21-1498

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

- v. –

HILARION KAPRAL, ET AL.,

Defendants-Appellants.

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

BRIEF *AMICI CURIAE* OF THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, ASSEMBLIES OF GOD (USA), JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY OF THE ANGLICAN CHURCH IN NORTH AMERICA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND THE LUTHERAN CHURCH–MISSOURI SYNOD IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF THE *AMICI*[1]

Amici curiae are a diverse coalition of denominational organizations. *Amici* and their members include churches of multiple denominations that are entrusted by their members to declare church doctrine, to discipline leaders who violate church teaching, and to protect the faithful from false teachers and unworthy leaders. As detailed further below, *amici* are protected by, and rely upon, the constitutional rights of faith communities to govern their own ecclesiastical matters. *Amici* submit this brief out of concern that, without immediate review and reversal, the decision below will unconstitutionally open the door to attacks on faith communities' freedom to govern their religious affairs, despite well-established caselaw protecting those interests.

The **Roman Catholic Archdiocese of New York** is the second-largest Catholic diocese in the United States, with more than 2.8 million Catholics and nearly 300 parishes within the Archdiocese's ten counties.

[1] No party's counsel has authored this brief in whole or in part; no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

Erected in 1808, the Archdiocese is led by His Eminence Timothy Cardinal Dolan, the auxiliary bishops of the Archdiocese, and nearly 1,000 priests.

The **Assemblies of God (USA)** is a Pentecostal Christian denomination with more than 13,000 churches and over 3 million adherents. It is part of the World Assemblies of God Fellowship, which has more than 69 million adherents worldwide and is the world's largest Pentecostal denomination and fourth-largest Christian fellowship. The General Council of the Assemblies of God (USA) sets and enforces standards for ordaining ministers, congregational affiliation, and scriptural interpretation.

The **Jurisdiction of the Armed Forces and Chaplaincy of the Anglican Church in North America (ANCA)** is a diocese that serves as the ANCA's official representative to certify chaplains for service in the U.S. Armed Forces. The Diocese also supervises and cares for chaplains serving in the military, federal and local government, hospital and hospice, and law enforcement, as well as other vocational and volunteer chaplains serving their communities. The Anglican Communion is the world's third-largest Christian communion, with over 85 million members.

The **General Conference of Seventh-day Adventists** is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 22 million members. The Church operates the largest Protestant school system in the world, along with healthcare institutions, publishing houses, an international development NGO, and numerous community service centers in the United States and around the world.

The **Lutheran Church—Missouri Synod**, a Missouri nonprofit religious corporation, has some 6,000 member congregations, 22,000 ordained and commissioned ministers, and nearly two-million baptized members throughout the United States. The Presidents of the 35 Districts of the Synod in the United States exercise ecclesiastical supervision over ministers and member congregations within their Districts.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal asks what role, if any, a federal court should have in adjudicating disputes over a faith community's selection, promotion, and discipline of its ministers. Centuries of tradition and precedent teach clearly that the civil legal system has *no* authority to second-guess a church's core ecclesiastical decisions to hire (or not) a person as a minister, to promote (or not) a minister to a leadership position, or to retain (or not) the services of a minister who, in word or deed, has violated the church's teachings or governance policies. Quite the opposite, the First Amendment guarantees faith communities the sole authority to set, enforce, and declare their doctrine—including and especially as relating to personnel matters—based solely on the teachings of their faith and not the threat of civil litigation.

The district court's decision to hear Father Alexander Belya's claims, and to order discovery in this case, poses immediate and irreparable harm to Defendants-Appellants' First Amendment rights—and, by extension, to *amici*'s reliance on these same rights. If allowed to stand, the decision would have a chilling effect on faith communities of all reli-

gions, sects, and denominations. Declaring and enforcing church doctrine, policy, and governance are necessary components of religious liberty; the church-autonomy and ministerial exception doctrines exist precisely to protect these critical prerogatives. Interfering with a church's selection of its own ministers—whether under the framework of Title VII, state defamation law, or any other civil legal regime—trespasses on churches' internal ecclesiastical affairs.

This case illustrates the very real threat churches face if core decisions pertaining to the selection, promotion, and discipline of ministers could be challenged in civil courts. Here, Father Alexander is disappointed that senior leadership in the Russian Orthodox Church Outside of Russia ("ROCOR") did not bestow on him the honor of being ordained a bishop. Unable to challenge that decision under the framework of employment law, he has dressed up an HR grievance as a defamation claim against ROCOR and its senior leadership in the United States. By virtue of pleading a cognizable defamation claim—which is not hard to do in disciplinary matters that, by definition, are derogatory and have adverse effects—Father Alexander will now be allowed to conduct far-reaching

discovery into church decisionmaking, including by Metropolitan Hilarion, the First-hierarch of ROCOR. This outcome—which would be akin to allowing discovery from and even the deposition of the Archbishop of New York or the President of the Union of Reform Judaism on core ecclesiastical matters—poses a grave threat to church autonomy that cannot be overstated.

