21-1498

In The United States Court Of Appeals For The Second Circuit

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York, No. 20-cv-6597

BRIEF FOR *AMICI CURIAE*
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INTEREST OF AMICI CURIAE

Michael W. McConnell is the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. He previously served as a judge on the United States Court of Appeals for the Tenth Circuit. Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia School of Law.[1]

Professor McConnell and Professor Laycock are leading First Amendment scholars with substantial expertise on the ministerial exception. For example, Professor Laycock argued before the Supreme Court on behalf of the church in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Professor McConnell filed an *amicus* brief in *Hosanna-Tabor*, and both joined the same *amicus* brief in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The Supreme Court has relied on their scholarship—for example, Justice Brennan cited Professor Laycock in his concurrence in

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties previously consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor any person other than *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987), and Chief Justice Roberts cited Professor McConnell in the *Hosanna-Tabor* majority opinion, 565 U.S. at 183. And this Court cited both professors in its first post-*Hosanna-Tabor* case addressing the scope of the ministerial exception. *Fratello v. Archdiocese of New York*, 863 F.3d 190, 199 & nn.17 & 19, 201 n.23 (2d Cir. 2017).

Amici believe that religious institutions must be free from government interference in deciding who performs core religious functions, that a robust ministerial exception is critical to safeguarding the values protected by the Religion Clauses, and that courts must consider these questions at the first opportunity—here, on collateral review—rather than potentially exposing a religious organization to undue government interference.

INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the Supreme Court agreed with the unanimous view of the circuit courts that, under the First Amendment, religious institutions must be free to decide who will occupy positions of

spiritual or pastoral significance, because such decisions are essential to their ability to deliver their religious messages and fulfill their religious missions. As the Supreme Court recognized again just last year, absent the authority to make such decisions, "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

The ministerial exception is best understood within the context of the broader religious autonomy doctrine, which "respects the authority of churches to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions' free from governmental interference." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)). The doctrine "mark[s] a boundary between two separate polities, the secular and the religious, … [and] acknowledg[es] the prerogatives of each in its own sphere." *Id.*

The religious autonomy doctrine both prevents "civil courts" from "becom[ing] entangled in essentially religious controversies," *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), and protects the freedom of religious institutions with respect to "church administration, the operation of the churches, [and] the appointment of clergy," *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952). Neither the ministerial exception nor the religious autonomy doctrine grants churches "general immunity from secular laws, but [the defense] does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Indeed, the First Amendment "outlaws" "any attempt by government to dictate or even to influence such matters." *Id.*

That much is clear. This brief emphasizes two corollary propositions. *First*, the ministerial exception is best understood as an immunity analogous to immunity for government officials, which means that suits where the ministerial exception applies should be dismissed at the earliest possible opportunity. If discovery is necessary to determine whether the defense applies, it should be limited to that purpose only.

And if a motion to dismiss or for summary judgment on ministerial-exception grounds is denied, interlocutory appellate review should be available. *Second*, tort claims like defamation are subject to the ministerial exception if they implicate religious institutions' internal decisions concerning ministerial positions. Such disputes are not amenable to the application of the "neutral principles" approach that has been used in some church-property cases.

SUMMARY OF ARGUMENT

I. The ministerial exception is best understood as an immunity from suit analogous to that enjoyed by certain government officials, as at least three circuit courts have held.

In determining whether a governmental official is entitled to immunity from suit, the Supreme Court has "been guided by the Constitution," "history," "common law," and "concerns of public policy, especially as illuminated by our history and the structure of our government." *Nixon v. Fitzgerald*, 457 U.S. 731, 747-48 (1982). Thus, the Court has held that the President, legislators, judges, prosecutors, and other government officials enjoy immunity from suit for their official actions because of structural aspects of the Constitution, common-law

practice and history, and practical concerns that government actors would shy from performing their duties with vigor if they could be dragged into court to defend meritless suits.

