No. 21-1498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff–Appellee,

v.

HILARION KAPRAL, AKA 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,

PAVEL LOUKIANOFF, JOHN DOES 1 THROUGH 100,

Defendants.

On Interlocutory Appeal from the
United States District Court for the Southern District of New York
Case No. 20-cv-6507, Hon. Victor Marrero

BRIEF FOR APPELLEE ALEXANDER BELYA

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INTRODUCTION

This Court should not and cannot consider this appeal. The district court denied a motion to dismiss. That ruling was the beginning of this litigation, not the end. Yet Defendants have made clear their strategy: Appeal early, appeal often, and don't let facts or law get in the way. They misstate the record, omit relevant proceedings in the district court, and ignore controlling precedent. But try as they might, Defendants cannot escape that review is barred at this juncture.

What they really want is to rewrite the ecclesiastical-abstention doctrine, converting it from a restriction on courts' authority to answer theological questions to an absolute immunity—not only from liability, but from being subject to suit at all—whenever a religious institution or people affiliated with it are involved. The district court correctly declined to accept that wild expansion of the doctrine on a motion to dismiss, concluding that Plaintiff Alexander Belya's claims could go to discovery based on the allegations in the Complaint because, at least so far, the court would not need to answer any religious questions. Defendants now try to paint that categorically *non*final decision as final. As for the other two decisions on appeal, one was a denial of a motion as untimely (a fact that Defendants fail to mention), and the other was an ordinary, mine-run discovery order. None are immediately appealable.

Defendants want this Court to look over the shoulders of district judges, second-guessing each and every decision they make, whenever (and just because) a defendant is religiously affiliated. But that's not how our legal system works. The district court made clear that should the First Amendment be genuinely implicated at any point, those issues will be addressed if or when they actually arise. And if Defendants are unhappy with those determinations, they can appeal at the proper time, employing lawful procedures. Until that hypothetical time, this Court should not open the floodgates to three entirely new categories of immediate interlocutory appeals.

JURISDICTIONAL STATEMENT

As explained in Part I, this Court lacks appellate jurisdiction. The district court's denial of the motion to dismiss on ecclesiastical-abstention grounds is not an appealable collateral order under 28 U.S.C. § 1291. Nor is the denial of the untimely motion to reconsider or the denial of the motion to bifurcate discovery. But even if any of those orders were somehow generally subject to interlocutory appeal, they certainly are not when the defendants refuse to accept the allegations in the complaint as true. *See Johnson v. Jones*, 515 U.S. 304, 307 (1995).

ISSUES PRESENTED

I. The dispositive question is whether this Court should create three new categories of interlocutory appeals despite Supreme Court and Circuit precedent foreclosing them.

II. If this Court did somehow have jurisdiction, the question would be whether the district court (1) erred in concluding that the Complaint on its face did not raise ecclesiastical-abstention problems; (2) erred in concluding that Defendants' attempt to raise a new issue (the ministerial exception) in a motion for reconsideration failed because the motion was filed out of time; and (3) abused its discretion by not bifurcating discovery.

STANDARDS OF REVIEW

If this Court had jurisdiction, review of the district court's denial of the motion to dismiss under the ecclesiastical-abstention doctrine would be *de novo*. *See Johnson v. Nextel Commc'ns., Inc.*, 660 F.3d 131, 138 (2d Cir. 2011). The facts in the Complaint would be taken as true and all reasonable inferences would be drawn in Belya's favor. *See id.* On those facts, as long as Belya's right to relief is not merely speculative, the motion was properly denied. *See id.*

Because the ministerial-exception arguments were not properly raised below, they are forfeited for purposes of this appeal. *See, e.g.*, *Spinelli v. Nat'l Football League*, 903 F.3d 185, 198 (2d Cir. 2018).

And discovery orders would be reviewed solely for abuse of discretion. *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003).

STATEMENT OF THE CASE

A. Factual Background

Alexander Belya was an Archimandrite—a monastic priest—in the Russian Orthodox Church Outside of Russia (ROCOR). Dkt. 1 ¶ 23.[1] In 2011, after serving in the Czech Republic and Slovakia, Belya moved to the United States to serve, at Hilarion Kapral's invitation. Dkt. 1 ¶ 24. In August 2018, Belya was nominated for the position of Vicar of Florida, with Kapral noting that during Belya's service, the "largest church in the region" had been "shining magnificently." Dkt. 1 ¶ 25. In December 2018, Belya was elected Bishop of Miami by the ROCOR Synod. Dkt. 1 ¶ 26.