To its credit, ROCOR has stood by its principles and incurred the burden of litigation in this case to defend its autonomy. But many churches—in particular, smaller churches and churches of minority faiths—will be deterred from making difficult personnel decisions if they fear doing so will subject them to drawn-out and expensive civil litigation. This case therefore has profound implications for faith communities that rely upon the protections of the church-autonomy doctrine and ministerial exception to safeguard their ability to set, declare, and enforce matters of doctrine and church governance.

ARGUMENT

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

From the earliest days of American colonial history, institutional religious liberty—the freedom of each sect and congregation to independently determine its own doctrine, organization, and policy—has played a key role in our conception of religious freedom. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182-85 (2012). That tradition is reflected in the twin guarantees of the Religion Clauses of the First Amendment. The Free Exercise Clause protects the rights of individuals to organize and operate institutional churches that declare and practice what they believe is correct doctrine. The Establishment Clause protects those choices by prohibiting the government from interfering with a church's selection, retention, and discipline of the ministers entrusted to "personify its beliefs." *Id.* at 188. The law thus recognizes that a church's selection of its own ministers is "a 'core matter of ecclesiastical self-governance' at the 'heart' of the church's religious mission," and represents "the most spiritually intimate grounds of a religious community's existence." *Hankins v. Lyght*, 441 F.3d 96, 117

(2d Cir. 2006) (Sotomayor, J., dissenting) (quoting *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) and *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000)).

Pursuant to these established principles, churches create and enforce rules and regulations for pastoral appointment, discipline, and succession. As Defendant-Appellants explain in this case, ROCOR grants authority over "the election, nomination, transfer, retirement and rewarding of bishops" to the Sobor of Bishops, "the highest law-making administrative, judicial and controlling body" in its church. ROCOR, *Regulations of the Russian Orthodox Church Outside of Russia* ¶¶ 7, 11(g), https://bit.ly/3z0zGv4 (last visited Aug. 31, 2021); *see* Appellants' Br. 5-6, ECF 76.

Other churches structure themselves differently, as is their prerogative. The Orthodox Presbyterian Church provides, for example, that pastors be selected by local congregations (acting through special committees) with the approval of the regional governing authority (presbytery). *See The Book of Church Order of the Orthodox Presbyterian Church*, chs. XIV, XXII (2020 ed.), https://opc.org/BCO/BCO_2020.pdf. In

the Church of Jesus Christ of Latter-day Saints, bishops of local congregations must be recommended for service by area leadership and approved by the highest levels of worldwide leadership. *See* Church of Jesus Christ of Latter-day Saints, *General Handbook: Serving in the Church of Jesus Christ of Latter-day Saints* § 30.8.1 (2021), https://bit.ly/3mN2Av8. There are strict requirements for who may serve as a bishop, *id.* § 30.7, and the church has set forth codes of conduct and specific responsibilities for bishops once ordained, *e.g.*, *id.* § 7.1.

Hiring ministers inevitably creates the need to "remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) ("Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."). The United Methodist Church's Book of Discipline, for instance, has detailed procedures for trying leaders accused of religious offenses, including "dissemination of doctrines contrary to the established standards of doctrine." *The Book of Discipline of the United Methodist Church* ¶ 2702.1*e* (2016). Roman Catholic canon law permits removal of an or-

dained minister under similar circumstances. 1983 Code cc.192-94. Similarly, both the Central Conference of American Rabbis and Rabbinical Council of America have extensive procedures and standards for investigating and disciplining Jewish rabbis. *See* Cent. Conf. of Am. Rabbis, *CCAR Ethics*, https://bit.ly/3suK0ZN (last visited Aug. 31, 2021); Rabbinical Council of Am., *Constitution* art. III, § 4 (as amended Nov. 2014), https://bit.ly/3iXm7XH ("RCA Constitution").

When religious institutions make the difficult choice to expel a leader for failing to live by church teachings, it is not merely a personnel action; it is an ecclesiastical determination regarding who is fit to lead the faithful and a means of protecting other congregations from future wrongdoing. *Hosanna-Tabor*, 565 U.S. at 188 ("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."). For example, some churches have removed ministers found to have misused or embezzled church funds.[2] Other ministers have been expelled for non-

[2] *See, e.g.*, Corey G. Johnson & John Romano, *The Rev. Henry Lyons Forced Out as Pastor of Tampa Church Amid Accusations of Theft, Misconduct*, Tampa Bay Times (Apr. 2, 2018), https://bit.ly/3ydkLMX; Adelle

criminal offenses, such as alcohol abuse and marital infidelity, that violate church teaching.[3] Such actions reflect not merely personnel judgment but fundamental choices about the minister's fitness to set a good example and lead a congregation in the ways of the faith.