The justifications underlying the ministerial exception are directly analogous. In addition to concerns for individual freedom, the ministerial exception is mandated by structural constitutional principles embodied in the Establishment Clause, a position that is fortified by the historical record and the common law in this country. And without the exception, courts would be pressed to answer religious questions they are not qualified to answer, and religious expression and organization would be chilled.

Because the ministerial exception functions as an immunity, its applicability must be resolved at the earliest possible stage of litigation. Because "even such pretrial matters as discovery … 'can be peculiarly disruptive,'" the Supreme Court has endorsed early resolution of official immunities, often at the pleadings stage. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted). So too in the mine-run ministerial-exception case. A religious organization's motion to dismiss invoking the ministerial exception should be granted if, on the face of the complaint,

the immunity applies. If applicability of the ministerial exception cannot be resolved at the pleadings stage, discovery may be taken, but it must be focused on gathering the information relevant to resolving the question on an early motion for summary judgment, as multiple courts have held. And the district court's denial of a religious organization's ministerial-exception defense should be immediately appealable because many of the interests protected by that defense, like those protected by official-immunity defenses, are "effectively lost if a case is erroneously permitted to go to trial." *Id*.

II. The ministerial exception bars defamation claims that interfere with a religious organization's management of its clergy. Although *Hosanna-Tabor* and *Our Lady of Guadalupe* involved employment-law claims, the reasoning behind the Supreme Court's holdings in those cases extends to any tort claim implicating "the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. Thus, a religious organization must be protected not just in its actual decisions to hire, fire, or promote ministers, but also in its explanation of those decisions. Otherwise, courts' evaluation of collateral civil disputes will inevitably "entangle[ ] [secular judges] in essentially religious controversies" that they are ill-

equipped to adjudicate. *Milivojevich*, 426 U.S. at 709. To avoid such muddling of civil and religious institutions, the Supreme Court has made clear that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185. And that bar applies to statutory employment disputes and civil tort claims alike.

ARGUMENT

I. THE MINISTERIAL EXCEPTION IS AN IMMUNITY SIMILAR TO IMMUNITIES FOR GOVERNMENTAL OFFICIALS.

Several federal courts of appeals have correctly concluded that the bar on civil courts' interference in religious matters is analogous to an official immunity. The Seventh Circuit has held that a district court's denial of a ministerial-exception defense is "closely akin to a denial of official immunity," making interlocutory appellate review appropriate. *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). The Third Circuit similarly has recognized that the ministerial exception "is akin to a government official's defense of qualified immunity." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006). The Tenth Circuit also has concluded that "the ministerial exception, like the broader church autonomy doctrine, can be likened to a governmental official's defense of

qualified immunity." *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (quotation marks omitted); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (explaining that "the church autonomy defense" "is similar to a government official's defense of qualified immunity").

Those courts are correct. As explained below, the ministerial exception is built on foundations analogous to immunities enjoyed by government officials. It applies a constitutional structural limitation that is rooted in history, the common law, and constitutional text. And the exception reflects substantial concerns about the ability and advisability of courts' adjudication of religious disputes, which would lead to impermissible chilling of free exercise rights and excessive judicial entanglement with religion.

Because the ministerial exception and immunities received by governmental officials are based on comparable foundations, they should provide similar protections. Immunities for government officials may not deprive the courts of the power to hear cases in the first instance. Nevertheless, they are "*immunit*[*ies*] *from suit*," not "mere defense[s] to liability." *Mitchell*, 472 U.S. at 526. The Supreme Court has thus

"'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). The same should be true of the ministerial exception.

A. Immunities For Governmental Officials Are Based On The Constitution, History, The Common Law, And Practical Policy Concerns.

