, but that it possibly "could find jurisdiction" to resolve disputes over a religious institution's violation of secular law. *Id.* at 395-96; *see also Natal v. Christian and Missionary All.*, 878 F.2d 1575, 1576-77 (1st Cir. 1989) (dismissing a minister's libel and slander claims because complaint alleged that defendant had violated church's own constitution, bylaws, rules, and regulations). And the D.C. Circuit held that it could not choose between "competing religious views," but affirmed that the federal courts can hear cases involving religious institutions "as long as the analysis can be done in purely secular terms." *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (quoting *Minker*, 894 F.2d at 1358).

The Massachusetts Supreme Judicial Court explained that the church-autonomy doctrine prevents courts from deciding someone's "fitness and reputation as a priest." *Hiles v. Episcopal Diocese of Mass.,* 773 N.E.2d 929, 937 (Mass. 2002). But the court also held that "a clergyman may not with impunity defame a person," *id.* (quoting *Madsen v. Erwin*, 481 N.E.2d 1160, 1167 (Mass. 1985)) and that the "First Amendment protection for statements made by a Church member in an internal church disciplinary proceeding would not apply to statements made or repeated outside that context," *id.* at 937, n.12. *See also El-Farra*

v. Sayyed, 226 S.W.3d 792, 795-97 (Ark. 2006) (dismissing a case that would require court to decide if "appellant's conduct 'contradict[ed] the Islamic law'" while distinguishing cases in which the First Amendment does not shield religious institutions from litigation because religious questions are not at issue).

II. This case is a poor vehicle and combining it with *Tucker* would compound the problems.

A. ROCOR's reliance on facts and arguments that cannot be before this Court makes this case a poor vehicle for three reasons.

First, answering the petition's questions would require this Court to prematurely resolve factual disputes.

The district court took "the well-pleaded factual allegations in the complaint as true" and drew all reasonable inferences in Belya's favor. *See Papasan v. Allain*, 478 U.S. 265, 283 (1986). It explicitly refused to go beyond the complaint to consider evidence ROCOR appended to its motion to dismiss. App.40a n.4. And ROCOR's only challenge to that decision was an untimely motion to reconsider. So it's too late to revisit that now. The complaint provides the only facts that the district court considered—and hence the only ones that were before the Second Circuit.

Yet before this Court, ROCOR continues citing to materials the district court declined to consider. *See, e.g.*, Pet. 7, 35. Going further still, ROCOR introduces an article published just four months ago. Pet. 34. Like the rest of the extra-record evidence, the article is irrelevant to Belya's claims. But ROCOR uses it to (further) demean Belya and fashion this case into something beyond the scope of the complaint and the record below.

The Court has "consistently condemned attempts to influence [its] decisions by submitting additional or different evidence that is not part of the certified record," because it "encourages gamesmanship and frustrates [the Court's] review." *Ross v. Blake*, 578 U.S. 632, 649 (2016) (Thomas, J., concurring in part and concurring in judgment) (cleaned up). This case is a prime example: For the Court to answer the questions raised by the petition, it would have to ignore the actual record, decide which extra-record facts were relevant, and then be the first court to consider them.

In any event, this Court is "a court of final review and not first view." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)).

Second, even if the Court were to accept ROCOR's misplaced view that the church-autonomy doctrine is akin to qualified immunity, disputes of fact prohibit appellate review here. As the Second Circuit highlighted, and the petition ignores, "[a] defendant who claims qualified immunity must fully stipulate to the plaintiff's recitation of facts and show her entitlement to qualified immunity as a matter of law before a court of appeals can have jurisdiction over the claim." App.61a (citing *Mitchell*, 472 U.S. at 530).

Here, "[d]ecidedly non-ecclesiastical questions of fact remain. For example, did 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?" App.24a.

ROCOR ignores these factual disputes. So even if this Court were to grant certiorari and hold that church autonomy functions like qualified immunity, the result would remain the same: The Second Circuit had no jurisdiction.