Churches also use various forms of discipline, including removal, to police doctrinal teachings and supervise rites or ordinances. As just a few examples:

- In 2018, the Southern Baptist Convention disfellowshipped an entire congregation for "alleged 'intentional discriminatory acts'" towards members of a predominantly-Black Baptist congregation. Jennifer Parks, *Albany Church Disfellowshipped After Accusals of Racism, Prejudice*, Albany Herald (June 13, 2018), https://bit.ly/3Dm5L39.

- In October 2020, the former Episcopal Bishop of Albany, William Love, was found to have violated church rules when he prohibited clergy from performing same-sex weddings; he ultimately agreed to resign. *See In re Title IV Disciplinary Matter Involving the Rt. Rev. William H. Love*, Episcopal Church (Oct. 2, 2020), https://bit.ly/385HYWv. Other churches, having taken an opposing view on the sacrament of marriage, have censured or fired ministers who performed same-sex weddings. *See* Mark

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M. Banks, *Prominent Bishop of AME Zion Church Suspended, Faces Financial Accusations*, Religion News Serv. (Jan. 8, 2021), https://bit.ly/3sUs0IF.

[3] *See, e.g.*, Leanne Italie, *Megachurch Pastor Carl Lentz Fired, Admits Cheating on Wife*, Assoc. Press (Nov. 5, 2020), https://bit.ly/3sJ462z; Leonardo Blair, *Perry Noble Fired for Alcoholism, Strained Marriage; Is Under Psychiatric Care, NewSpring Church Confirms*, Christian Post (July 10, 2016), https://bit.ly/3my7pIL.

Memmot, *Methodist Minister Who Officiated at Gay Wedding Is Defrocked*, NPR (Dec. 19, 2013), https://n.pr/3sDDT5z.

- In January 2020, the Catholic Church excommunicated Damon Jonah Kelly, a monk who authored a blog post attacking Pope Francis and the LGBT community. *See, e.g.*, Alya Zayed, *"Sinister" Monk Who Distributed Homophobic Leaflets Across Cambridgeshire Excommunicated from the Catholic Church*, CambridgeshireLive (Jan. 9, 2020), https://bit.ly/3B3uKGg.

- In 2013, an Australian priest was excommunicated for publicly advocating ordination of women to the priesthood, in defiance of Catholic canon law. Abby Ohlheiser, *Pope Francis Excommunicated a Priest Who Supports Women's Ordination*, The Atlantic (Sept. 24, 2013), https://bit.ly/3kiYxnD.

- In Canada, a group known as the Army of Mary was excommunicated for what the Catholic Church deemed heretical teachings on the Virgin Mary. Canadian Conf. of Cath. Bishops, *Army of Mary Incurs Excommunications* (Sept. 11, 2007), https://bit.ly/3jya3w5; *see also 6 Catholic Nuns Excommunicated for Heresy*, CBS News (Sept. 27, 2007), https://cbsn.ws/3mfsiIC (similar decision by the Diocese of Little Rock, Arkansas).

- Last year, the Roman Catholic Bishop of Sacramento publicly announced the excommunication of a priest who refused to recognize Pope Francis's authority. Diocese of Sacramento, *Letter to the Faithful regarding Fr. Jeremy Leatherby* (Aug. 7, 2020), https://bit.ly/37SJmf5.[4]

[4] *See also* RCA Constitution, *supra*, art. II, § 1(4) (stating that one purpose of the RCA is "[t]o be ever on guard against any distortion or misinterpretation of Torah-true Judaism by individuals or groups within and without the House of Israel and to clarify through the written and spoken word the true teachings of the Torah").

Other examples, from virtually every religious order and on a wide array of issues, abound.

Since "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose," *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) (per curiam), it is essential that all churches, regardless of faith or denomination, be able to maintain the purity of their message by controlling the composition of their leadership and the doctrine taught in their groups. This concept is not new; many epistles in the Christian New Testament, for example, memorialize efforts by early Christian leaders to correct what they saw as doctrinal deviations and wayward practices in local churches. *See, e.g.*, 1 *Corinthians* 11:18 ("I hear that there be divisions among you ...."); *Colossians* 4:16 ("And when this epistle is read among you, cause that it be read also in the church of the Laodiceans ....").