In determining whether a governmental official is entitled to immunity from suit, the Supreme Court has "been guided by the Constitution," "history," "common law," and "concerns of public policy, especially as illuminated by our history and the structure of our government." *Nixon*, 457 U.S. at 747-48. For example, "a former President … is entitled to absolute immunity from damages liability predicated on his official acts" as a "function[ ]" of his "office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749. "[T]he President's constitutional responsibilities and status … counsel[ ] judicial deference and restraint," a view espoused by "the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." *Id.* at 750-53 & n.31. And "there exists the greatest public interest in providing" the President with "'the maximum

ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (citation omitted). Indeed, "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32.

Other officials receive absolute immunity for similar reasons. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975) (absolute legislative immunity); *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (absolute judicial immunity); *Stump v. Sparkman*, 435 U.S. 349, 362-63 (1978) (same); *Imbler v. Pachtman*, 424 U.S. 409, 420, 424 (1976) (absolute prosecutorial immunity). Constitutional principles of the separation of powers and federalism support these limitations on the judiciary's interference with certain acts of officials in the other branches of government.

For legislators, the Constitution's Speech or Debate Clause "is an absolute bar to interference"; a court case, whether criminal or civil, "creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503.

Judicial immunity "for acts done by them in the exercise of their judicial functions" has "'a deep root in the common law,'" and with good reason. *Bradley*, 80 U.S. at 347. "If civil actions could be maintained … against the judge," "the protection essential to judicial independence would be entirely swept away." *Id.* at 348. Without immunity for official judicial acts, the judicial "office [would] be degraded and [the judge's] usefulness destroyed." *Id.* at 349.

"The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunit[y] of judges." *Imbler*, 424 U.S. at 422-23. Specifically, prosecutors receive immunity from civil suits regarding their official actions because of the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Of course, not all government officials receive absolute immunity. But most officials who do not receive absolute immunity still receive qualified immunity, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson*, 555 U.S. at 231 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Although this immunity is not absolute, it protects similar interests as other immunities. Namely, it minimizes "the danger that fear of being sued will 'dampen'" the "'discharge of [official] duties.'" *Harlow*, 457 U.S. at 814 (citation omitted). Qualified immunity also seeks to avoid "social costs includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* The Supreme Court also has expressed skepticism that courts are able to competently "second-guess[ ]" certain official actions, such as the "quick choice[s]" faced by officers in the field. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citation omitted).

B. The Ministerial Exception Rests On Similar Foundations To Government Officials' Immunities.

The ministerial exception is rooted in justifications that are functionally similar to those underlying the various immunities for government officials: the Constitution, the common law and history, and practical policy concerns. The case for vigorously protecting the ministerial exception is even stronger, because unlike most official

immunities, the ministerial exception is firmly grounded in two constitutional clauses that expressly protect liberty in matters of religion.

1. The ministerial exception implements both Religion Clauses. "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188. And "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions," is "violate[d]" if the government "determine[s] which individuals will minister to the faithful." *Id.* at 189. The ministerial exception not only protects the free-exercise rights of litigants invoking the defense, but also ensures that private law suits do not roll back the guarantee of disestablishment. *See* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012) (the "history of disestablishment [in the States] is persuasive evidence that the freedom of all religious institutions to choose their clergy, free of government interference, was understood to be part and parcel of disestablishment").

The ministerial exception thus is not just a substantive guarantee of individual rights, but also "a structural limitation" "that categorically

prohibits federal and state governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). The exception is "rooted in constitutional limits on judicial authority" that prevent courts from becoming "impermissibly entangle[d] … in religious governance and doctrine." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4, 121 (3d Cir. 2018). As the Tenth Circuit explained in *Bryce*, the exception is akin to an immunity and should therefore be addressed "early in the litigation process," because "[b]y resolving the question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters." 289 F.3d at 654 n.1.

This view finds support in scholarship and in Founding-era sources. The work of John Locke was "an indispensable part of the intellectual backdrop" for the First Amendment. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1431 (1990); *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 354 (2002) ("Locke's version of the idea of liberty of conscience formed the basic theoretical ground for the separation of church and state in America.").