On December 10, 2018, Kapral sent a letter, which he signed and stamped with his official seal, to Kirill, the Patriarch of Moscow and All Russia, sharing the "joyful news" that Belya had been "elected as the Bishop of Miami." Dkt. 1 ¶¶ 28-29. Because ROCOR Bishops must also be approved by the Moscow Synod, Kapral notified Kirill that a request to confirm Belya for his position was forthcoming. Dkt. 1 ¶ 30. Separately, Kapral personally

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[1] The facts come from Belya's original Complaint, which was the only document evaluated by the district court in denying Defendants' motion to dismiss. *See* JA68 n.2; *infra* pp. 46-47. Filings in this Court are cited as ECF and district-court filings not included in the appendix are cited as Dkt.

congratulated Belya on his election and informed him of suggested practices to implement to ensure confirmation by the Moscow Synod. Dkt. 1 ¶¶ 27, 31. In early January 2019, Archbishop Gavriil of Montreal and Canada wrote to Kapral, confirming that Belya had implemented those practices; and on January 11, Kapral wrote and sent a letter to Patriarch Kirill asking for approval of Belya as Bishop of Miami. Dkt. 1 ¶¶ 32-34. Kapral signed and stamped this letter with his official seal also. Dkt. 1 ¶ 35. Belya then met with Kirill, who informed him that the Moscow Synod would approve his appointment. Dkt. 1 ¶ 36. On August 30, 2019, the Moscow Synod published its approval on its official website, and Kapral congratulated Belya by telephone on his election. Dkt. 1 ¶¶ 37-38.

Meanwhile, a group of detractors led by Defendant Nicholas Olkhovskiy, head of the Eastern American Diocese, had plotted to thwart Belya's promotion. Dkt. 1 ¶ 39. And after the promotion was confirmed, they pressured Kapral to undo the appointment. Dkt. 1 ¶¶ 39-41.

The detractors wrote to Kapral and ROCOR's Eastern American Diocese on September 3, 2019. Dkt. 1 ¶ 42. Their letter made false and defamatory accusations about Belya: They accused Belya of forging Kapral's signature on the December 10 letter to Moscow. Dkt. 1 ¶ 43. They accused him of falsifying the letter from Gavriil to Kapral and the January 19 letter from

Kapral to Kirill. Dkt. 1 ¶¶ 44, 46. And they accused him of fabricating the results of his election as Bishop of Miami. Dkt. 1 ¶ 45.

The detractors sent their letter not just to church leadership but also to "online media outlets." Dkt. 1 ¶¶ 49-50. "Numerous Internet posts and articles" containing the defamatory statements soon followed. Dkt. 1 ¶¶ 53-56. Via a social-media post, Defendant Serafim Gan directly accused Belya of forgery. Dkt. 1 ¶ 53. As a result of the widespread, published defamation, Belya's "reputation and good name" were "ruined." Dkt. 1 ¶ 58.

When Kapral ultimately sided with the detractors and stripped Belya of his position, Belya left ROCOR. Dkt. 1 ¶¶ 57-58. He is now an Archimandrite of the Greek Orthodox Church of America. Dkt. 1 ¶ 1.

B. Procedural History

In August 2020, Belya brought claims for defamation, defamation per se, defamation by innuendo, and vicarious liability against Kapral, Olkhovskiy and several of his co-conspirators, Gan, the Eastern American Diocese of ROCOR, the Synod of Bishops of ROCOR, and John Does 1-100.[2] Dkt. 1 ¶¶ 59-90, 101-113. He limited his claims to present a "straightforward defamation action" that avoids any "involvement whatever in religious dogma or practice." Dkt. 1 at 2.

[2] Belya also made but then withdrew a false-light claim. JA25.

Under the district judge's individual rules, Defendants filed a three-page, pre-answer motion arguing that the court lacked subject-matter and personal jurisdiction, and that Belya failed to state a claim. JA16-18; *see* Individual Practices of United States District Judge Victor Marrero II.B, https://perma.cc/77NM-KKLH. Defendants asserted an ecclesiastical-abstention defense, arguing that reviewing Belya's allegations "would require the court to interpret ROCOR's religious laws, rules, and regulations." JA17. Defendants never mentioned, must less properly raised and argued, any ministerial-exception defense. JA16-18. They attached to their motion the September 3, 2019, letter from Olkhovskiy and his allies. JA19-21.

Defendants then filed a letter requesting a conference or guidance on whether to file a full motion to dismiss, again arguing why they believed that dismissal was appropriate. JA27-29. The district court denied that request, directing Belya to respond to Defendants' arguments in support of dismissal and to attach an amended complaint. JA30. Belya did so, JA31-34, and Defendants replied, arguing that Belya's proposed amended complaint should be rejected, JA35-37. Defendants' filings never mentioned the ministerial exception. JA27-29, 35-37.

The district court converted Defendant's pre-answer motion into a motion to dismiss, which the court denied. JA67-85 (citing

Kapitalforeningen Lægernes Inv. v. United Techs. Corp., 779 F. App'x 69, 70 (2d Cir. 2019) (affirming practice of using letters as motions)). The court explained that its analysis was based exclusively on the statements in the Complaint, and that the court was not incorporating by reference the letter that Defendants attached to their motion. JA68 n.2, 79 n.4. Addressing the ecclesiastical-abstention doctrine, the court determined that, at this stage in the proceedings, the Complaint raised "secular inquiries" that "may be resolved by appealing to neutral principles of law." JA77. The court therefore denied Defendants' motion and directed Belya to file his amended complaint, JA84, which he did, JA86-111.