Relatedly, churches must be free to help shape public perceptions and protect their members by disavowing groups or individuals whose teachings or practices are not in line with the institution's. In 2008, amid extended news coverage of the arrest of polygamist Warren Jeffs, the Church of Jesus Christ of Latter-day Saints went to great lengths to

make clear that their church "has absolutely no affiliation with this polygamous sect" and that "no one at the Texas compound has ever been a member" of their church. Church of Jesus Christ of Latter-day Saints, *Media Letter* (June 24, 2008), https://bit.ly/3gfVH1v; *see also* Church of Jesus Christ of Latter-day Saints, *Church Seeks to Address Public Confusion over Texas Polygamy Group* (June 26, 2008), https://bit.ly/2W7c0GQ. Similarly, though Baptist churches do not have a single centralized institutional authority, one journalist observed that Baptist leaders are "quick to say" they have no affiliation with the Westboro Baptist Church, known for its virulent anti-LGBT protests. Melissa Nann Burke, *The Gospel According to Fred Phelps*, YDR (Oct. 8, 2010), https://bit.ly/2XF0kvF. The internet age has only accelerated the need for churches to warn publicly of individuals and organizations that distort doctrine or circumvent church governance.

And of course, religious institutions by necessity must deal with schisms and divisions among believers, which sometimes culminate in organizational and physical divisions. *See, e.g.*, Council of Bishops of the United Methodist Church, Press Release, *United Methodist Traditional-*

ists, Centrists, Progressives & Bishops Sign Agreement Aimed at Separation (Jan. 3, 2020), https://bit.ly/37Rwwh8. Schisms are hardly new,[5] but some observers say they have become increasingly common. *See, e.g.*, Daniel Burke, *The Methodist Church Will Probably Split in Two over Homosexuality, and That's Bad for All of Us*, CNN (Jan. 17, 2020), https://cnn.it/37QDvqK ("Religious historians say we haven't seen so many church schisms since 19th-century debates over slavery.").

In sum, selecting, promoting, and removing church leaders—as well as regulating what those leaders do and preach and warning of those who stray from church doctrine—are matters of inescapable importance for faith communities. Indeed, courts have recognized that "the right to choose ministers without government restriction underlies the well-being of religious communities," *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008) (cleaned up), and thus, "questions of church discipline and the composition of the church hierarchy are at the *core of ecclesiastical concern*," *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S.

[5] *See generally The Great Schism: The History and Legacy of the Split Between the Catholic and Eastern Orthodox Churches in 1054* (Charles River Eds. 2020); Lesley Hazleton, *After the Prophet: The Epic Story of the Shia-Sunni Split in Islam* (2010).

696, 717 (1976) (emphasis added); *see also McClure*, 460 F.2d at 558 ("The relationship between an organized church and its ministers is its *life-blood*.") (emphasis added).

The matters at issue in this case are thus neither peripheral nor incidental questions of religious freedom; Father Alexander's defamation lawsuit seeks to enter the Holy of Holies.

II. The First Amendment Ensures That Churches May Make Personnel Decisions Independently, Guided Only by Their Faith.

Acknowledging the importance of the needs and practices discussed above, courts have recognized and applied two overlapping doctrines that preserve churches' institutional rights in these areas. The church-autonomy and ministerial exception doctrines arise from the Free Exercise and Establishment Clauses and "protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). These doctrines "ensure that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 423 (2d Cir. 2018) (cleaned up).

A. The first of these complementary doctrines is the church-autonomy, or ecclesiastical-abstention, doctrine, under which civil courts "decline[] to 'interfere[] with ecclesiastical hierarchies, church administration, and appointment of clergy.'" *Rweyemamu*, 520 F.3d at 204-05; *see also Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 975-76 (7th Cir. 2021) (en banc); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655, 658 (10th Cir. 2002). In other words, under the church-autonomy doctrine, a court may not hear claims that "require inquiry into religious doctrine, interference with the free-exercise rights of believers, or meddling in church government." *In re Diocese of Lubbock*, 624 S.W.3d 506, 513 (Tex. 2021).

Father Alexander's defamation claim here would inevitably "inquir[e]" into, "interfere[]" in, and "meddl[e]" with ROCOR's "hierarchy, church administration, and appointment of clergy." *Rweyemamu*, 520 F.3d at 204-05. Indeed, his claim is *designed* to do so, because he seeks damages for statements made about him in the context of the church's internal deliberations over whether his appointment as bishop was valid, and whether he was fit to continue as a priest at all.

In his own words, "the heart" of Father Alexander's defamation claim is a 2019 letter written by several ROCOR clergy to senior ROCOR leaders disputing Father Alexander's claim that he was elected to the post of Bishop of Miami, Vicar of the Eastern Archdiocese of Florida. Pl.-Appellee's Br. Supp. Mot. to Dismiss Appeal at 2, ECF No. 22-2. This letter pointed out "irregular[ities]" in the documents evidencing Father Alexander's election as bishop, and described complaints about Father Alexander's ministerial conduct, including "breaking of the seal of Confession," using "information obtained during Confession ... for the purpose of denigrating parishioners and of controlling them," and failing to care for church property and finances. JA 19-21. As a result of the letter, Metropolitan Hilarion "suspend[ed] Alexander from his priestly duties," pending an "investigation." JA 99.