In Locke's view, "the whole jurisdiction of the magistrate reaches only to … civil concernments," and "all civil power, right, and dominion, is bounded and confined to … promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls …." John Locke, *A Letter concerning Toleration* (1689), *in* 5 The Founders' Constitution 52, 52 (Philip M. Kurland & Ralph Lerner eds., 1987). No intrusion by civil authorities into internal religious matters is acceptable.

Founding-era sources further support this view. To take just one example, James Madison—"the leading architect of the religion clauses of the First Amendment," *Hosanna-Tabor*, 565 U.S. at 703 (citations omitted)—publicly rejected the idea that "the Civil Magistrate is a competent Judge of Religious Truth" and argued that "Religion" was "exempt from the authority" both of "Society at large" and "that of the Legislative Body." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 The Founder's Constitution 82, 82-83.

2. Common law also supports granting religious institutions immunity from suits that implicate their internal governance or religious doctrine. The first Supreme Court case that addressed the religious

autonomy doctrine did not rely on the Religion Clauses. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), involved a dispute between two factions of a Presbyterian church over slavery that had split into "distinct bodies," each claiming to be the real "church," *id.* at 681. The highest governing body of the Presbyterian church determined that the anti-slavery faction was the authorized church. The Supreme Court refused to disturb that ruling, explaining that "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" is "a matter over which the civil courts exercise no jurisdiction." *Id.* at 733. By "inquir[ing] into" such matters, the "civil courts" "would deprive [religious] bodies of the right of construing their own church laws." *Id.* Thus, based on "a broad and sound view of the relations of church and state under our system of laws," the Court held "that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

3. The ministerial exception also reflects practical concerns similar to those presented by other immunity doctrines. "[T]he judicial process is singularly ill equipped to resolve" issues of religious doctrine, which are "not within the judicial function and judicial competence." *Thomas v. Review Bd.*, 450 U.S. 707, 715, 716 (1981). As the Seventh Circuit put it, disputes concerning ministers present "issue[s] that [courts] cannot resolve intelligently." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). That is not to say that courts and juries lack "technical or intellectual capacity." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 176 (2011). Rather, the issue is the costs of imposing liability for religious decisions and the very high risk of error in judicial (or jury) evaluation of those decisions. "[M]atters of faith" may not be strictly "rational or measurable by objective criteria" of the sort that courts and juries are used to applying. *Milivojevich*, 426 U.S. at 714-15. Courts are simply "not well positioned to determine whether ministerial employment decisions rest on practical and secular considerations or fundamentally different ones that … [are] difficult for a person not intimately familiar with the religion to understand."

Fratello v. Archdiocese of N.Y., 863 F.3d 190, 203 (2d Cir. 2017); *see also Milivojevich*, 426 U.S. at 714 n.8 ("[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes").

That is especially true in the context of a church's choice of a minister. As this Court has noted, the Biblical stories about "a stammering Moses [being] chosen to lead the people, and a scrawny David to slay a giant" illustrate the sort of leadership decision that may be "perfectly sensible" "in the eyes of the faithful" in ways that courts are "ill-equipped" to second-guess. *Fratello*, 863 F.3d at 203.

Moreover, even a brief inquiry into church governance or doctrine can chill the free exercise of religion. "If civil courts undertake to resolve such controversies … , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concerns." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). The Supreme Court has recognized the "significant burden" that religious organizations face if made to "predict which of [their] activities a secular court will consider religious." *Corp. of Presiding*

Bishop v. Amos, 483 U.S. 327, 336 (1987). Beyond any actual penalties imposed by the courts, "[f]ear of potential liability" has a profound chilling effect on "the way an organization carrie[s] out … its religious mission." *Id.*

C. Application Of The Ministerial Exception Should Be Determined Early And Denial Of The Defense Should Be Immediately Appealable.

