UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-1498 Caption [use short title] Belya v. Kapral, et al.

Motion for: dismissal of interlocutory appeal

Set forth below precise, complete statement of relief sought:

This appeal is from a denial of a motion to dismiss the complaint. Appellee seeks dismissal on the grounds that the appeal does not satisfy any of the three criterial that must be met under the collateral order doctrine

MOVING PARTY: Alexander Belya
- ☑ Plaintiff
- ☐ Defendant
- ☐ Appellant/Petitioner
- ☐ Appellee/Respondent

OPPOSING PARTY: Defendants Hilarion Kapral et al.

MOVING ATTORNEY: Oleg Rivkin

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Court-Judge/Agency appealed from: Hon. Victor Marrero (SDNY)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s/ Oleg Rivkin **Date:** July 15, 2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

-vs-

HILARION KAPRAL, et al.,

Defendants-Appellants.

CAP Dkt. No. 21-1498

SDNY Dkt. No.: 20-cv-6597

PLAINTIFF-APPELLEE'S BRIEF IN SUPPORT OF MOTION TO DISMISS THE APPEAL

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Plaintiff-appellee, Alexander Belya ("Belya"), by his counsel, The Rivkin Law Group pllc, submits this brief in support of his motion to dismiss this interlocutory appeal for lack of appellate jurisdiction.

I. PRELIMINARY STATEMENT

Defendants-appellants (hereinafter, "Defendants") appeal from the district court's denial of a motion to dismiss Belya's Complaint. In an effort to bring the denial of their motion within the ambit of appealable judgments, Defendants couch their appeal as one predicated on the collateral order doctrine. The district court's decision and order does not come close to satisfying the necessary requirements of the collateral order doctrine. The decision did not conclusively determine a disputed question; did not resolve an important issue completely separate from the merits of the action; and is amply reviewable on a final appeal. As shown below, on each of the three prongs which must be met before jurisdiction can be asserted under the collateral question doctrine, Defendants' argument fails. This appeal should be dismissed.

II. COMPLAINT, DECISION BELOW AND PROCEDURAL BACKGROUND

A. The Amended Complaint

The Amended Complaint[1] ("Complaint") alleges claims for defamation, defamation *per se*, defamation by implication/innuendo, and vicarious liability. [SDNY Dkt. No. 48]. At the heart of the Complaint is a certain letter written by the Defendants in which they charged Belya with forgery and fabrication, and which they widely disseminated within the church community and broadly online. Specifically, in the letter Defendants charged Belya with fabricating his own election as Bishop of Miami, claiming that the election had never taken place and that the official correspondence confirming the election was a forgery. Defendants publicly accused Belya of falsifying a letter from Defendant Hilarion, the head of ROCOR, (and of forging his signature) to the head of the church in Russia informing the latter of Belya's election. Defendants also charged Belya of falsifying and forging the signature on a separate letter which confirmed that Belya had instituted required changes of practice. The eight (8) specific Defamatory Statements made by the

[1] The Amended Complaint was filed on May 20, 2021, in accordance with the district court's order included in its decision on the motion to dismiss. For the purposes of this motion and the appeal there are no substantive differences between the allegations in the original Complaint and the Amended Complaint. The differences pertain to other arguments that were made by the Defendants on their motion to dismiss before the district court, which are not relevant to this appeal.

Defendants are set forth in paragraph 66 (a) – (h) of the Complaint. [SDNY Dkt. No. 48].

Defendants then proceeded to disseminate their letter containing the charges of falsification and forgery among members of the New York Synod, to parishes, churches, monasteries and other institutions, as well as broadly to online media outlets. [*Id*. at ¶¶ 50, 53-56].

In sum, the crux of the claim is that Belya was publicly and falsely accused by the Defendants of being a forger and a swindler, who had fabricated official correspondence and forged signatures of church officials on letters relating to his election as Bishop of Miami, which the Defendants claim had never taken place.