Whether the allegations in the letter are true and whether Metropolitan Hilarion's actions were justified falls squarely within the church-autonomy doctrine's core protections. The letter was an internal communication from Father Alexander's fellow ministers to ROCOR's highest religious authority and governing body, expressing concerns over matters that lie entirely within the church's exclusive adjudicative authority:

first, that Father Alexander's bishopric was improper as a matter of church government; and second, that his misconduct warranted removing him from ministerial service entirely. There is no way for a civil court to evaluate whether these statements are defamatory (and thus false) without intruding on ecclesiastical matters, such as whether Father Alexander's appointment was valid.

As the Supreme Court has recognized, "it is the function of the church authorities," not a federal court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Milivojevich*, 426 U.S. at 711-12 (quoting *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929)); *see also id.* at 717-18 (church hierarchy has "sole discretion" to determine validity of minister's claim to office). Adjudicating Father Alexander's claim to be a bishop would thus "plunge an inquisitor into a maelstrom of Church policy, administration, and governance." *Rweyemamu*, 520 F.3d at 209 (quoting *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576 (1st Cir. 1989) (alterations omitted)); *see also Lubbock*, 624 S.W.3d at 513 (similar).

Evaluating whether the misconduct allegations against Father Alexander are accurate would likewise "risk 'government involvement

in ... ecclesiastical decisions,'" *Penn*, 884 F.3d at 428 (omission in original), and "meddl[e] in church government," *Lubbock*, 624 S.W.3d at 513. As early as 1872, the Supreme Court emphasized that it was beyond the judicial role to "inquire ... whether [the minister's] conduct was or was not in accordance with the duty he owed to the synod or to his denomination." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730-31 (1872) (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843)). Nor could, in this case, a court determine whether a minister "br[oke] … the seal of Confession" without having to resolve contested matters of church doctrine. JA 20; *see also Watson*, 80 U.S. (13 Wall.) at 732 ("Any other than [ecclesiastical authorities] must be incompetent judges of matters of faith, discipline, and doctrine ...."); *Penn*, 884 F.3d at 428 ("Any jury hearing Mr. Penn's ... claims therefore would have to determine how a minister should conduct religious services or provide spiritual support."). The church-autonomy doctrine reserves these issues to ROCOR alone.

B. The second doctrine protecting churches' constitutionally required independence is the ministerial exception, which "follows naturally from the church autonomy doctrine." *Demkovich*, 3 F.4th at 975.

The exception recognizes that the Religion Clauses mandate the government "have no role in filling ecclesiastical offices." *Hosanna-Tabor*, 565 U.S. at 184.

Though it first appeared in cases asserting unlawful employment discrimination, "[t]he 'ministerial exception' applies without regard to the type of claims being brought." *Alicea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003); *see infra* pp. 24-26. As such, courts may not hear *any* claim, regardless of its statutory or common law basis, that would effectively "[r]equir[e] a church to accept or retain an unwanted minister, or punish[] a church for failing to do so," because "[s]uch action interferes with the internal governance of the church" and "depriv[es] the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188.

Father Alexander claims he was harmed by internal church statements challenging the validity of his appointment, and so fundamentally seeks to "punish[]" ROCOR "for failing" to "accept ... an unwanted minister." *Id.* Put another way, he asserts "an enforceable right to be considered or accepted by the church hierarchy as a minister," which, per the ministerial exception, "[n]o member of a church may claim." *Rayburn v.*

Gen. Conf. of Seventh-day Adventists, 772 F.2d 1164, 1168 n.5 (4th Cir. 1985); *see also Moon v. Moon*, 833 F. App'x 876, 880 (2d Cir. 2020) ("[W]e cannot intervene here to adjudicate what remains an essentially religious question over who the rightful leader ... is."), *cert. denied*, No. 20-1415, 2021 WL 2405175 (U.S. June 14, 2021) (mem.); *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1247-48 (9th Cir. 1999) ("The First Amendment not only precludes a civil court from determining for itself who is entitled to hold religious office, but also precludes it from determining whether the religious organization followed its own ecclesiastical rules in anointing one of its leaders.").

A secular court cannot evaluate a plaintiff's fitness to be a religious leader without depriving the church of its right "to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). The First Amendment shields both the hiring and the firing of ministers *as well as* the internal church deliberations that underlie those decisions. For this reason, *Hosanna-Tabor* held that the court could not decide a terminated pastor's claim that the "asserted religious reason ... was pretextual," because judges have no business parting the veil that shields a church's internal

workings. *Id.* at 194; *Rayburn*, 772 F.2d at 1169 ("[T]he state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."). And for the same reason, the district court below may not evaluate whether the complaints against Father Alexander or the process of his supposed election were accurate or not.[6]

* * *

Father Alexander's defamation claim challenges church actions squarely within the core of ecclesiastical decisions that, under established church-autonomy and ministerial-exception principles, are not amenable to judicial scrutiny. Allowing the district court to proceed here would violate ROCOR's First Amendment rights and would encourage courts in this Circuit to do the same going forward.