About four weeks later, Defendants filed their notice of appeal. JA112-113. At the same time, they filed a Rule 59(e) motion asking the district court to alter or amend the judgment. Dkt. 51. That motion argued that the court was wrong on the ecclesiastical-abstention doctrine, Dkt. 51 at 12-18, presented an entirely new ministerial-exception argument, Dkt. 51 at 7-12, and argued that the district court should have incorporated the September 3 letter in deciding the motion to dismiss, Dkt. 51 at 18-21. Nine days later, Defendants asked the district court to certify for interlocutory appeal under 28 U.S.C. § 1292(b) the denial of their motion to dismiss. Dkt. 54.

The district court denied the reconsideration motion as untimely, explaining that because no judgment had yet been entered, the purported

Rule 59(e) motion should have been filed as a Local Rule 6.3 motion for reconsideration. JA115. And under that rule, the filing was 14 days late. JA115; *see* Local Civ. R. 6.3. The court explained in a footnote that even if the reconsideration motion had been timely and the court had therefore been able to consider it on the merits, the court would have denied it. JA115 n.1. The decision did not further address either ecclesiastical abstention or the newly raised ministerial-exception defense. *See* JA115.

In the same order, the court also denied Section 1292(b) certification of the denial of Defendants' motion to dismiss. JA117. The court reasoned that "[i]nstead of presenting disagreement regarding the legal standards being applied," the motion asserted "factual disputes" that did not "merit certification for interlocutory appeal" at the motion-to-dismiss stage. JA117.

Defendants amended their notice of appeal to include that order. JA143-145.

The following month, Defendants filed a motion in the district court requesting either bifurcated discovery on their Religion Clause defenses or a stay of the proceedings. Dkt. 62. The court determined that because the only issues raised by the Complaint were purely secular ones, there was no need to bifurcate discovery. JA147. The court made clear, however, that it would "not pass judgment on the internal policies or determinations of the

Russian Orthodox Church Outside Russia, nor would it be able to under the doctrine of ecclesiastical abstention." JA147.

Defendants again amended their notice of appeal, to include the order denying the motion for bifurcated discovery or stay of the proceedings. JA149-151.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to hear this appeal. Courts of appeals generally have jurisdiction to hear appeals only from final decisions. *See* 28 U.S.C. § 1291. Under the collateral-order doctrine, the courts can hear appeals of a narrow group of interlocutory decisions. A class of orders can be collateral only if they are conclusively decided, raise important questions completely separate from the merits of the claims, and are otherwise effectively unreviewable on appeal.

The collateral-order doctrine has always been interpreted narrowly. And in recent years the Supreme Court and this Court have specifically cautioned against expanding it. Instead, the courts have favored certified appeals under 28 U.S.C. § 1292(b) or petitions for writs of mandamus—neither of which create entirely new categories of appeals, unlike the collateral-order doctrine.

Defendants did not satisfy Section 1292(b), nor did they seek mandamus. Rather they filed immediate appeals from *three* interlocutory

district-court orders, every one of which would require this Court to create a new category of collateral-order appeals. They offer no explanation why this Court should so drastically change course from its preference for case-specific appeals over collateral-order review.

Instead, Defendants leave out pertinent procedural history and argue that a smattering of considerations support a collateral-order appeal as of right for all three orders. But that's not how collateral-order appeals work. *Each order* must satisfy the doctrine's requirements. None of the appealed orders do: Binding circuit precedent forecloses interlocutory appeal for the ecclesiastical-abstention defense; Defendants' untimely filing below precluded the district court from addressing the ministerial-exception issue in the first instance, barring appeal here; and the refusal to bifurcate represents an interlocutory discovery order of the type that this Court has long held not to be collaterally appealable.

II. Even if there were jurisdiction, the district court's rulings were correct.

The ecclesiastical-abstention doctrine forbids courts to decide religious questions. It does not provide religious organizations a general right to be free from civil laws or proceedings. This Court and others have consistently held that where claims can be adjudicated based on neutral principles of law, the ecclesiastical-abstention doctrine is not implicated. And because

Belya's claims focus strictly on neutral principles, the district court was correct that dismissal based on ecclesiastical abstention would have been inappropriate on a motion to dismiss.

Because the Defendants procedurally defaulted the ministerial-exception defense in the district court, it was never properly raised or decided. So this Court cannot decide it now. But even had Defendants properly raised it, the district court would have been right to reject it. The ministerial exception protects the ability of church authorities to choose important teachers and preachers of the faith, and therefore precludes employment-discrimination suits by certain employees against religious employers. It does not bar defamation claims—and certainly does not bar defamation claims, brought by a former employee against nonemployers, that have nothing whatever to do with an employment relationship.

Finally, the decision not to bifurcate discovery is wholly discretionary. The district court ruling explained precisely why bifurcation was inappropriate, and further detailed the protections that the court would continue to provide to Defendants going forward. Defendants do not provide any reason to intrude on the discretion of the district court.