As noted above, an immunity is more "than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Rather, "[t]he entitlement is an *immunity from suit*." *Id.* The purpose of these immunities is to prevent litigation of the claims that the immunities cover. The Supreme Court thus "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 232 (quotation omitted). Federal courts must be "alert" to prevent harassing lawsuits, including by "quickly terminat[ing]" lawsuits at either the motion-to-dismiss or summary-judgment stage when presented with a valid claim of immunity. *Harlow*, 457 U.S. at 808 (quotation omitted).

The same is true in cases implicating the ministerial exception: "the question of the doctrine's applicability" should be "resolv[ed] … early

in litigation." *Bryce*, 289 F.3d at 654 n.1. Applying the ministerial exception as early as possible respects "the [religious] community's process of self-definition," while avoiding both "excessive government entanglement with religion" and "the danger of chilling religious activity" that comes with "the prospects of litigation." *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring in judgment); *see also Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 982-83 (7th Cir. 2021) (en banc) (discussing the "prejudicial effects of incremental litigation" and emphasizing the "threshold" nature of the ministerial-exception question). In short, applying the procedural rules applicable to governmental immunities best achieves the purposes of the ministerial exception.

Accordingly, a religious organization's motion to dismiss invoking the ministerial exception should be granted if it appears on the face of the complaint that the immunity applies. That is consistent with *Hosanna-Tabor*'s statement that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." 565 U.S. at 195 n.4. Precisely the same is true of most governmental immunities, which typically do not preclude subject-

matter jurisdiction, but still require the immunity to be applied as early as possible. *See, e.g.*, *Petruska*, 462 F.3d at 302-03 ("[A]ssertion of the ministerial exception ... is akin to a government official's defense of qualified immunity, which is often raised in a Rule 12(b)(6) motion. The exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them." (citation omitted)).

Indeed, *Hosanna-Tabor* explained that merely "inquiring into whether the [religious institution] had followed its own procedures" is sufficiently intrusive to be unconstitutional. 565 U.S. at 187. It follows that the grounds for avoiding such inquiries should be authoritatively resolved as early in the litigation process as possible. *See* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 292-93 (2012) ("Chopko & Parker") ("it is important that these questions be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury as well as to give the litigants a clear picture of how the court sees the claims and defenses and how the case ought to proceed").

If the ministerial-exception invocation cannot be resolved at the pleading stage, discovery should initially focus on information relevant to the defense, with the aim of resolving the question on an early motion for summary judgment before further intrusive discovery is permitted. The Supreme Court has blessed this approach already in the context of qualified-immunity defenses that hinge on factual questions, instructing district courts to exercise their discovery discretion "in a way that protects the substance of the qualified immunity defense." *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998).

In the ministerial-exception context, this initial discovery should be limited to issues relevant to determining whether the individual is a minister within the meaning of the exception. Chopko & Parker, *supra*, at 293 ("where permitted, discovery should be directed towards answering questions that would highlight the clash of principles present in these cases, and should not encompass the entire merits of the claim or all of the other various issues that might be implicated in the case"). "[D]iscovery to determine who is a minister differs materially from discovery" related to the merits of the plaintiff's claims, "especially because admissible evidence is only a subset of discoverable information."

Demkovich, 3 F.4th at 983; *see also, e.g.*, *Stabler v. Congregation Emanu-El of the City of New York*, 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (permitting discovery *only* for purpose of determining if synagogue's former librarian was a "minister"). Absent limits on discovery, a "plaintiff will be free to seek discovery of information that proves her fitness for the position"—for example by "depos[ing] congregants about the quality of her sermons or the orthodoxy of her teaching"—which "could well provoke disputes or discord within the congregation" but "would promote no legitimate governmental interests." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1877 (2018); *see also Demkovich*, 3 F.4th at 983 ("the depositions of fellow ministers" would be "onerous"). Allowing discovery aimed at anything more than that "threshold inquiry," therefore, runs an unacceptable risk of "'imping[ing] on rights guaranteed by the Religion Clauses.'" *Demkovich*, 3 F.4th at 983 (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)). "It is not only the conclusions" reached that may impinge on those rights, "but also the very process of inquiry leading to findings and conclusions." *Catholic Bishop*, 440 U.S. at 502. After limited discovery is completed, the

religious organization can then move for summary judgment on the ministerial exception.

