# 21-1498

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

ALEXANDER BELYA,

*Plaintiff-Appellee*,

v.

HILARION KAPRAL, ET AL.,

*Defendants-Appellants*.

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

**DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION TO DISMISS THE APPEAL**


Donald J. Feerick, Jr.
FEERICK NUGENT MACCARTNEY, PLLC
96 South Broadway
South Nyack, NY 10960
(845) 353-2000
*dfeerick@fnmlawfirm.com*

Diana M. Verm
Daniel H. Blomberg
Daniel D. Benson
William J. Seidleck
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*dverm@becketlaw.org*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

In this lawsuit, Father Alexander Belya claims that he was elected as a Vicar Bishop in the Russian Orthodox Church Outside Russia. The Church and its leadership insist that he was not, and that he is not qualified to be one. This dispute runs headlong into the Constitution's protection of churches' rights to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (applying *Kedroff* to common-law claim).

But in trying to avoid settled law, Father Alexander repackaged his challenge against the Church as defamation claims: if he cannot sue the Church and its leaders for not *making* him a bishop, he will sue them for *saying* he's not a bishop. Permitting such repackaging would have extraordinary consequences—including encouraging religious leadership disputes to be regularly recast as defamation and allowing disgruntled priests to depose their cardinals. The district court, however, rejected the Church's First Amendment defenses, refused to dismiss the case, determined that it could decide factual questions on the merits, and ordered the parties to finish discovery by December.

Allowing Father Alexander's claims to proceed to merits discovery would violate the First Amendment's protections for religious autonomy and separation of church and state. These First Amendment doctrines

not only shield religious organizations from an ultimate judgment of liability, but also prevent church-state entanglement ensuing from unnecessary discovery and trial. The claims must be dismissed at the earliest juncture that interference is apparent.

Here, interference is already not merely apparent, but blatant. And in two different ways: first, because it enmeshes federal courts in an obvious church leadership dispute between a priest and church hierarchy over a denied bishopric; second, because adjudicating the elements of the claims—including the claimed damages flowing from alleged ecclesiastical injuries—will require second-guessing matters of church governance and belief. Thus, this case should have been dismissed because merits discovery and adjudication will violate the Religion Clauses.

This Court accordingly has jurisdiction under the collateral order doctrine. The appeal presents pure questions of law involving core First Amendment protections. These questions are not only separate from the merits of Father Alexander's claims, but also legally antecedent to the merits. Barring appeal of these issues now would irreparably violate the Religion Clauses by permitting the very sort of civil investigations and adjudication they forbid. Hence, the Fifth and Seventh Circuits and several state supreme courts have permitted interlocutory review in cases like this, and leading scholars have reached the same conclusion.

Similarly, this Court has shown solicitude for other First Amendment rights by accepting interlocutory appeal in numerous cases.

## STATEMENT OF THE CASE

Defendants-Appellants are senior leadership, clergy, and ecclesiastical entities of the Russian Orthodox Church Outside Russia ("ROCOR"). The lead Appellant is the ruling bishop and First Hierarch of ROCOR, Metropolitan Hilarion, whose legal name is Hilarion Kapral. He is joined by ROCOR's Synod of Bishops and Eastern American Diocese, along with a large group of other ROCOR bishops and priests (collectively "the Church" or "ROCOR").

ROCOR is part of the Russian Orthodox Church. Founded in 1920 following the 1917 Bolshevik revolution, ROCOR exists to promote "the overall spiritual nourishment of the Orthodox Russian flock in the diaspora[.]" Regulations of the Russian Orthodox Church Outside of Russia ¶3.[1] The highest ecclesiastical body is the Sobor (Council) of Bishops. *Id.* ¶7; *see Kedroff*, 344 U.S. at 96 n.1 (defining "sobor"). It is ROCOR's controlling body—making the Church's laws, administrating

[1] *Available at* https://www.synod.com/synod/engdocuments/enov_polozhenierocor.html. This Court can take judicial notice of a church's publicly available religious law. Fed. R. Evid. 201; *see, e.g.*, *Bouchard v. N. Y. Archdiocese*, No. 04 CIV. 9978 (CSH), 2006 WL 3025883, at *5 (S.D.N.Y. Oct. 24, 2006).

its ministry, adjudicating its internal disputes, and electing new bishops. *Id*. ¶¶7-8. Metropolitan Hilarion is the Sobor's president. *Id*. ¶8.