ARGUMENT

I. The Court lacks jurisdiction to hear this appeal.

This Court's jurisdiction is generally limited to reviewing "final decisions" of the district courts. *See* 28 U.S.C. § 1291. A final judgment typically "ends the litigation on the merits," leaving the court merely to "execute the judgment." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (citation omitted). Denials of motions to dismiss are not final decisions. *See, e.g.*, *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 501 (2d Cir. 2004). Nor are denials of motions for reconsideration, *see Cnty. of Suffolk v. First Am. Real Est. Sols.*, 261 F.3d 179, 186 (2d Cir. 2001), or discovery orders, *see EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 205 (2d Cir. 2012).

Section 1291 permits immediate appeals of a "small class" of "collateral" orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The collateral-order doctrine is narrow and stringent, to preserve the general rule that only final orders may be appealed. *See, e.g.*, *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994). And while the doctrine

has historically been narrowly interpreted, *see Will v. Hallock*, 546 U.S. 345, 350 (2006), the Supreme Court has recently gone yet further, strongly disfavoring any judicial expansions of the doctrine to new areas of law. *See, e.g.*, *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 113 (2009). So too has this Court, which has recognized the doctrine's "limited scope" that "stems from 'a healthy respect for the virtues of the final-judgment rule.'" *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016) (quoting *Mohawk*, 558 U.S. at 106).

Yet Defendants ask this Court to ignore the strict jurisdictional bar and create *three* new classes of appealable interlocutory orders, all of which would erase the line between the appellate function of this Court and the role of the district courts. To make matters worse, Defendants ask this Court to grant collateral review on an issue that they never properly raised in the district court, as well as a mine-run discovery order—both drastic revisions of appellate jurisdiction and the rules of appellate procedure. But at every step, they fail to satisfy the collateral-order doctrine's stringent test.

A. Appellate review would dramatically expand the collateral-order doctrine, contrary to the Supreme Court's directive.

1. In 1988, after years of patchwork collateral-order decisions, Justice Scalia diagnosed that the courts' "finality jurisprudence is sorely in need of

further limiting principles." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring). Congress responded by amending the Rules Enabling Act to empower the Supreme Court to issue rules defining which orders are final and appealable under Section 1291. *See* 28 U.S.C. § 2072(c) (1990). Two years later, Congress expressly authorized the Supreme Court to specify through rulemaking which categories of interlocutory orders should be immediately appealable. *See* 28 U.S.C. § 1292(e) (1992).

In keeping with these grants of statutory authority, the Supreme Court has since recognized that the "procedure Congress ordered for such changes . . . is not expansion by court decision, but by rulemaking." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995). Rulemaking is the proper "means for determining whether and when prejudgment orders should be immediately appealable," because it allows the judiciary to "draw[] on the collective experience of bench and bar" and to "facilitate[] the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 113-14. So the Court admonished that "[a]ny further avenue for immediate appeal of [interlocutory] rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides." *Id.* at 114; *see also, e.g.*, *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1296 n.2 (10th Cir. 2011)

(Gorsuch, J.) ("[A]ny pleas to expand appellate jurisdiction ought to be directed to the Rules Committee," not to courts).[3]

And when immediate appeal is warranted in a *particular* case, there are ways to review those specific issues that do not create new appeals as of right. First, district courts can certify questions of law for interlocutory review under 28 U.S.C. § 1292(b). *See Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 974 (7th Cir. 2021) (en banc). Second, where one claim but not an entire action is finally decided, the court may, upon a party's request, "direct entry of a final judgment" as to that claim if the court "determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). And third, a petition for mandamus may be filed in the court of appeals to correct an interlocutory decision that risks actual harm to important rights. *See* 28 U.S.C. § 1651(a).

Preference for those methods makes sense because application of the collateral-order doctrine was never meant to be an individualized, case-by-case inquiry. *See Digit. Equip.*, 511 U.S. at 868. Rather, the doctrine is a "blunt, categorical instrument" that, when applied, makes an entire class of

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[3] The Supreme Court has used the rulemaking power when appropriate: Having previously held that denials of class certification did not satisfy the collateral-order doctrine's requirements, *see Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court later concluded through rulemaking that immediate appeals of orders granting or denying class certification should be allowed, and Federal Rule of Civil Procedure 23(f) was born.

orders immediately appealable before final judgment. *Id.* at 883. And "'[a]s long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under § 1291.'" *United States v. Punn*, 737 F.3d 1, 5 (2d Cir. 2013) (quoting *Mohawk*, 558 U.S. at 107).

Accordingly, the Supreme Court has repeatedly refused to expand the classes of appealable collateral orders. For if the courts could instead expand appellate jurisdiction over interlocutory orders willy-nilly through actions in individual cases, "'Congress['s] final decision rule would end up a pretty puny one.'" *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017) (quoting *Digit. Equip.*, 511 U.S. at 872). The "historic federal policy against piecemeal appeals" to preserve judicial and party resources and ensure the orderly administration of justice also demands that the collateral-order doctrine be narrow. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980); *see Mohawk*, 558 U.S. at 106. So too does respect for "district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)); *see Linde v. Arab Bank, PLC*, 706 F.3d 92, 103 (2d Cir. 2013) ("[T]he district court's central role in managing ongoing litigation" requires a restrictive collateral-order doctrine.).