B. Motion to Dismiss And The District Court's Decision

Defendants moved to dismiss the Complaint on several grounds: (1) that the defamatory statements were statements of opinion; (2) that the statements were protected under the qualified common-interest privilege; (3) that the Court lacked subject-matter jurisdiction under the ecclesiastical abstention doctrine; and (4) that personal jurisdiction over out-of-state Defendants was lacking. [SDNY Dkt. No. 46, p. 7].

By Decision and Order dated May 19, 2021, the district court denied Defendants' motion to dismiss the Complaint. [SDNY Dkt. No. 46]. As to

Defendants' argument based on the ecclesiastical abstention doctrine, the district court stated as follows:

> Here, the Court is persuaded that Belya brings a suit that may be resolved by appealing to neutral principles of law. Plaintiff's claim centers on Defendants' allegations that he forged the various letters at issue that led to the confirmation of his election as Bishop of Miami. Belya does not ask this Court to determine whether his election was proper or whether he should be reinstated to his role as Bishop of Miami, and the Court would not consider such a request under the doctrine of ecclesiastical abstention. Instead, the issues that the Complaint requires the Court to address include whether, under New York law, Defendants made the alleged statements, the truth of the alleged statements, Defendants' knowledge of the alleged statements' falsity at the time they were made, whether the alleged statements are subject to defamation laws, if any harm was caused by the alleged defamation, and whether any privilege applies. These elements raise secular inquiries that the ultimate finder of fact may make without weighing matters of ecclesiastical concern.

[SDNY Dkt. No. 46, p. 11] (citations omitted).

C. <u>Post-Decision Proceedings Before the District Court</u>

On June 16, 2021, Defendants filed a motion for reconsideration of the Court's May 19, 2021, decision. [SDNY Dkt No. 51].

On June 17, 2021, Defendants filed a Notice of Appeal from the district court's decision, claiming appellate jurisdiction based on the collateral order doctrine. [SDNY Dkt. No. 52].

On June 25, 2021, Defendants filed a motion for a certification of the district court's decision for interlocutory appeal pursuant to 28 U.S.C. §1292(b). [SDNY Dkt. No. 54].

By Decision and Order dated July 6, 2021, the district court denied both of Defendants' motions. [SDNY Dkt. No. 57]. With regard to the motion for reconsideration, the district court ruled that the motion was untimely. The district court further stated that, while, given the untimeliness, it did not need to reach the merits, the Court was "persuaded that the motion is meritless," as it "does not set forth concisely the matters or controlling decisions which counsel believes the Court has overlooked," but rather "attempts to inappropriately relitigate old issues, present the case under new theories, secure a rehearing on the merits, or otherwise take a second bite at the apple." [SDNY Dkt. No. 57, n. 1] (quotations, citations omitted).

III. ARGUMENT

A. The District Court Properly Applied The Ecclesiastical Abstention Doctrine

The crux of the Defendants' argument, both on the motion to dismiss and on this appeal, is that Belya's claims are barred by the ecclesiastical abstention doctrine. The long-standing, well-established principle of the doctrine is that is does not bar claims if they can be resolved by appealing to neutral principles of law. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 451 (1969). The "neutrality" principle has been enunciated by