The defendant Synod of Bishops is the Sobor's executive organ. *Id*. ¶16. The Synod consists of Metropolitan Hilarion, two of his deputies, and four members of the Sobor. *Id*. As relevant here, the Synod is also charged with several ecclesiastical responsibilities, including investigation of "serious disruption" in a diocese, activities involving the appointment, transfer, release, and retirement of bishops between Sobors, conducting an appellate court to defrock clergy, resolving matters involving church property, and among other things, "the resolution of questions concerning various aspects of church life and church administration." *Id*. ¶¶19, 29.

The Plaintiff-Appellee is Father Alexander Belya, an "Orthodox Christian archimandrite"—a monastic priest. Father Alexander claims he was elected "by a majority of the Bishops" in the Church to the position of Bishop of Miami, Vicar of the Eastern Archdiocese of Florida, on December 6, 2018. First Amended Complaint, Dkt. 48 (Compl.) ¶26.

On September 3, 2019, several ROCOR Clergy, including members of the Synod, wrote a letter to the ROCOR Synod and Metropolitan Hilarion raising concerns about "irregular" aspects of the documents supposedly evidencing Father Alexander's election and confirmation as a bishop. Dkt. 38 at 4. The letter explained that the election had never happened and called on the Synod not to consider Father Alexander's candidacy in

the future because of "the submission of so many serious complaints against him." *Id.* at 5. It described problems with Father Alexander's priestly performance, including him "breaking the seal of Confession" and using "information obtained during Confession … for the purpose of denigrating parishioners and of controlling them." *Id.* It closed by calling on the Metropolitan to suspend Father Alexander "from performing any clerical functions," and asking "the Synod to ascertain the circumstances of the confirmation of the non-existent 'election.'" *Id.* at 5-6. As the district court recognized, this letter is the crux of Father Alexander's complaint. Dkt. 46 at 5. Father Alexander claimed that this letter and its publication led him to leave the Church and join another church. Compl. ¶58. He sued for defamation, claiming damages for the loss of income from members leaving his congregation, and "severely impaired reputation and standing" in the ROCOR community. Compl. ¶¶81-82, 93-94, 102.

Father Alexander brought this lawsuit on August 18, 2020, alleging, as relevant here, defamation, defamation per se, defamation by innuendo, and vicarious liability against the Synod and the Eastern American Diocese.[2]

On November 24, 2020, the Church requested that the complaint be

[2] Defendant Pavel Loukianoff has not appeared in this appeal as he was not properly served with a complaint.

dismissed for, *inter alia*, lack of subject-matter jurisdiction given the First Amendment's prohibition on court interference in ecclesiastical disputes and failure to state a valid claim. Dkt. 38. The district court limited the Church to submitting its request in a letter-brief of no more than three pages. *See* Individual Rules of Practice II.B, https://perma.cc/77NM-KKLH. The Church argued that because the complaint centers on "an ecclesiastical dispute" involving Father Alexander's "nomination, election, and confirmation" as a bishop, reviewing the merits of Father Alexander's defamation claims would violate the First Amendment. The Church attached the full September 3 letter—which Father Alexander did not attach to his complaint, though he quoted from it—to its letter-brief to demonstrate the ecclesiastical context of the communication. *See* Dkt. 38.[3] The district court denied the Church's three-page request for a conference, Dkt. 40, and directed Father Alexander to respond in a letter and with an amended complaint, Dkt. 41. Following one additional three-page letter-brief from the Church, on May 19, 2021, the court construed the Church's initial letter as a motion to dismiss and denied the motion without full briefing or oral argument. Dkt. 46.

[3] A complaint includes "any statements or documents incorporated in it by reference." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (cleaned up).