So compelling is this logic that Justice Thomas has argued that the courts should altogether cease relying on *Cohen* and the collateral-order doctrine; the rulemaking process should be the sole source of new categories of interlocutory appeals. *Mohawk*, 558 U.S. at 115 (Thomas, J., concurring in part and in the judgment). Though the Court stopped short of abolishing the collateral-order doctrine entirely, it clarified that the courts should be extraordinarily hesitant to apply it beyond the handful of situations in which it had already been applied. *Id.* at 113-14.

Accordingly, as this Court has recognized, "the conditions that allow for collateral review 'are stringent.'" *Linde*, 706 F.3d at 103 (quoting *Hallock*, 546 U.S. at 349). Because the "Supreme Court has emphasized that the collateral order exception to the final judgment rule must 'never be allowed to swallow the general rule that a party is entitled to a single appeal,'" appeals permitted under the doctrine must remain a "small set." *SEC v. Rajaratnam*, 622 F.3d 159, 167 (2d Cir. 2010) (quoting *Mohawk*, 558 U.S. at 106).

Like this Court, therefore, the other circuits have been extremely hesitant to create new categories of collateral orders.[4] Instead, they have

[4] *See, e.g.*, *SmileDirectClub v. Battle*, 4 F.4th 1274, 1280-82 (11th Cir. 2021) (en banc); *United States v. Emakoji*, 990 F.3d 885, 888-89 (5th Cir. 2021); *Rosner v. United States*, 958 F.3d 163, 166 (2d Cir. 2020); *United*

followed the Supreme Court's strong preference for case-specific ways to appeal.[5]

2. Yet without even passing mention of the strong admonitions against using particular cases to create entirely new categories of appellate jurisdiction, Defendants ask this Court to create appellate jurisdiction to

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States v. Acad. Mortg. Corp., 968 F.3d 996, 1004-05 (9th Cir. 2020); *Kell v. Benzon*, 925 F.3d 448, 461, 463-64 (10th Cir. 2019).

[5] *See, e.g.*, *Acad. Mortg. Corp.*, 968 F.3d at 1009 ("Safety valves" including writs of mandamus "are more than adequate to address denials of motions to dismiss that implicate interests more important than run-of-the-mill litigation burdens.") (cleaned up); *Kell*, 925 F.3d at 465 n.17 ("Rather than await a final judgment, the government could have sought a writ of mandamus."); *United States v. Gorski*, 807 F.3d 451, 458 (1st Cir. 2015) ("[I]mmediate review of serious errors is available through a writ of mandamus . . . ."); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (Mandamus, rather than the collateral-order doctrine, is the proper method to appeal attorney-client-privilege orders.); *JPMorgan Chase Bank v. Asia Pulp & Paper Co.*, 707 F.3d 853, 869 (7th Cir. 2013) (Because "adequate alternatives for review," including Section 1292(b) certification and mandamus, are available, "the collateral-order doctrine does not extend to the district court's order."); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011) ("This court . . . favors mandamus as the appropriate method of review" of discovery orders.); *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 484 (10th Cir. 2011) ("The availability of these alternatives counsels strongly against permitting immediate collateral order review of all discovery orders adverse to a claimed First Amendment privilege."); *McClendon*, 630 F.3d at 1297-98 (Gorsuch, J.) ("Congress has already provided a way for parties to challenge a district court's erroneous assertion of jurisdiction before the entry of a final judgment. That path is paved by 28 U.S.C. § 1651(a) and its approval of writs of mandamus."); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (assuming without deciding that "discovery orders denying claims of First Amendment privilege are not reviewable under the collateral order doctrine," and instead relying on mandamus to hear the appeal).

review (1) denials of motions to dismiss based on ecclesiastical abstention, (2) denials of untimely (and so undecided) ministerial-exception arguments, and (3) discovery orders that present, at most, only hypothetical future issues. None of these categories are justified.

Ecclesiastical Abstention. This Court held in *In re Roman Catholic Diocese*, 745 F.3d 30 (2d Cir. 2014), that denial of a motion to dismiss that raised ecclesiastical-abstention issues was *not* appealable under the collateral-order doctrine. After the district court in that case denied a motion to dismiss for lack of personal jurisdiction, this Court acknowledged that if the case went forward, there would be the potential harm of "[s]ubjecting the Diocese to suit and the resultant foray into sensitive documents." *Id.* at 33. Yet the Court held that "the Diocese rightly [did] not assert that the order [was] appealable under the collateral order doctrine," because it did not satisfy the doctrine's strict standards. *Id.* at 36. A request for a writ of mandamus was instead the correct procedural approach. *Id.* at 41.

Completely ignoring this precedent, Defendants instead rely on the one circuit-court decision, from the Seventh Circuit, that has allowed a party to take an interlocutory appeal on an ecclesiastical-abstention-related order—one that would have sent to the jury the question whether someone was a nun. *See McCarthy v. Fuller*, 714 F.3d 971, 974-76 (7th Cir. 2013). But the

Seventh Circuit also held that it did *not* have jurisdiction over a different issue that the appellants argued implicated ecclesiastical abstention, because the issue could be resolved by neutral principles of law. *See id.* at 979.