[6] Importantly, the allegedly defamatory statements came from other clergy members. "Interaction between ministers is critical to a religious organization and its mission. ... Within a religious organization, workplace conflict among ministers takes on a constitutionally protected character." *Demkovich*, 3 F.4th at 979.

III. Allowing Disgruntled Ministers to Circumvent These Doctrines by Recasting Discipline as Defamation Would Render These Protections Meaningless.

The church-autonomy doctrine and ministerial exception unambiguously protect a church's decisions to govern itself, including to hire, promote, censure, or fire clergy, as well as decisions to alert other members of the faith communities when ministers depart from the doctrines or requirements of the church. Any federal or state claim, regardless of how it is labeled, that intrudes into that "private sphere" cannot proceed. *See Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

"The First Amendment is a rule of substantive protection, not an artifice of categories." *Alexander v. United States*, 509 U.S. 544, 565 (1993) (Kennedy, J., dissenting); *accord, e.g.*, *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) ("The government cannot foreclose the exercise of First Amendment rights by mere labels.") (cleaned up). Thus, it does not matter that Father Alexander has brought his employment dispute with ROCOR under defamation law rather than employment law. Father Alexander clearly could not ask the court to order him appointed a bishop. *See Milivojevich*, 426 U.S. 696. Yet if a jury concluded that the

bishops' letter defamed him by questioning the validity of his appointment, ROCOR and its most senior leaders in the United States would be held liable for refusing to do exactly that. Such an outcome would ineludibly "contradict [the] church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185.

Thus, regardless of how a claim is pleaded, the First Amendment prohibits secular courts from adjudicating "any federal or state cause of action that would otherwise impinge on the Church's prerogative to choose its ministers." *Werft v. Desert Sw. Ann. Conf. of United Methodist Church*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004) (per curiam). For example, in property disputes involving religious groups, the Supreme Court has required courts to abstain where ostensibly property-based disputes turn on ecclesiastical disputes over doctrine or leadership. *See, e.g.*, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115 (1952); *see Milivojevich*, 426 U.S. at 725-35 (Rehnquist, J., dissenting) (similar); *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008) ("[W]hatever their 'emblemata,' some claims may inexorably entangle us in doctrinal disputes."). And in a wide variety of other contexts, state and federal courts abstain when they determine that resolving a plaintiff's

claims would entangle courts in religious questions. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *34 (W.D. Pa. Aug. 22, 2017) (breach of contract), *aff'd*, 903 F.3d 113 (3d Cir. 2018); *Doe v. Pontifical Coll. Josephinum*, 87 N.E.3d 891, 896-97 (Ohio Ct. App. 2017) (intentional inflection of emotional distress); *Patton v. Jones*, 212 S.W.3d 541, 551-52 (Tex. App. 2006) (tortious interference); *Mammon v. SCI Funeral Servs. of Fla. Inc.*, 193 So. 3d 980, 984-85 (Fla. Dist. Ct. App. 2016) (state unfair trade practices statute); *see also Hosanna-Tabor*, 565 U.S. at 196 ("There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

More specifically, federal and state courts dismiss defamation claims by disgruntled pastors when resolving them might require that the court intrude on ecclesiastical disputes. In *Lubbock*, the Texas Supreme Court granted an extraordinary writ directing the trial court to dismiss defamation claims by a former deacon against the Diocese of Lubbock. 624 S.W.3d at 509. The former deacon's name had been included on an online announcement to the diocese that included a list of "All Clergy with a Credible Allegation of Sexual Abuse of a Minor." *Id.* at 510. The court found that publishing the list with the former deacon's name

on it fell within the church's sphere of autonomy protected by the First Amendment and was therefore not subject to judicial examination. *Id.* at 509-10.

Likewise, in *Cha v. Korean Presbyterian Church of Washington*, the Virginia Supreme Court held that "[r]esolution of the plaintiff's claims," including for defamation, "would have required that the [state] court adjudicate issues regarding the church's governance, internal organization, and doctrine, and such judicial intervention would have limited the church's right to select its religious leaders." 553 S.E.2d 511, 515 (Va. 2001). "[P]laintiff's allegations of defamation against the individual defendants," the state supreme court held "cannot be considered in isolation, separate and apart from the church's decision to terminate his employment." *Id.* at 516. And as here, "[t]he individual defendants who purportedly uttered defamatory remarks about the plaintiff were church officials who attended meetings of the church's governing bodies that had been convened for the purpose of discussing certain accusations against the plaintiff." *Id.* Just as in *Cha*, addressing Father Alexander's complaint would inevitably lead to entanglement with religious matters.