Instead of considering the undisputedly authentic September 3 letter itself, the district court "accept[ed] the Complaint's allegations as to its contents as true." Dkt. 46 at 13 n.4. The court held that the First Amendment does not bar Father Alexander's defamation claims because the suit "may be resolved by appealing to neutral principles of law." Dkt. 46 at 11.

On June 16, 2021, the Church filed a timely Rule 59(e) motion to alter the judgment. Dkt. 51; Fed. R. Civ. P. 59(e). On June 25, the Church also filed a separate request that the district court certify its order for interlocutory appeal under 28 U.S.C. 1292(b). Dkt. 54.

Less than two weeks later, on July 6, the district court denied both motions in a single five-page order. Dkt. 57. The court acknowledged "the controlling legal doctrines at issue, the ministerial exception and the doctrine of ecclesiastical abstention," but reaffirmed its previous order denying the Religion Clauses defenses and held that disputes "as to whether the factual situation presented fits into the ministerial exception or ecclesiastical abstention" likewise warranted denying certification. *Id.* at 4. On July 14, the Court ordered that the parties must complete discovery within four months from August 13. Dkt. 59.

The Church timely filed this collateral order appeal of the order denying the motion to dismiss on June 16. Dkt. 52. On July 16, the Church amended its notice of appeal to include the July 6 order denying

the Rule 59(e) motion. Dkt. 61. Father Alexander moved to dismiss this appeal on July 15, 2021.

## ARGUMENT

This Court has jurisdiction to hear this appeal under the collateral order doctrine. Appellate courts can hear appeals of "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This includes prejudgment, collateral orders resolving rights that are "too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For an order to be collateral, it must "[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." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

Under this test, collateral orders include those involving a party's entitlement not to "stand trial" or "'face the other burdens of litigation,'" *id.* at 147, and those implicating important rights "originating in the Constitution." *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994); *see also, e.g.*, *Sell v. United States*, 539 U.S. 166 (2003) (privacy); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (Speech or Debate Clause immunity). And this Court has repeatedly held that orders causing

irreparable harm to First Amendment rights are immediately appealable under the collateral order doctrine. *See Arista Recs. LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010) (right to anonymous speech); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 118 (2d Cir. 2006) (public access to court proceedings); *Liberty Synergistics*, 718 F.3d at 148 (anti-SLAPP law protecting "certain defendants from the burdens of litigation" because they engaged in constitutionally protected speech); *United States v. Thomas*, 757 F.2d 1359, 1369 (2d Cir. 1985) (Free Exercise right to practice faith during criminal trial).

This is no surprise. "Adjudicating the proper scope of First Amendment protections has *often* been recognized by [the Supreme] Court as a 'federal policy' that merits" interlocutory appeal. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (emphasis added) (arising under parallel statute concerning appeals from "[f]inal judgments" of state courts, 28 U.S.C. § 1257); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975) (granting interlocutory appeal because, although appellants "may prevail at trial," the application of the First Amendment could mean "there should be no trial at all"). Courts have thus "repeatedly found the [collateral order] doctrine applies in cases in which pre-trial orders arguably infringe on First Amendment rights." *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th Cir. 2013).

Courts have likewise repeatedly permitted interlocutory appeals of orders intruding into a church's constitutionally protected autonomy. *See*

*Roman Catholic Archdiocese v. Feliciano*, 140 S. Ct. 696 (2020) (accepting interlocutory appeal in church autonomy case arising under 28 U.S.C. § 1258); *Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68, 373 (5th Cir. 2018) (interlocutory appeal of a discovery order was necessary because of the "structural protection afforded religious organizations and practice under the Constitution"); *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013) (immediate appeal permitted because "harm of … governmental intrusion into religious affairs would be irreparable"). Indeed, just this month, the en banc Seventh Circuit resolved a certified interlocutory appeal of a ministerial exception case. *Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142, 2021 WL 2880232, at *2 (7th Cir. July 9, 2021) (en banc).