Additionally, Defendants do not mention that Judge Sykes, who was on the original *McCarthy* panel, wrote a later Seventh Circuit opinion clarifying that *McCarthy* did *not* hold that any ruling addressing ecclesiastical abstention is immediately appealable. *Herx v. Diocese of Fort Wayne–S. Bend*, 772 F.3d 1085, 1091-92 (7th Cir. 2014). Instead, a collateral-order appeal is proper, the court explained, only in the rare circumstance that a district-court order *necessarily* requires resolution of a question of religious doctrine. *Id.*

And while the Fifth Circuit granted a collateral-order appeal in a case involving ecclesiastical-abstention issues, it did so largely because a new trial after final judgment to correct erroneously ordered discovery was not possible with respect to the third-party appellant in the case. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018). This case, in which the district court has merely directed the parties to proceed to discovery, presents no such order. JA146-148.

Ministerial Exception. *No* federal court has *ever* exercised appellate jurisdiction over a collateral-order appeal from denial of a motion to dismiss

under the ministerial exception. Defendants do not offer this Court sufficient reason to be the first.[6]

What is more, Defendants ask this Court to allow interlocutory appeals from denials of the ministerial exception even when Defendants have procedurally defaulted in two respects: Defendants neglect to mention that they first raised the ministerial exception only in a motion for reconsideration—when a party is prohibited from "presenting the case under new theories." *Berg v. Kelly*, 343 F. Supp. 3d 419, 423 (S.D.N.Y. 2018). Nor do Defendants mention that the district court properly denied their motion as untimely. *Compare* JA115 (order), *with* Br. 10 (self-describing motion as "timely"). Defendants' argument would be a vast expansion of the collateral-order doctrine even had the issue been properly presented. On this record, it would entirely jettison the rules of civil procedure.

Discovery. Defendants also ask this Court to create a new collateral-order category for discovery orders, despite this Court's "long-stated view that *Cohen* does not provide jurisdiction to review interlocutory discovery orders." *Chase Manhattan Bank v. Turner & Newall, PLC*, 964 F.2d 159,

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[6] Defendants point to state-court decisions, Br. 53-54, without acknowledging that state courts have their own jurisdictional rules and are not bound by Section 1291 or federal precedent on the stringent application of the collateral-order doctrine. Defendants do not explain why state-court procedures should have any bearing on *federal* appellate jurisdiction.

163 (2d Cir. 1992). And the Supreme Court made crystal clear in *Mohawk*—a decision that Defendants do not cite, never mind try to explain away—that discovery orders generally are not appropriate under the collateral-order doctrine even when there are "important institutional interests at stake." 558 U.S. at 108. To conclude otherwise would seriously "disrupt the orderly progress of the litigation, swamp the courts of appeals, and substantially reduce the district court's ability to control the discovery process." Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.23 (2d ed.).

3. Nor have Defendants shown that case-specific appeal methods are insufficient to protect their interests. On the contrary, the system has worked as Congress intended.

Defendants raised, Dkt. 54, and the district court denied, a Section 1292(b) motion on the order denying the motion to dismiss. *See* JA115-117. The district court explained precisely why a Section 1292(b) certified appeal was inappropriate: Defendants' arguments were not about contested law but about "the factual situation presented." JA117. And because Section 1292(b) provides for appeals involving "controlling question[s] of *law*," not review of factual disputes, interlocutory appeal was not warranted. JA116 (citing 28 U.S.C. § 1292(b) (emphasis added)). In other words, the district

court engaged in precisely the careful analysis required by the statute in evaluating Defendants' right to appeal immediately.

Moreover, Defendants have not sought mandamus, despite previous decisions in the Supreme Court and this Court articulating that mandamus is the proper vehicle to challenge orders similar to those here. *See Mohawk*, 558 U.S. at 111; *In re Roman Catholic Diocese*, 745 F.3d at 36; *see also supra* p. 19 n.5.

If the challenged orders in this case are collaterally appealable as of right, the statute- and rule-based appeal methods that Congress and the Supreme Court have prescribed would become superfluous—despite the Supreme Court's admonitions against expanding interlocutory review through the means that Defendants employ. *See, e.g.*, *Mohawk*, 588 U.S. at 110-11. Defendants provide no reason to cast aside the Supreme Court's strong preference for deciding whether to allow case-specific appeals and create even one entirely new class of collateral-order appeals—much less three.

4. If all of that weren't enough, Defendants' arguments here rely on extra-record materials that the district court never considered. Defendants attached to their motion to dismiss a copy of the letter in which they made the defamatory statements that are the subject of this suit. JA19-21. And they present materials from the letter not included in the Complaint, Br.

21-23, just as they sought to do below, Dkt. 51 at 18-21. But in denying the motion to dismiss, the court properly exercised its discretion in declining to consider contested factual assertions outside the four corners of the Complaint. JA79 n.4; *see Am. Bird Conservancy v. Harvey*, 232 F. Supp. 3d 292, 298 (E.D.N.Y. 2017). So those statements are not before this Court.