Third, as to the ministerial-exception questions, there is nothing for this Court to review. As already explained (at 9), ROCOR raised its ministerial-exception defense for the first time in an untimely motion for reconsideration. Neither the district court nor the Second Circuit ever addressed it. So there is no decision to review—final or otherwise.

B. ROCOR attempts to elide these problems by insisting that the Court consider this case alongside *Faith Bible Chapel International v. Tucker*. Pet. 36.

But *Tucker* is a different (although similarly flawed) case. In *Tucker*, the district court denied a motion for summary judgment under the ministerial exception because there were disputes of material fact. *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1027 (10th Cir. 2022), *pet. for cert. filed*, No. 22-741 (Feb. 3, 2023). The defendant unsuccessfully moved to reconsider, raising a new defense—the church-autonomy doctrine. *Id.* at 1031. When the defendant sought interlocutory review under *Cohen*, the Tenth Circuit decided only the one narrow issue before it—whether denial of a ministerial-exception defense at summary judgment satisfied *Cohen*. *Id.* at 1032.

As ROCOR acknowledges (at 36), this case and *Tucker* present different legal issues, decided in different procedural postures, with different rules about how courts are to treat fact disputes. But ROCOR asks the Court to consider the cases together and address

every one of these circumstances under sweeping arguments about the "Religion Clauses." That means expanding collateral-order review to motions to dismiss, discovery motions, reconsideration motions, and summary-judgment motions—regardless of factual disputes.

What's more, both petitions rely on defaulted arguments without acknowledging that the courts below never considered the issues because petitioners did not properly raise them. So this Court would have to decide when a procedural error—such as raising a new argument in a motion for reconsideration or filing a motion two weeks late—precludes review under *Cohen*, or instead demands it.

Combining the petitions would exacerbate this petition's vehicle problems by making the issues before the Court boundless. That would lay waste to *Cohen*'s narrow question whether a given *order* is immediately appealable.

III. The Second Circuit followed this Court's decisions.

A. The panel majority followed this Court's repeated admonition that the collateral-order doctrine remain narrow "and never be allowed to swallow the general rule, that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digit. Equip.*, 511 U.S. at 868 (citation omitted). After all, if the courts of appeals freely expanded the collateral-order doctrine whenever tempted by an individual case, "Congress's final decision rule would end up a pretty puny one." *Id.* at 872.

Interlocutory appeals are appropriate only when the category of order "(1) conclusively determines the disputed question; (2) resolves an important issue

completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment." *Mohawk*, 558 U.S. at 105. The appellant bears the burden of showing that "*every* issue presented in an interlocutory appeal . . . 'fall[s] within *Cohen's* collateral-order exception.'" *United States v. Wampler*, 624 F.3d 1330, 1335 (10th Cir. 2010) (Gorsuch, J.) (quoting *Abney v. United States*, 431 U.S. 651, 663 (1977)).

ROCOR can't satisfy its burden for any of the orders—much less all three.

First, this Court has insisted that "[t]o be appealable as a final collateral order, the challenged order must constitute a complete, formal, and in the trial court, final rejection of a claimed right." *Risjord*, 449 U.S. at 376 (quoting *Abney*, 431 U.S. at 659). "[I]nherently tentative" orders cannot satisfy *Cohen*. *Gulfstream Aerospace Corp.*, 485 U.S. at 277.

Here, the three challenged orders are quintessentially tentative—the district court rejected ROCOR's church-autonomy arguments as premature. App.17a. As Judge Chin explained, the district court made clear that it would consider the defense "at a later point in the litigation if it becomes apparent that further inquiry and litigation will implicate church autonomy." App.86a; *see also* App.53a. It's hard to picture a more tentative approach.

Second, the challenged orders are inextricably tied up with the merits. In denying the motion to dismiss, the district court looked to Belya's allegations that he was falsely (and publicly) accused of forgery. App.40a. Whether challenged statements are false is at the very heart of any defamation claim. ROCOR argued that the statements *can't* be false because the

truth or falsity of the statements must be "determined by ROCOR and its policies." CA2 Br. 25. ROCOR doesn't explain what church policy has to do with deciding whether Belya fraudulently drafted letters on others' letterhead and signed their names. But it can make that merits argument at the proper time.