This Court has jurisdiction to review and reverse the district court's order denying dismissal under the collateral order doctrine. First, the related First Amendment doctrines of church autonomy and the ministerial exception immunize the Church against civil adjudication of Father Alexander's suit arising from a religious leadership dispute. Thus, correcting the district court's error can only be done now, not after intrusive discovery and trial that, if allowed to continue, would cause irreparable harm. Second, the district court's order conclusively decided the First Amendment questions because the merits discovery to which the Church will be subjected cannot be undone. Third, because this appeal centers on purely legal questions about the scope of protection

from the First Amendment, it is separate from the merits of Father Alexander's defamation claims. Father Alexander's motion to dismiss should therefore be denied.

## I. This Court has jurisdiction under the collateral order doctrine.

### A. The district court's denial of the Church's motion to dismiss will be effectively unreviewable absent immediate appeal.

The first, and "major," characteristic of an appealable collateral order is that, if the order is not "reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (cleaned up). The erroneous rejection of First Amendment church-autonomy and ministerial-exception defenses creates an injury that cannot be corrected after trial by forcing the Church into the very church-state entanglement that the Religion Clauses are designed to prevent. *See McCarthy*, 714 F.3d at 975. Immediate appeal is therefore necessary.

#### 1. The church autonomy and ministerial exception defenses are threshold issues that bar adjudication of claims within their ambit.

Under "the general principle of church autonomy," the Religion Clauses protect a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). Crucially, proceedings involving "civil court review of ecclesiastical decisions of church tribunals … are *in themselves* an

extensive inquiry into religious law and practice, and hence forbidden by the First Amendment." *Young v. N. Ill. Conf.*, 21 F.3d 184, 187 (7th Cir. 1994) (cleaned up). Likewise, the ministerial exception—which is rooted in the broader church autonomy doctrine—protects a church's ability to select its own ministers without interference from civil courts. *See Our Lady*, 140 S. Ct. at 2060; *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 200-01 (2d Cir. 2017).[4]

---

[4] Father Alexander claims that the ministerial exception was waived because it was not raised in the Church's letter-briefing that was construed as a motion to dismiss. Mot. 9. Not so. First, in its available briefing, the Church argued that Father Alexander's claims were barred by the First Amendment because they involved his role as bishop, which is the essence of a ministerial exception defense. *See, e.g.*, Dkt. 38 at 2. Second, "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015); *accord Lee v. Sixth Mount Zion*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (citing *Conlon* to affirm district court's *sua sponte* consideration of the ministerial exception). The Seventh Circuit agreed in *Tomic v. Catholic Diocese of Peoria*, explaining that "the ministerial exception … is not subject to waiver," so "[a] federal court will not allow itself to get dragged into a religious controversy even if a religious organization *wants* it dragged in." 442 F.3d 1036, 1042 (7th Cir. 2006) (emphasis added).

Father Alexander makes other arguments regarding the applicability of the ministerial exception, which are tangential to the jurisdictional question and better addressed in briefing on the merits of this appeal. Likewise, the argument that "neutral principles" of law may decide this ecclesiastical dispute fails and is best addressed on the merits. *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (neutral principles doctrine was "simply not applicable" to religious leadership

Together, the Religion Clauses set "constitutional limits on judicial authority" requiring courts to avoid "entangle[ment] … in religious doctrine." *Lee,* 903 F.3d at 116, 118 & n.4. This is a "categorical[]" rule, *Conlon,* 777 F.3d at 836, because "[r]eligious questions are to be answered by religious bodies," and "federal courts are not empowered to decide (or to allow juries to decide) religious questions." *McCarthy*, 714 F.3d at 976, 980.

The protection afforded by church-autonomy doctrine and the ministerial exception is "closely akin" to "official immunity," protecting against "the travails of a trial and not just from an adverse judgment." *Id.* at 975; *accord Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (likening church autonomy to qualified immunity). Courts have long recognized that they must "resolv[e] the question of the doctrine[s'] applicability early in litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. The EEOC likewise advises that Religion Clauses defenses "should be resolved at the earliest possible stage *before* reaching the underlying discrimination claim." EEOC Compliance Manual Section 12: Religious Discrimination, EEOC-CVG-2021-3 (Jan. 15, 2021) (emphasis added).