That's not all. The motion to dismiss was directed at the original Complaint and was decided as such. In the order denying that motion, the district court ordered Belya to file his proposed amended complaint, JA84, which he then did, JA86-111. So this appeal is about the denial of dismissal of a superseded, no-longer-operative Complaint—meaning, in practical effect, that the dismissal order itself is superseded and no longer live.[7]

If the Court were to conclude that *these* circumstances justified expanding appellate jurisdiction over interlocutory rulings, it's hard to imagine what wouldn't.

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[7] It makes no difference that Belya's original and amended complaints are substantively similar on the issues in *this* appeal. Because collateral orders are categorical, allowing the appeal here would open the floodgates to appeals addressing nonoperative, superseded complaints when entirely different amended complaints have already been filed. In essence, this Court would be issuing an advisory opinion on a controversy that no longer exists in the way that the Court is being asked to review.

B. The district court's orders do not satisfy the requirements for a collateral order.

Even if creating new categories of collateral orders were not so strongly disfavored, there still would be no jurisdiction here. For an immediately appealable collateral order must: (i) be effectively unreviewable on an appeal from a final judgment, (ii) conclusively determine a disputed question, and (iii) resolve an important issue completely separate from the merits. *Mohawk*, 558 U.S. at 106 (citing *Cohen*, 337 U.S. at 545-46).

The appellant bears the burden of showing that "*every* issue presented in an interlocutory appeal must 'fall within *Cohen*'s collateral-order exception' before [a court] may review its merits." *United States v. Wampler*, 624 F.3d 1330, 1335 (10th Cir. 2010) (Gorsuch, J.) (quoting *Abney v. United States*, 431 U.S. 651, 663 (1977)). Even if "the courts of appeals may exercise jurisdiction over an appeal from a pretrial order," there is no jurisdiction over "other claims contained in the motion" unless they, too, fully satisfy *Cohen*. *Abney*, 431 U.S. at 662-63; *see also McCarthy*, 714 F.3d at 976, 979 (granting interlocutory appeal on one order implicating ecclesiastical-abstention concerns but denying a second that also raised potential ecclesiastical-abstention issues).

Defendants do not even try to meet that standard. Instead, they agglomerate all three orders and argue that because the Religion Clauses

supposedly might be implicated, this Court must exercise jurisdiction over them all. *See* Br. 49-57. But "the jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digit. Equip.*, 511 U.S. at 872. When each order is considered on its own, as it must be, none satisfy the *Cohen* requirements.

1. There is no jurisdiction to review the ruling on the ecclesiastical-abstention defense.

a. Collateral-order appeals are appropriate "only 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.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)).

The asserted right here, ecclesiastical abstention, is a narrow doctrine that prohibits courts from deciding "strictly and purely ecclesiastical" questions. *Watson v. Jones*, 80 U.S. 679, 733-34 (1871); *see Bryce v. Episcopal Church*, 289 F.3d 648, 657 (10th Cir. 2002). It does not forbid courts to resolve cases by applying "neutral principles of law" just because a religious entity is a party. *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

Again, this Court has already concluded that ecclesiastical-abstention concerns do not satisfy *Cohen*, so *Roman Catholic* forecloses this appeal. There, the Defendant Diocese sought mandamus after the district court

denied its motion to dismiss for lack of personal jurisdiction and ordered the Diocese to, among other things, produce decades' worth of sensitive internal documents. *Roman Catholic*, 745 F.3d at 35. Central to this Court's granting the writ was that no other form of relief was available—for as the Court specifically noted, "the Diocese rightly [did] not assert that the order [was] appealable under the collateral order doctrine." *Id.* at 36. "Setting aside the first two [*Cohen*] requirements," this Court explained, "the order [did] not involve 'an asserted right the legal and practical value of which would be destroyed if not vindicated before trial,' and therefore would be reviewable upon entry of a final judgment." *Id.* (quoting *Punn*, 737 F.3d at 5). In other words, this Court specifically held that a wrongly decided denial of a motion to dismiss that allowed discovery into a religious organization's "sensitive documents—investigations into allegations of sexual abuse by its employees"—does not satisfy *Cohen*. *Id.* at 33, 36. Defendants fail to explain why that straightforward holding does not doom their appeal here. Instead, they just pretend that the case does not exist.

Roman Catholic aligns with other circuits' precedents as well. The Seventh Circuit, for example, has held that where, as here, a district court judge is aware of the duty "*not* to weigh or evaluate the Church's doctrine," the decision to deny a dispositive motion does not "'wreak irreparable harm on the appellant'" and therefore is "not effectively unreviewable on an

appeal from a final judgment." *Herx*, 772 F.3d at 1091-92 (quoting *McCarthy*, 714 F.3d at 975).

It also aligns with the Supreme Court's treatment of Religion Clause defenses generally. For example, religious organizations may be required to undergo state administrative investigations before being able to raise Religion Clause-based challenges to those proceedings. *See Ohio Civ. Rts. Comm'n v. Dayton Christian Schs.*, 477 U.S. 619, 629 (1986). In *Dayton*, that was so even where the investigation could intrude on sensitive areas, such as sex-discrimination claims against a religious school, and even if the state agency could not consider the school's First Amendment objections in the administrative proceedings. *Id.* at 624-25, 628-29. If organizations subject to official state investigations "receive an adequate opportunity to raise [their] constitutional claims" on appeal after final judgment, so too will Defendants here. *See id.* at 628.[8]

Ignoring *Dayton* too, Defendants insist that the ecclesiastical-abstention issue must be resolved "'at the earliest possible stage in litigation'" because it is not just an exemption from liability, but an "immunity from suit." Br.