numerous courts in this and other jurisdictions. *See, e.g.*, *Kavanagh v. Zwilling*, 997 F. Supp.2d 241, 249-50 (S.D.N.Y. 2014) (if "inquiry into religious law and polity is not required" to resolve the issues "that arise with respect to a religious entity," the Court may properly exercise jurisdiction); *Ram v. Lal*, 906 F.Supp.2d 59, 69-70 (E.D.N.Y. 2012) ("civil courts may resolve … secular issues that arise with respect to a religious entity, but only when inquiry 'into religious law and polity' is not required."); *Hyung Jin Moon v. Hak Ja Han Moon*, 431 F.Supp.3d 394, 412-413 (S.D.N.Y. 2019) ([t]he application of the ecclesiastical abstention doctrine is fact-specific, and civil courts may adjudicate secular issues that arise in the context of church disputes when inquiry into religious law and polity is not required. … [Under the] "neutral principles of law" approach … civil courts can adjudicate church disputes "without resolving underlying controversies over religious doctrine); *Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 879 N.E.2d 1282, 849 N.Y.S.2d 463 (2007) ("[j]udicial involvement is permitted when the case can be decided solely upon the application of neutral principles of law, without reference to any religious principle"); *Berger v. Temple Beth El of Great Neck*, 303 A.D.2d 346, 348 (2d Dep't 2003) ("[s]ince the instant defamation action can be settled by the application of neutral principles of law and does not implicate matters of religious doctrine or practice, the Supreme Court may properly exercise subject matter jurisdiction"); *Sieger v. Union of Orthodox Rabbis of U.S. and*

Canada, Inc., 1 A.D.3d 180, 182 (1st Dep't 2003) ("[t]o the extent plaintiff has alleged defamatory statements which can be evaluated solely by the application of neutral principles of law and do not implicate matters of religious doctrine and practice, such as whether plaintiff is sane or is a fit mother, they are not barred by the Establishment Clause"); *Abdelhak v. The Jewish Press*, 985 A.2d 197, 204 (App. Div. 2009) ("[i]f … the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion, there is no First Amendment shield to litigation. Neutral principles are wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal evaluations").

The Complaint is narrowly drafted to allege a purely secular dispute that requires no consideration of church doctrine or discipline, much less any weighing of competing doctrinal views, and which can be resolved by the application of neutral principles of law. The sole basis for the defamation claim is that Defendants knowingly and falsely charged Belya with forging the signature of defendant Hilarion on two letters and with fabricating the contents of these letters. Belya does not challenge his expulsion, does not ask the Court to order his reinstatement, or seek any other declaratory relief. He is seeking damages for being publicly labeled a forger and swindler.

The district court correctly identified the following issues to be decided in the litigation: (a) whether Defendants made the alleged statements, (b) the truth of the alleged statements, (c) Defendants' knowledge of the alleged statements' falsity at the time they were made, (d) whether the alleged statements are subject to defamation laws, (e) if any harm was caused by the alleged defamation, and (f) whether any privilege applies. [SDNY Dkt. No. 46, p. 11]. The district court correctly concluded that these "raise secular inquiries that the ultimate finder of fact may make without weighing matters of ecclesiastical concern." [*Id.*]. The district court went on to note that Belya "does not ask this Court to determine whether his election was proper or whether he should be reinstated as Bishop of Miami, and the Court would not consider such a request under the doctrine of ecclesiastical abstention." [*Id*.]. In sum, the district court's application of the ecclesiastical abstention doctrine to the facts, as pleaded in the Complaint, is perfectly in line with the decisions of the courts in this and other jurisdictions.

B. Defendants' Belated Attempt To Re-couch Their Argument Under the Ministerial Exception Was Properly Rejected By The District Court

On the motion for reconsideration, Defendants argued that, in addition to the ecclesiastical abstention doctrine, the Complaint should be dismissed pursuant to the ministerial exception, under the Supreme Court decisions in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). Notably, the

Defendants did not make this argument on the motion to dismiss, which was limited solely to the ecclesiastical abstention doctrine. They raised the ministerial exception for the first time on the motion for reconsideration.

The ministerial exception is wholly inapplicable to this case, among other reasons because there is no and never was any employer-employee relationship between Belya and the Defendants.

In *Hosanna-Tabor*, the Supreme Court addressed the ministerial exception doctrine, as it had evolved over the past several decades after the passage of Title VII. The Court "agree[d]" with the several Courts of Appeals that there is "a ministerial exception grounded in the First Amendment that precludes application of [employment-discrimination] legislation to claims concerning the employment relationship between religious institution and its ministers." 565 U.S. at 188. As to the limitation of the ministerial exception, the Court stated as follows:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold *only* that the ministerial exception bars such a suit. *We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers*.