"Indeed, most courts that have considered the question" whether the First Amendment prohibits "consider[ing] a pastor's defamation claims against a church and its officials have answered that question in the affirmative." *Id.*[7] It is unremarkable that former ministers would assert that statements made during internal church proceedings that ultimately led to their ouster are incorrect, or even defamatory. But if such claims were viable, "it is difficult to conceive the termination case which could not result in a sustainable lawsuit." *Higgins v. Maher*, 258 Cal. Rptr. 757, 761 (Ct. App. 1989). And allowing defamation lawsuits in

[7] *See, e.g.*, *Maize v. Friendship Cmty. Church, Inc.*, No. E2019-00183-COA-R3-CV, 2020 WL 6130918 (Tenn. Ct. App. Oct. 19, 2020); *In re Alief Vietnamese All. Church*, 576 S.W.3d 421 (Tex. Ct. App. 2019); *Sumner v. Simpson Univ.*, 238 Cal. Rptr. 3d 207 (Ct. App. 2018); *Turner v. Tri-Cnty. Baptist Church of Cincinnati*, 122 N.E.3d 603 (Ohio Ct. App. 2018); *Dermody v. Presbyterian Church (U.S.A.)*, 530 S.W.3d 467 (Ky. Ct. App. 2017); *Nykoriak v. Bilinski*, No. 319871, 2015 WL 1227740 (Mich. Ct. App. Mar. 17, 2015) (per curiam); *Susan v. Romanian Orthodox Episcopate of Am.*, No. 1-12-0697, 2013 WL 1636467 (Ill. App. Ct. Apr. 16, 2013); *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013); *Ind. Area Found. of United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174 (Ind. Ct. App. 2011); *Mallette v. Church of God Int'l*, 789 So. 2d 120 (Miss. Ct. App. 2001); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994); *McManus v. Taylor*, 521 So. 2d 449 (La. Ct. App. 1988); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986).

these circumstances would mean that churches would need to conduct all such proceedings in the shadow of defamation law.[8]

Of additional concern, permitting such claims against ecclesiastical leaders "who are merely discharging the duty which has been entrusted to them by their church could have a potentially chilling effect on the performance of those duties." *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988) (quoting *Joiner v. Weeks*, 383 So. 2d 101, 106 (La. Ct. App. 1980)). The church-autonomy and ministerial-exception doctrines shield churches not only from liability, but from the burden, expense, and disruption of civil litigation. Thus, permitting plaintiffs to plead their way around these defenses poses "the danger that churches, wary of ... judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of

[8] Defamation liability also conflicts with the First Amendment in a unique way that other claims may not: this cause of action seeks to control what a minister may say while carrying out ministerial duties. The Acts of Uniformity regulating the established English church "dictated what ministers could preach and imposed penalties for non-compliance." *Morrissey-Berru*, 140 S. Ct. at 2061. Defamation liability against ROCOR's clergy in this case would be functionally similar—controlling what bishops and priests can or cannot say in carrying out their religious office, and penalizing them for saying something a jury later finds false and injurious.

their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn*, 772 F.2d at 1171; *see also Demkovich*, 3 F.4th at 981 ("This invitation to turn the spiritual into the secular raises the concern of chilling religious-based speech in the religious workplace."); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) ("Having once been deposed, interrogated, and haled into court, members of the Department of Canon Law [responsible for making personnel choices] would do so 'with an eye to avoiding litigation or bureaucratic entanglement.'" (quoting *Rayburn*, 772 F.2d at 1171)). The First Amendment therefore disfavors such claims, because "[a] church is not truly free to manage its affairs, practice its faith, and publicly proclaim its doctrine if lawyers and judges lie in wait to pass human judgment on whether the church should have chosen its words more carefully." *Lubbock*, 624 S.W.3d at 521 (Blacklock, J., concurring).

Even where the threat of a defamation lawsuit does not prevent a church from taking disciplinary action, it may have the pernicious effect of encouraging church leaders to resolve matters behind closed doors, and thus fail to protect other churches and other communities from untrust-

worthy ministers. Most notably, in recent years, many religious organizations have taken public steps to address grave and tragic issues of clergy sexual abuse.[9] This reckoning has involved not only punishing priests but also alerting the public of individuals who have been credibly accused of sexual misconduct. *See, e.g.*, Rick Rojas, *New York Archdiocese Names 120 Catholic Clergy Members Accused of Abuse*, N.Y. Times (Apr. 26, 2019), https://nyti.ms/3kkx4BY. It is not difficult to imagine a church's reasonable efforts to alert the faithful of ministers who have violated their sacred vows resulting in a defamation lawsuit—indeed, it requires no imagination at all, *see Lubbock*, 624 S.W.3d at 509-12 ("Guerrero alleges that the Diocese defamed him by including his name on a list of clergy 'credibly accused of sexual abuse of a minor.'").