Third, the district court's denials are not unreviewable. They may be addressed on appeal after the district court issues a final decision.

The Second Circuit's conclusion that the church-autonomy doctrine is not an "immunity from discovery nor an immunity from trial on secular matters," App.21a, aligns with how this Court has long treated the Religion Clauses.

This Court allowed state administrative investigation into a religious organization, holding that First Amendment rights are sufficiently vindicated if the organization can raise Religion Clause challenges after the investigation is complete. *See Ohio C.R. Comm'n v. Dayton Christian Schs.*, 477 U.S. 619, 629 (1986).[7] And when the Court was asked to wade into questions of religious doctrine, it concluded that it was bound by a religion's answer to a religious question. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). It did not breathe a word about immunity from trial. *Id.*

Neither has the Court treated the ministerial exception as an immunity from trial. Just last year, this Court denied interlocutory review in *Gordon College*

[7] While comity and federalism concerns were part of the rationale for *Dayton*'s holding, *see* 477 U.S. at 625-28, if the Religion Clause defenses operated as a constitutional immunity from suit, surely that would have overcome any comity-based justification.

v. DeWeese-Boyd, where a state court had conclusively decided that the respondent was not a minister. 142 S.Ct. 952 (2022) (statement of Alito, J., respecting denial of certiorari). Although four justices found the state court's decision "troubling," *id.* at 952, the Court allowed the case to proceed to trial on the merits because petitioner could seek review "when the decision is actually final," *id.* at 955 (citation omitted).

B. Holding otherwise and allowing immediate review every time a district court denies a defendant's church-autonomy defense would create havoc and confusion in the courts of appeals and district courts.

1. Since Congress answered Justice Scalia's call to revamp this Court's finality jurisprudence, the Court has been extremely hesitant to create new categories of appealable orders under *Cohen*. *See Mohawk*, 558 U.S. at 106; *see also id.* at 115 (Thomas, J., concurring in part and in the judgment) (arguing against *any* new categories under *Cohen*). It has done so just three times in the last thirty years. And none involved litigation between private parties. *See Shoop*, 142 S.Ct. at 2043; *Osborn*, 549 U.S. at 238; *Sell*, 539 U.S. at 175.

Instead, the Court has suggested that *Cohen* should be expanded in litigation between private parties only when there is an "*explicit* statutory or constitutional guarantee that trial will not occur." *See Digit. Equip.*, 511 U.S. at 874 (emphasis added) (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989)). For example, the Speech and Debate Clause ensures that members of Congress "shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. But that is "a rare form of protection." *Digit. Equip.*, 511 U.S. at 879. And nothing in the First Amendment is an explicit "guarantee that trial will not occur," *id.* at 874.

ROCOR doesn't say otherwise. Instead, it argues that because the First Amendment is important, it must be treated as an immunity. Pet. 22-23. But this Court has warned that attempts to categorize a right as an immunity from trial should be viewed "with skepticism, if not a jaundiced eye." *Digit. Equip.*, 511 U.S. at 873. "[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Id.* (quoting *Midland Asphalt*, 489 U.S. at 501). "But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters." *Will v. Hallock*, 546 U.S. 345, 351 (2006). This Court has instead been steadfast in its commitment to maintain the collateral-order doctrine's "modest scope." *Id.* at 350. Hence, "that a ruling 'may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment,'" even when it comes to important rights, "has never sufficed." *Mohawk*, 558 U.S. at 107 (quoting *Digit. Equip.*, 511 U.S. at 872).

To find that the church-autonomy doctrine is an immunity from suit, despite the utter lack of textual support for that conclusion, this Court would have to abandon its text-based approach. That would invite countless other collateral appeals under any issue that could broadly be framed as important.

2. Worse yet, because "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs," *Digit. Equip.*, 511 U.S. at 868, and because ROCOR's argument is not limited to any particular order or class of orders, ruling in ROCOR's favor would mean that any time a district court denies *any* church-autonomy defense, there would be a right to an immediate appeal.