565 U.S. at 196 (emphasis added).

In *Our Lady Of Guadalupe*, the Court further explained the limited scope of the *Hosanna-Tabor* ministerial exception, as follows:

> Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label "ministerial exception" because the individuals involved in pioneering cases were described as "ministers."

140 S.Ct. at 2060.

> When the so-called ministerial exception finally reached this Court in *Hosanna-Tabor*, we unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations.

Id. at 2061.

The limitation of the application of the ministerial exception doctrine solely to employment discrimination cases was made abundantly clear by this Court in *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017). In discussing the history and import of the ministerial exception, this Court stated, *inter alia*, as follows:

> The ministerial exception bars employment-discrimination claims brought by ministers against the religious groups that employ or formerly employed them. *Id.* at 198;
>
> [I]n *Hosanna-Tabor* the Supreme Court "agree[d]" with the Courts of Appeals that there is "a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.*, at 200;

The ministerial exception is thus a narrowly tailored rule that provides religious institutions with a shield against employment discrimination claims. It is not, as Defendants claimed on the motion for reconsideration, synonymous with the ecclesiastical abstention doctrine. As explained in *Hyung Jin Moon,* 431 F.Supp.3d 394, at n. 13, "*Hosanna-Tabor* was not a case about ecclesiastical abstention, it addressed the related – but distinct – ministerial exception, which protects employers from employment discrimination lawsuits brought by ministers." (Citations, quotations omitted). *See also Penn v. New York Methodist Hospital,* 884 F.3d 416, 424 (2d Cir. 2018) (the ministerial exception applies to "religious groups" when making employment decisions involving "ministers"); *United States v. Thompson,* 896 F.3d 155, 166 (2d Cir. 2017) ("In *Hosanna-Tabor*, the Supreme Court held only that the 'ministerial exception' doctrine 'protects religious employers from employment discrimination lawsuits brought by their ministers'").

Brandenburg v. Greek Orthodox Archdiocese of North America, 2021 WL 2206486 (S.D.N.Y., June 1, 2021), is the most recent analysis of the scope of the ministerial exception in this Circuit. The case involved claims of discrimination, retaliation, and civil rights violations under New York State Human Rights Law. Noting that the ministerial exception only bars "claims arising from, or relating to, tangible employment actions – such as hiring, firing, promoting, compensation, job assignments, and the like," *id*., at * 4, the Court stated that "the question remains

whether the exception bars all or only some" of Plaintiff's claims. *Id*. The Court went on to conclude that the claims of constructive discharge based on harassment, as well as retaliation (to the extent it was based on the alleged harassment) were *not* barred by the ministerial exception because these were not based on "a tangible employment action." *Id*. at * 5 (emphasis added).

The ministerial exception has no application to Belya's claims here for the following reasons:

First, Belya was not an employee of any of the Defendants, and none of the Defendants were employers of Belya. Belya was and remains a fully autonomous (and self-employed) spiritual leader of his own parish, headquartered at the Cathedral of St. Matrona, and of the St. Nicholas Monastery in Dania Beach, Florida. Belya was an archimandrite within the Russian Orthodox Church. After the events described in the Complaint, Belya left the Russian Orthodox Church and joined the Greek Orthodox Church. [SDNY Dkt. No. 48 (Complaint) at ¶ 58]. That is, Belya shifted his affiliation – and that of his parish – from one Christian Orthodox denomination to another. An employee-employer relationship, which is a *sine qua non* of the ministerial exception doctrine, simply does not exist here.

Second, Belya does not complain of any "tangible employment actions" by Defendants. *Brandenburg,* at * 4. His claims have nothing to do with "hiring, firing,

promoting, compensation [or] job assignments." *Id*. Belya has not asserted any employment-related claim at all.