---

disputes); *In re Diocese of Lubbock*, No. 20-0127, 2021 WL 2386133, at *7 (Tex. June 11, 2021) (rejecting neutral principles argument because church "[i]nvestigations that relate to the character and conduct of church leaders are inherently ecclesiastical").

Thus, in rejecting these defenses at the pleadings stage, ordering the case to proceed to merits discovery, and denying a certified appeal, the district court below destroyed the Church's immunity—scuttling the right to not only "avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996); *see also McCarthy*, 714 F.3d at 976 (allowing an immediate appeal because "[t]he harm of such a governmental intrusion into religious affairs would [otherwise] be irreparable"). It is "well-settled" that denials of immunity from suit are archetypical examples of proper collateral-order appeals. *Coollick v. Hughes*, 699 F.3d 211, 217 (2d Cir. 2012); Mot.13-14 (admitting that denial of an immunity from suit is immediately appealable). A court's failure to dismiss a claim where qualified immunity applies would warrant immediate appeal; so too here. Even "the beginnings of discovery" into the merits of a minister's claims can have "prejudicial effects" on "rights guaranteed by the Religion Clauses." *Demkovich*, 2021 WL 2880232, at *8-9.

Numerous courts have "likened" "church autonomy doctrine … 'to a government official's defense of qualified immunity,'" *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010), and thus allowed interlocutory appeals of orders rejecting church

autonomy defenses.[5] Prominent legal scholars agree.[6] Thus, accepting this appeal would not "leave the final order requirement of § 1291 in tatters." Mot. 19. Rather, this Court would simply be recognizing—along with a plethora of other courts—that the Religion Clauses shield ecclesiastical organizations from the intrusion of merits discovery and trial into their internal religious affairs.

**2. Absent this appeal, the Church will suffer irreparable harm.**

Allowing merits discovery will cause "irreparable" harm. *McCarthy*, 714 F.3d at 975, 979-80 (reversing district court's denial of an interlocutory appeal by the Holy See under the collateral order doctrine

---

[5] *See*, *e.g.*, *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990) (allowing interlocutory appeal because "once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated."); *see also Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014) (similar); *Dayner v. Archdiocese of Hartford,* 23 A.3d 1192, 1199-1200 (Conn. 2011) (similar); *Harris v. Matthews*, 643 S.E.2d 566, 569-70 (N.C. 2007) (similar).

[6] *See, e.g.*, Br. Amici Curiae for InterVarsity Christian Fellowship/USA at *19, *Our Lady*, Nos. 19-267, 19-348, 2020 WL 635296 (Feb. 10, 2020), (Prof. Michael McConnell explains that a church autonomy defense "should be immediately appealable under the collateral-order doctrine."); Carl H. Esbeck, *After* Espinoza*, What's Left of the Establishment Clause?*, 21 Fed. Soc'y Rev. 186, 202 (2020) (Church autonomy "operates like an immunity from suit" for cases like this); Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) ("threshold constitutional question" warrants "immediate appeal").

because the "federal courts are not empowered to decide (or to allow juries to decide) religious questions"). The ministerial exception and broader church autonomy doctrine, each grounded in the First Amendment, protect against government intrusion into matters "strictly ecclesiastical." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 (2012); (citation omitted). The discovery sought by Father Alexander will violate the Church's First Amendment rights—and such a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020).

The district court ordered the parties to begin merits discovery, Dkt. 59, and Father Alexander opposed the Church's efforts to limit discovery to the applicability of the Religion Clauses defenses. Dkt. 62. Instead, he insists on deposing each of the clergy defendants. Dkt. 63. These are exactly the kinds of "onerous" "depositions of fellow ministers" regarding matters of church discipline and selection of clergy that the Seventh Circuit has just determined—on an interlocutory appeal—were not permitted by the Religion Clauses, *Demkovich*, 2021 WL 2880232, at *9. Pursuing these merits questions in discovery would subject the Church to unreviewable, irreparable harm.[7] Entangling discovery would also be

[7] If the district court grants the Church's motion to bifurcate discovery, Dkt. 62, the collateral issue may become moot and allow the Church to dismiss the appeal, but if Father Alexander's discovery plan is permitted, the Church will suffer irreparable harm.

required from Father Alexander on the question of damages, which he bases on the loss of members of his congregation and of income from his role as bishop, as well as his "severely impaired reputation and standing" in the ROCOR community. Compl. ¶¶ 81-82, 93-94, 102.