And that flood of appeals is to say nothing of ROCOR's demand that collateral-order review include evidence that the district court never considered in the first place. How would courts of appeals decide when unauthenticated evidence not considered by the district court should be reviewed on appeal?

3. This disruption of civil and appellate procedure would not be confined to Religion Clause cases.

ROCOR's atextual description of the Religion Clauses as an immunity would guarantee "a further expansion of the collateral order doctrine." App.60a (Lohier, J., concurring in denial of rehearing en banc). After all, the same argument could be made for "virtually every other 'liberty'-based right." *Id.*

Even if the Court were to limit a newly found immunity from trial to the First Amendment, that would still create a mess in the lower courts because other First Amendment rights have widely been described as immunities too. For example, this Court has defined the Free Speech Clause as providing "immunity." *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). So too the right of free association. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("immunity from state scrutiny of membership lists").

And the lower courts have widely described the *Noerr-Pennington* doctrine, grounded in the Petition Clause, as an "immunity." *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013); *Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 295-96 (5th Cir. 2000). Yet they have consistently held that the doctrine does not confer a right to interlocutory appeal. *See, e.g.*, *Nunag-Tanedo*, 711 F.3d at 1141.

There is no logical justification for treating church autonomy any differently. Like the Petition Clause, the doctrine "does not enjoy a special status, or confer any greater immunity, than that provided by other First Amendment guarantees." *See id.* (citing *McDonald v. Smith,* 472 U.S. 479, 484-85 (1985)).

If this Court were to hold that the Religion Clauses satisfy *Cohen*, by what logic would a court deny interlocutory review to a newspaper that didn't like a ruling under *New York Times v. Sullivan*, or any organization whose freedom-of-association defense was rejected (no matter how meritless the arguments may be)? And how would a court engage in coherent line drawing when facing "doubly protect[ed] religious speech" covered by the "overlapping protection for expressive religious activities" granted by the Free Speech Clause and the Religion Clauses? *See Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022).

4. The Court need not answer these tough questions.

Instead of creating new collateral orders to review "judicial decisions in particular controversies," *Hall v. Hall*, 138 S.Ct. 1118, 1131 (2018) (quoting *Microsoft Corp. v. Baker*, 582 U.S. 23, 39 (2017)), the Court prefers avenues for case-by-case appellate review like Section 1292(b) and writs of mandamus under 28 U.S.C. § 1651(a). *See Mohawk*, 558 U.S. at 105, 110-11. Neither requires the wholesale rewriting of appellate jurisdiction that a ruling under *Cohen* would. And these paths have allowed the courts of appeals to review interlocutory orders when appropriate, without

expanding *Cohen* to place an unworkable drain on judicial resources.[8]

ROCOR did not seek a writ of mandamus. It sought immediate review under Section 1292(b), which provides for appeals involving "controlling question[s] of law." 28 U.S.C. § 1292(b). But the district court denied ROCOR's request because it did not raise any question of law and challenged only "the factual situation presented." App.11a.

ROCOR attempts to shift the blame for its failure to seek mandamus or satisfy its burden under Section 1292(b) by arguing that the Second Circuit "categorically den[ies] interlocutory appeal for church autonomy defenses." Pet. 24 (citing App.64a). But that's flatly wrong: Denying a new category of interlocutory appeals does not mean categorically denying *every* interlocutory appeal. The Second Circuit's refusal to create three new categories of appeal just means that parties must rely on, and satisfy, the preferred case-by-case avenues to appeal.

CONCLUSION

The petition should be denied.

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[8] *E.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (mandamus, rather than collateral-order doctrine, is proper to appeal attorney-client-privilege orders); *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1298 (10th Cir. 2011) (Gorsuch, J.) ("Congress has already provided a way for parties to challenge a district court's erroneous assertion of jurisdiction before the entry of a final judgment . . . writs of mandamus."); *see also United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1009 (9th Cir. 2020); *United States v. Gorski*, 807 F.3d 451, 458 (1st Cir. 2015); *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co.*, 707 F.3d 853, 869 (7th Cir. 2013); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011).

Respectfully submitted.

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