The procedural history in *Fratello*, this Court's first post-*Hosanna-Tabor* case, provides an example of this in practice. There, the principal of a Roman Catholic school filed an employment-discrimination suit after the school did not renew her contract. 863 F.3d at 192. The Archdiocese filed a motion to dismiss premised on the ministerial exception, but the district court could not determine at the motion-to-dismiss stage whether the exception properly applied "because Plaintiff had plausibly alleged that she was not a minister, and had no religious training, duties or functions; that others handled all religiously related activities; and that she was simply a secular administrator doing what a public-school principal would do." *Fratello v. Roman Catholic Archdiocese of N.Y.*, 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2016). It then "ordered discovery limited to whether Fratello was a minister within the meaning of the exception"—and "appropriately" so, according to this Court. 863 F.3d at 198. "At the close of that limited discovery," the Archdiocese again invoked the ministerial exception in a motion for summary judgment, which the district court granted. *Id.*

Denial of the applicability of the ministerial exception—on a motion to dismiss or for summary judgment—should be grounds for an immediate appeal. "Given the importance of a prompt and threshold determination, it is axiomatic that a refusal to dismiss a claim against the religious-body defendant based on the ministerial exception is effectively final and should ordinarily be permitted to be tested on interlocutory appeal." Chopko & Parker, *supra*, at 294.

The doctrinal basis for permitting such appeals is the collateral-order doctrine, which permits an interlocutory appeal "over a small class of 'collateral' rulings" that do not end the litigation in the district court "but are nonetheless sufficiently 'final' and distinct from the merits to be appealable without waiting for a final judgment to be entered." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013). "The requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

This Court has explained that "[i]t is well-settled that a decision denying a defendant the defense of qualified immunity satisfies the collateral order doctrine 'to the extent that it turns on an issue of law.'" *Coollick v. Hughes*, 699 F.3d 211, 217 (2d Cir. 2012). The same principle should apply to the ministerial-exception immunity as well. As the Seventh Circuit has squarely held, denial of a religious organization's ministerial-exception defense satisfies all three requirements for interlocutory appeal under the collateral-order doctrine. *McCarthy*, 714 F.3d at 974-76; *see also Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002) (same). It conclusively deprives the religious organization of the litigation-terminating benefit of the immunity, which is almost always distinct from the merits of the underlying employment—or, as here, a defamation—lawsuit.

Most importantly, failure of the courts to respect the ministerial exception would immediately subject religious organizations to unconstitutional interference and lead to excessive judicial entanglement in religious matters, thereby producing the very injuries the exception is intended to guard against and making the denial effectively unreviewable on appeal from a final judgment. "The harm of such a

governmental intrusion into religious affairs would be irreparable, just as in the other types of cases in which the collateral order doctrine allows interlocutory appeals." *McCarthy*, 714 F.3d at 976; *see Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) ("'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'"). As the Seventh Circuit recognized in comparing a church-autonomy defense to an official immunity while allowing an interlocutory appeal, "official immunity is immunity from the travails of a trial and not just from an adverse judgment." *McCarthy*, 714 F.3d at 975.[2] And as discussed above, it is also critical to avoid discovery on the merits of the dispute until a ministerial-exception defense has been fully adjudicated, including on appeal. *Demkovich*, 3 F.4th at 983; *see also Mitchell*, 472 U.S. at 526 (explaining that "such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive'").