Subjecting religious leaders and institutions to being "deposed, interrogated, and haled into court" can also create the sort of "impermissible entanglement" that is "forbidden by the First Amendment." *EEOC v. Catholic Univ.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996); *accord Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.) (warning against subjecting "church personnel and records … to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church").

But for Father Alexander to succeed, the court would have to examine the validity of the process of his election as bishop in compliance with ROCOR's internal policies. *See Greenberg v. Spitzer*, 62 N.Y.S.3d 372, 383 (N.Y. App. Div. 2017) ("Truth is an absolute defense to an action based on defamation." (citation omitted)). The "investigation and review" necessary to resolve his claims "could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 703 (7th Cir. 2003); *accord Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., joined by Kagan, J., concurring) (explaining that "the *mere*

*adjudication* of [religious] questions would pose grave problems for religious autonomy" (emphasis added)). For this reason, courts have repeatedly rejected ministers' defamation claims against churches under both ministerial exception and church autonomy defenses. *See, e.g.*, *Hutchison*, 789 F.2d 392 (church decision on the status of a minister); *Lee v. Sixth Mount Zion*, No. CV 15-1599, 2017 WL 3608140, at *34 (W.D. Pa. Aug. 22, 2017) (collecting cases), *aff'd* 903 F.3d 113; *Kraft v. Rector*, No. 01-CV-7871, 2004 WL 540327, at *6 (S.D.N.Y. Mar. 17, 2004); (defamation claim barred where "essentially tied to" the ministerial dispute); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000) (defamation claims regarding priestly status were barred); *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("[D]efamation is one of those common law claims that" cannot "overcome First Amendment protection surrounding a church's choice of pastoral leader.").

As the Supreme Court has explained, "[j]udicial review" of the merits of a religious organization's internal management decisions "would undermine the independence of religious institutions." *Our Lady*, 140 S. Ct. at 2055. The Church possesses the right to "protect [its] autonomy with respect to internal management decisions that are essential to the institution's central mission"; and this right unquestionably allows the Church, without interference of the courts, to determine Father Alexander's status as a bishop and to communicate about it internally and externally to the church. *Id.* at 2060; *see also In re Diocese of Lubbock*,

2021 WL 2386133, at *9 ("exercising jurisdiction" over Church's publication of an internal investigation into its own clergy "would necessarily "encroach[] on the church's ability to manage its internal affairs"). Therefore, absent this Court's immediate intervention, the Church will be permanently deprived of its First Amendment freedoms against court interference in its internal affairs if it is subjected to the ordered (and sought) plenary discovery.

### B. The district court's order conclusively denied the Church's rights against merits discovery and is collateral to the merits.

The district court's denial of the motion to dismiss and rejection of the Church's First Amendment defenses "finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations" or to "face the other burdens of litigation." *Mitchell*, 472 U.S. at 526-27; *see also Liberty Synergistics*, 718 F.3d at 147 ("If either such right is at issue, a denial of that right 'conclusively determines' the disputed issue by ensuring that 'the defendant must bear the burdens of discovery.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009))). Even if the district court's erroneous legal analysis of the applicable rights could be "corrected on appeal from a final judgment," that would not redress the harm of merits discovery facing the Church—precisely the harm that the church autonomy doctrine and the ministerial exception should prevent. *McCarthy*, 714 F.3d at 976; *see Lynch v. Ackley*, 811 F.3d 569,

576 (2d Cir. 2016) (explaining that entitlement to immunity from litigation "should be resolved 'at the earliest possible stage in litigation'" because "an important part of its benefit is effectively lost if a case is erroneously permitted to go to trial" (quoting *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009))).