Third, aside from the absence of any employee-employer relationship and of any "tangible employment actions" by Defendants, *Hosanna-Tabor* makes clear that the ministerial exception does not bar "actions by employees alleging … tortious conduct by their religious employers." 565 U.S. at 196. Thus, even when its threshold employment-related requirements are met, the ministerial exception does not grant religious institutions immunity from defamation claims, or from any other tortious conduct, provided, of course, these can be proven through neutral principles of law, as is the case here.

C. The District Court's Order Does Not Satisfy The Requirements For Collateral Order

1. Collateral Order Doctrine Standard

Denials of a motion to dismiss are not appealable as "final decisions" of the district court under 28 U.S.C. §1291. *Catlin v. United States*, 324 U.S. 229, 236 (1945).

The collateral order doctrine is "a narrow exception to the final order rule" that "allows an appellate court to review immediately a district court order affecting rights that will be irretrievably lost in the absence of an immediate appeal." *United States v. Esposito*, 970 F.2d 1156, 1159 (2d Cir. 1992). The doctrine has been held applicable most often to motions asserting—as a matter of law—"an *immunity from*

suit," not "a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

To fall within the scope of the collateral order doctrine, an order 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." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988) (internal quotation marks omitted). An order is "effectively unreviewable" where "the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines, S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989) (internal quotation marks omitted). In contrast, the fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment" is not sufficient. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (internal quotation marks omitted). The conditions are "stringent," *Digital Equipment Corp. v. Desktop Direct, Inc*., 511 U.S. 863, 868 (1994) (citing *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 799 (1989)), and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further: judicial efficiency, for example, and the "sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to

which a litigation may give rise.' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)). *See also Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope.").

All three of the requirements for appeal under the collateral order doctrine must be met; if any one is unsatisfied, the order is not immediately appealable under this doctrine. *See, e.g., Lauro Lines,* 490 U.S. at 498 (where the order in question "fail[s] to satisfy the third requirement of the collateral order test," "we need not decide whether [the] order ... conclusively determines a disputed issue, or whether it resolves an important issue that is independent of the merits of the action"); *Mohawk Indus.,* 558 U.S. at 108 (where "collateral order appeals are not necessary to ensure effective review ..., we do not decide whether the other *Cohen* requirements are met"). Where review from a final judgment will be adequate, the fact [t]hat a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment ... has never sufficed." *Digital Equip.,* 511 U.S. at 872. Instead, the decisive consideration is whether delaying review until the entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." *Will*, 546 U.S. at 352-353.

2. The District Court's Order Does Not "Conclusively Determine" a "Disputed Question"

A "conclusive determination" required by the first prong of the collateral order standard, requires that the appealed order be a "complete, formal and, in the trial court, final rejection" of the issue. *Abney v. United States*, 431 U.S. 651, 659 (1977). A denial of a motion to dismiss on the pleadings will rarely, if ever, satisfy this requirement. That is because, on a motion to dismiss, the district court does not as a rule "conclusively decide" anything. All the court decides is whether, *as pleaded*, the complaint states a cognizable claim. The "issue" here is whether Belya could prove his claim of defamation without requiring the court or jury to delve into ecclesiastical doctrinal matters. The only thing the district court concluded is that, reading the complaint in the light most favorable to the plaintiff, it cannot rule as a matter of law that the claims could not be adjudicated by appealing solely to neutral principles of law. Nothing prevents the Defendants from developing a record in the course of discovery to show that consideration of ecclesiastical matters would be necessary to adjudicate the claims, or, having done so, from renewing their argument on a motion to summary judgment or at trial. The district court's ruling is thus "'inherently tentative' in this critical sense—because it is not made with the expectation that it will be the final word on the subject addressed." *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988). Under even the most expansive definition of "conclusive," that is not a conclusive decision.