[2] The D.C. Court of Appeals has reached the same conclusion in allowing an interlocutory appeal based on the ministerial exception: the ministerial-exception is "an entitlement not to stand trial or face the other burdens of litigation," and is "effectively lost if a case is erroneously permitted to go to trial." *Heard*, 810 A.2d at 877 (quoting *Mitchell*, 472 U.S. at 526).

In short, "the absence of an avenue for immediate appeal [in cases invoking the ministerial exception] will require the court not only to permit discovery about, but to resolve, quintessentially religious questions" in violation of the Establishment Clause, which "limits the power of the government not only to issue and enforce a binding judgment on such matters but also merely to entertain such questions." Smith & Tuttle, *supra*, at 1881. "Forcing the parties through years of expensive litigation, where churches may weary of the diversion of resources away from mission, is precisely the kind of equitable consideration, coupled with the importance of the threshold constitutional question, that warrants an immediate appeal." Chopko & Parker, *supra*, at 294; *cf.* *Abney v. United States*, 431 U.S. 651, 660-62 (1977) (decision that Double Jeopardy Clause does not apply is immediately appealable because the Clause protects defendants from being forced "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense").

Treating the denial of a ministerial-exception defense as an immediately appealable collateral order would not be innovative. As the Defendants-Appellants explained in their opposition to the Plaintiff's

motion to dismiss the appeal, interlocutory appeals regularly occur in the First Amendment context generally and in the church-autonomy context in particular. ECF 41, at 9-10. There is no basis for treating church-autonomy and ministerial-exception cases any less favorably than other First Amendment cases.

II. THE MINISTERIAL EXCEPTION BARS TORT CLAIMS THAT INTERFERE WITH RELIGIOUS ORGANIZATIONS' INTERNAL OPERATIONS.

Although *Hosanna-Tabor* and *Our Lady of Guadalupe* concerned employment-law disputes, a tort claim—like the defamation claim here—is also barred by the ministerial exception if it interferes with a religious organization's assessment or evaluation of its clergy. Courts "look to the substance and effect of plaintiffs' complaint[s], not [their] emblemata. Howsoever a suit may be labelled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577 (1st Cir. 1989); *see also Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1103 (9th Cir. 2004) ("The ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between

an organized religious institution and its clergy, termed the 'lifeblood' of the religious institution.").

Application of the ministerial exception to tort claims implicating internal decision-making concerning ministers follows directly from the underlying purpose of and rationale for the defense—namely, to protect "the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. As the Court recognized well over a century ago, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Watson*, 80 U.S. at 727.

Religious organizations' self-governance includes, most clearly, the selection and removal of ministers, but it also includes communications to and among the religion's followers related to those decisions. As Justices Alito and Kagan explained in *Hosanna-Tabor*, "a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its

message' and 'its voice to the faithful.'" 565 U.S. at 201 (Alito, J., concurring) (citation omitted).[3]

Relatedly, a religious organization must be protected in its explanation of choices *about* those who serve in such prominent roles. Thus, the ministerial exception extends not just to the removal of clergy but also to the church's deliberations in the course of making that decision and in its explanation of that removal to its faithful. It is in no one's interest to require that decisions about the clergy be made without discussion. That is why numerous federal and state courts have held that defamation and similar claims against religious institutions are subject to the ministerial exception.

For example, in *Ogle v. Church of God*, the Sixth Circuit affirmed dismissal of defamation and other claims brought by a bishop in the Church of God, concluding that they "all implicate[d] the Church of God's internal disciplinary proceedings." 153 F. App'x 371, 376 (6th Cir. 2005). The church had found that Ogle participated in "unbecoming ministerial

[3] *See Fratello*, 863 F.3d at 205 ("we receive and accept substantial further guidance from the concurrence of Justice Alito, in which Justice Kagan joined[,] … because we find its analysis both persuasive and extremely helpful").