Finally, whether the Church's First Amendment defenses apply is "conceptually distinct" from the merits of Father Alexander's defamation claims, and it is therefore a collateral issue. *Mitchell*, 472 U.S. at 527. That is because this Court "need not consider the correctness of the plaintiff's version of the facts" regarding his defamation claims; "[a]ll it need determine is a question of law." *Id.* at 528; *Liberty Synergistics*, 718 F.3d at 148. Where a pleadings-stage denial turns on a legal question and not a factual dispute, interlocutory appeal is appropriate. *Britt v. Garcia*, 457 F.3d 264, 271-72 (2d Cir. 2006). And the presence of troubling First Amendment questions further necessitates collateral review. *See, e.g.*, *Lugosch*, 435 F.3d at 118.

No factual issues prevent this appeal. *See, e.g.*, *Coollick*, 699 F.3d at 219 (courts may review a denial of immunity at the motion-to-dismiss stage "to the extent [the case] can be resolved on … the facts that the plaintiff alleges are true"). There is no disputing that Father Alexander was a priest under the ecclesiastical authority of the Church, or that his claims arise from a controversy over religious leadership decisions. Whether the Religion Clauses preclude Father Alexander's claims is "a

pure question of law." *Fratello v. Roman Catholic Archdiocese*, 175 F. Supp. 3d 152, 163 (S.D.N.Y. 2016) (quoting *Conlon*, 777 F.3d at 833), *aff'd*, 863 F.3d 190 (2d Cir. 2017); *see also Bryce*, 289 F.3d at 654 (application of the church autonomy doctrine is a "question of law"); *Kirby*, 426 S.W.3d at 608-09 (the ministerial exception "is a question of law"). Thus, because an immunity from trial inheres in these First Amendment defenses, they are separate "from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

## II. This Court can consider jurisdiction and the First Amendment defenses together.

The Court has ordered that the Church's merits brief is due on August 19. ECF 31. The prompt pace of this appeal, along with the reality that full briefing on the Church's First Amendment defenses will underscore why the Court has jurisdiction, together counsel consolidating the question of jurisdiction with the merits of the appeal.[8]

The Tenth Circuit recently used this approach in a similar appeal involving church autonomy and the collateral order doctrine. *See* Order, *Tucker v. Faith Bible Chapel Int'l*, No. 20-1230 (10th Cir. July 1, 2020). In *Tucker*, as here, the defendant church filed an interlocutory appeal after the district court denied its church autonomy defenses and set the

[8] This approach is further confirmed by Father Alexander's motion, which devotes over half its argument to whether the decision below was correct. Mot. 5-13.

case for merits discovery. The Tenth Circuit ordered the church to file a jurisdictional memorandum and, upon receiving the church's explanation that its church autonomy defenses were appealable under the collateral order doctrine, promptly consolidated the jurisdictional question with the merits of the church's appeal. *Id.* at 1, *see also* Order of Nov. 24, 2020 (staying district court proceedings pending resolution of appeal).

A similar approach would be sensible here, and well within the Court's discretion. *See Coollick*, 699 F.3d at 217 (addressing jurisdiction under the collateral order doctrine before "turn[ing] to the merits" in the same opinion); *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 89 (2d Cir. 2015) (similar).

## CONCLUSION

The Court should deny Father Alexander's motion to dismiss this appeal. In the alternative, it should consider its jurisdiction along with the merits of the appeal.

Respectfully submitted,

/s/ Diana M. Verm
Diana M. Verm
Daniel H. Blomberg
Daniel D. Benson
William J. Seidleck
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*dverm@becketlaw.org*

Donald J. Feerick, Jr.
FEERICK NUGENT
MACCARTNEY, PLLC
96 South Broadway
South Nyack, NY 10960
(845) 353-2000

## CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Fed. R. App. P. 27(d) because it has 5,102 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

July 26, 2021

/s/ Diana M. Verm
Diana M. Verm

## 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 July 26, 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.

July 26, 2021

/s/ Diana M. Verm
Diana M. Verm