3. The District Court's Order Did Not Resolve Issues Separate From The Merits

The district court ruled that the allegations, as pleaded, could be adjudicated by appealing solely to neutral principles of law. This ruling is not on an issue that is in any meaningful sense separate from the merits of the case. That is because the district court's decision does not conclusively and finally resolve the applicability (or inapplicability) of the ecclesiastical doctrine to this case. The decision is limited solely to the adequacy of the pleadings. As stated above, the Defendants are free to develop a record that would demonstrate the need for the factfinder to delve into ecclesiastical matters in order to adjudicate plaintiff's claims, and to renew their ecclesiastical doctrine argument on a motion to summary judgment or at trial.

The requirement that the appealed issue be separate from the merits stems from the final-judgment rule. *Johnson v. Jones*, 515 U.S. 304, 311 (2005). That is because when the issues on interlocutory appeal are truly distinct from the merits, there is little risk that a court of appeals will have to take them (or similar issues) up again later, in a subsequent appeal. *Id*.

If this Court were to accept jurisdiction, and then affirm the district court's decision, the matter would proceed to merits discovery. At the end of which the Defendants would file a motion for summary judgment, arguing that evidence adduced in discovery supports their argument that the claims could not be adjudicated without consideration of ecclesiastical matters. If the district court

denies that motion, the Defendants would file yet another interlocutory appeal on *this very issue*. If the case were then remanded for trial and the jury is allowed to consider issues which Defendants believe are ecclesiastical in nature, they would have yet a *third appeal* on these same issues after final judgment. This sort of piecemeal approach to litigation is precisely what the final-judgment rule is intended to prevent.

4. The District Court's Order is Reviewable On Appeal From Final Judgment

An order is "effectively unreviewable" where it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines,* 490 U.S. at 498-99. Being burdened by litigation is not sufficient. *Mohawk Indus.,* 558 U.S. at 107.

This is not by a long shot a situation where the defendants would irretrievably lose some right in the absence of an immediate appeal. *Esposito*, 970 F.2d at 1159. None of Defendants' rights would be "destroyed" if they were required to proceed with the case, particularly since nothing prevents them from raising the ecclesiastical doctrine argument on summary judgment after an evidentiary record has been developed, or at trial before a final judgment is rendered. Defendants are not claiming that they are entitled to complete immunity under the ecclesiastical doctrine. Nor, plausibly, could they. The ecclesiastical doctrine and the "neutral principles of law" standard is clear and well-settled. As with any interlocutory order,

if the trial court gets it wrong, this Court can reverse and correct the error on appeal from final judgment.

In their submissions to the district court, Defendants' sole claim of "harm" is having to participate in discovery. That is wholly insufficient to satisfy the "irretrievable loss of right" requirements. *See Digital Equip.,* 511 U.S. at 872, 873-74 (the fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment ... has never sufficed"; courts view "with skepticism, if not a jaundiced eye" arguments for a right to be free from trial, especially when there is no textual basis for that asserted right).

Casting an assertion of a right to avoid the burdens of discovery and trial as effectively unreviewable on appeal after a final judgment "is too easy to be sound." *Will*, 546 U.S. at 350-51. Many pretrial order address issues that could be characterized as implicating a right not to stand trial, including those dealing with personal jurisdiction, statutes of limitation, the Sixth Amendment right to a speedy trial, claim preclusion, and summary judgment. *See Digital Equip.*, 511 U.S. at 873. To treat all such orders as collateral and subject to immediate appeal "would leave the final order requirement of § 1291 in tatters" and wholly undermine the strong jurisprudential interest in saving appellate review for after final judgment. *Will*, 546 U.S. at 351.

In sum, this appeal does not meet any of the three criteria for collateral order-based appellate jurisdiction.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of appellate jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 15, 2021, I electronically filed the foregoing motion with the Clerk of the Court of the for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in this appeal who are registered CM/ECF users will be served by the CM/ECF system.

Dated: July 15, 2021

/s/ Oleg Rivkin
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