conduct" and suspended him. *Id.* at 373. Ogle argued that the court should hear his "defamation claim in particular," because "defamation claims are not governed by Church of God law, but rather are governed by Michigan statutory and common law." *Id.* at 376. The court rejected that argument, explaining that the "case f[ell] squarely within the class of cases" that are precluded by the First Amendment. *Id.*

In *Bryce*, an Episcopal church terminated the employment of its youth minister, Lee Ann Bryce, after she entered into a civil-commitment ceremony with her partner, Reverend Sara Smith, with whom Bryce had a sexual relationship. 289 F.3d at 651-52. At the time, Episcopal doctrine defined marriage as being "between a man and a woman in lifetime union," and called for "those who are not called to marriage" to remain celibate. *Id.* at 652. Around the time of Bryce's termination, the church's reverend "sent several letters and memoranda to the Vestry and other leaders" of the church "to inform them of the situation." *Id.* The church also conducted "four parish meetings to inform the congregation about homosexuality and Bryce's employment situation" at which several statements were made about the women and their relationship that the women found objectionable. *Id.* at 652-53. The Tenth Circuit rejected

the women's resulting sexual-harassment lawsuit, finding that, although the statements "may be offensive, and some of the statements may be incorrect," the church-autonomy doctrine barred the lawsuit "because the remarks were made as part of ecclesiastical discussions on church policy towards homosexuals." *Id.* at 651, 658.

In *Klouda v. Southwest Baptist Theological Seminary*, a seminary professor sued the seminary and its president after she was fired allegedly because "she was a woman." 543 F. Supp. 2d 594, 596 (N.D. Tex. 2008). Among other things, the plaintiff brought a defamation claim, alleging that the president "labeled her a 'mistake'" and that the chair of the board of trustees of the seminary told a "newspaper that hiring a woman to teach men was a 'momentary lax of parameters.'" *Id.* at 596-97. The court agreed with the Sixth Circuit's decision in *Ogle*, dismissing all of plaintiff's claims because they were "derivative of or intimately related to the employment action taken against [plaintiff] by defendants." *Id.* at 613.

As one more example, in *Heard v. Johnson*, the D.C. Court of Appeals rejected a former pastor's defamation claim against trustees of the church arising from a "manual documenting the grievances against

[him], the reasons for his dismissal as pastor, and the attempts the congregation had made to remove [him] as pastor." 810 A.2d at 875. The court held that the case should have been dismissed, explaining that "[w]hen a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts because resolution of the claim would require an impermissible inquiry into the church's bases for its action." *Id.* at 883-84 (collecting cases). *See also In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021) (dismissing defamation suit by deacon included on a public list of clergy credibly accused of sex abuse).

Disputes like those detailed in *Ogle*, *Bryce*, *Klouda*, *Heard,* and *Lubbock* are not amenable to the application of "neutral principles." The Supreme Court has recognized that, in certain disputes over church property, "neutral principles" unrelated to church doctrine can guide courts' decisions and raise less risk of unconstitutional entanglement in religious matters. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979). But even in those cases, the Court required that "civil courts defer to the resolution of issues of religious doctrine or polity" by the religious authorities. *Id.* at 602.

In fact, the Court has never employed "neutral principles" to impose liability on a church for its decision to discharge a clergyman and explain that decision to its members. "The 'neutral principles' doctrine has never been extended to religious controversies in areas of church government, order and discipline, nor should it be." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). Neutral principles apply to church-property disputes after a church split, when the two sides both assert rightful ecclesiastical authority; the purpose of the doctrine is to keep the courts out of the business of weighing their competing claims. In defamation actions brought by a minister or former minister against the church, there is no doubt about what entity exercises ecclesiastical authority. The purpose of the ministerial exception is to *avoid* applying ostensibly neutral and generally applicable laws that would interfere with internal church affairs. "[I]t is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185. That is a complete bar to judicial inquiry.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed and the case dismissed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) and Local Rule 29.1(c) because this brief contains 6,981 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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