And this issue, of course, is not limited to sex-abuse cases. Churches can, do, and should be free to alert other congregations when dismissed ministers misused church funds, mistreated church staff, or

[9] *See, e.g.*, Ruth Graham, *Southern Baptists Expel 2 Churches over Sex Abuse and 2 for L.G.B.T.Q. Inclusion*, N.Y. Times (Feb. 23, 2021), https://nyti.ms/2VYEKC0; Cent. Conf. of Am. Rabbis, *Rabbis Expelled, Suspended, or Censured with Publication*, https://bit.ly/3z0JG7l (last visited Aug. 31, 2021).

otherwise failed to live up to a religion's expectations of its ministers.[10] It is of unquestionable public benefit that churches alert co-religionists to former ministers' misconduct, lest the conduct repeat itself in other congregations in other places. Penalizing churches for warning the faithful of wolves in sheep's clothing will incentivize looking the other way—an outcome that benefits no one.

And finally, absent this Court's intervention, the process of litigating these claims will itself harm ROCOR's interest in self-government free of state interference, because that process will inevitably inquire into church doctrine and policy. In *NLRB v. Catholic Bishop of Chicago*, the

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[10] *See, e.g.*, Kate Shellnutt, *Former Mars Hill Elders: Mark Driscoll Is Still 'Unrepentant,' Unfit to Pastor*, Christianity Today (July 26, 2021), https://bit.ly/3sFO61e (reporting on investigation that concluded a pastor was "quick-tempered, arrogant, and domineering"); Hannah Frishberg, *Hillsong Shutters Dallas Church After Reports of Pastors' Lavish Lifestyle*, N.Y. Post (Apr. 14, 2021), https://bit.ly/384yD1p; Christine Condon, *Baltimore Megachurch Empowerment Temple Removes Senior Pastor over Filing of Financial Audits, Board Says*, Balt. Sun (Aug. 9, 2021), https://bit.ly/3jmtuI9; Kate Shellnutt, *Too Soon for Perry Noble's Second Chance at Church?*, Christianity Today (Aug. 9, 2017), https://bit.ly/3mVWpoY (statement attributed to church leader: "We cannot speak for other churches and how they make decisions. For us, Perry currently does not meet the biblical qualifications of a pastor, teacher, shepherd."); Diocese of Sacramento, *Letter to the Faithful*, *supra* ("Both clergy and faithful are instructed to refrain from any further attempt by Fr. Leatherby to offer the Mass or other sacraments.").

Court held that the National Labor Relations Act did not apply to church schools because the church's rights would be violated both by the NLRB's ultimate conclusions and remedial actions as well as by "the very process of inquiry leading to findings and conclusions." 440 U.S. 490, 502 (1979). On the basis of those serious constitutional concerns, the Court interpreted federal law to not grant the NLRB jurisdiction to investigate religious schools. *Id.* at 507; *see also Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 834-35 (D.C. Cir. 2020). Likewise, the Fourth Circuit has warned that permitting minister-termination claims to proceed creates constitutional issues because "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171.

So too here, the process of determining whether the bishops' letter to Metropolitan Hilarion is factually correct would require probing ROCOR's internal records, including sensitive complaints from congregants and internal discussions about Father Alexander's candidacy. It seems equally likely that Father Alexander would seek to depose at least a handful of ROCOR bishops and priests. And the prospect that Father

Alexander might even seek to depose Metropolitan Hilarion himself—the rough equivalent of a Catholic Archbishop—should give the Court significant pause.

In short, labeling his claims as for "defamation" does not save Father Alexander's complaint, and allowing a disgruntled minister to circumvent established protections for church decision-making would chill religious liberty generally. Regardless of how a claim is framed, the First Amendment prohibits secular courts from adjudicating ecclesiastical issues. Such interference is unavoidable here; for a court or jury to determine whether the letter is defamatory will require the court to determine whether Father Alexander's purported appointment is valid under church law, as well as whether the complaints regarding Father Alexander's service were true. Merely subjecting ROCOR and its leaders to discovery in this case violates the First Amendment, and allowing the decisions below to stand is cause for grave concern for all houses of faith in this Circuit. Our constitutional order demands that purely ecclesiastical matters be resolved by ecclesiastical authorities, without the intrusion or superintendence of civil courts.

CONCLUSION

For the foregoing reasons, the Court should deny Father Alexander's motion to dismiss, reverse the decision below, and direct the district court to dismiss Father Alexander's complaint.

September 2, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. Here, the supported party's brief is limited to 14,000 words, *see* 2d Cir. Local Rule 32.1(a)(4)(A), and the foregoing brief contains 6,644 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

Dated September 2, 2021.

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 2, 2021.

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

Dated September 2, 2021.

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