[8] While part of the rationale for *Dayton*'s holding was comity and federalism concerns, *see* 477 U.S. at 625-28, if the Religion Clause defenses operated as a constitutional bar against any inquiry into "internal religious affairs," as Defendants contend (at 53), surely that would have overcome the comity-based justification for allowing the administrative proceedings to go forward.

51 (quoting qualified-immunity case *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016)). But courts properly view arguments of a right to be free from trial "with skepticism, if not a jaundiced eye," *Digit. Equip.*, 511 U.S. at 873, and not all claims of supposed entitlements to avoid trial make orders collaterally appealable. *Hallock*, 546 U.S. at 350-51. The mere incantation of the word "'immunity,' sometimes conjoined with 'absolute,'" cannot necessarily "resolve issues of [immediate] appealability" because that loose description often does not genuinely represent a right to avoid trial. *Herx*, 772 F.3d at 1091 (quoting *Segni v. Com. Off. of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (cleaned up)).

"It is always true," that "'there is value . . . in triumphing before trial, rather than after it.'" *Lauro Lines v. Chasser*, 490 U.S. 495, 499 (1989) (quoting *MacDonald*, 435 U.S. at 860 n.7). But concluding that "any order denying a claim of right to prevail without trial satisfies [*Cohen*'s] third condition" is "too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters." *Hallock*, 546 U.S. at 351. To count, the right asserted must be "essentially destroyed." *Lauro Lines*, 490 U.S. at 499.

The Supreme Court and this Court have thus recognized only two categories of immunities from civil suits as clearing that high bar.

The first is when there is an "'explicit statutory or constitutional guarantee that trial will not occur.'" *United States v. Robinson*, 473 F.3d 487, 491 (2d Cir. 2007) (quoting *Digit. Equip.*, 511 U.S. at 874). For instance, the Speech or Debate Clause, the Eleventh Amendment, foreign sovereign immunity, and diplomatic immunity confer absolute immunities from standing trial. *See, e.g.*, U.S. Const. art. I, § 6, cl. 1 (Members of Congress "shall not be questioned in any other place."); U.S. Const. amend. XI (prohibiting extension of "[t]he Judicial power" in any respect to suits "commenced or prosecuted against one of the United States by Citizens of another state"); 28 U.S.C. § 1604 ("[F]oreign state[s]" are presumptively "immune from the jurisdiction of the courts of the United States."); 22 U.S.C. § 254d ("Any action or proceeding brought against an individual" with diplomatic immunity "shall be dismissed.").

Second, the need to avoid trials that could be "'peculiarly disruptive of effective government'" may sometimes justify collateral-order appeals. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). That includes when qualified immunity is wrongly denied, *id.*, and, for example, denials of tribal sovereign immunity, *see, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (denial of tribal sovereign immunity is collaterally appealable because the immunity "'is a necessary corollary to Indian

sovereignty and self-governance'" (quoting *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986))).

Defendants do not show any textual basis for their argument that the Religion Clauses confer a right to be free from pretrial procedures. *Cf.* U.S. Const. amend. I.[9] Instead, they attempt to analogize their defenses to qualified immunity, repeatedly quoting qualified-immunity decisions to imply that ecclesiastical abstention is similar. *See* Br. 51-52. But qualified immunity serves "the public benefit" of allowing "public officials [to] perform their duties unflinchingly and without constant dread of retaliation," *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010), and in doing so protects the "government's interest in . . . proper functioning," *Jackler v. Byrne*, 658 F.3d

[9] Defendants argue that there is a presumptive right to appeal under the First Amendment. ECF 41, at 8-9. But the cases they rely on allowed appeals by *non*parties, *see, e.g.*, *Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010); *Lugosh v. Pyramid Co. of Onondaga*, 435 F.3d 110, 118 (2d Cir. 2006) (same), or when authorized by an anti-SLAPP statute's text, *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013). And although Defendants call *Sell v. United States*, 539 U.S. 166 (2003), a "privacy" case, ECF 41, at 8, it was a *criminal* case, and criminal cases are unique under the collateral-order doctrine. *See Sell*, 539 U.S. at 176 (appellant faced forced medication absent appellate-court intervention); *cf. United States v. Bescond*, 7 F.4th 127, 135 (2d Cir. 2021) (collateral appeal of a fugitive-disentitlement order that, absent review, was likely to bar criminal defendant from ever having any access to the American legal system).

225, 243 (2d Cir. 2011). The rationale has no bearing whatever on asserted defenses of private parties, under the Religion Clauses or anything else.[10]

Moreover, even denials of qualified immunity are appealable under the collateral-order doctrine "only to the narrow extent they turn on questions of law." *Bolmer v. Oliveira*, 594 F.3d 134, 140 (2d. Cir. 2010). But motions to dismiss under the ecclesiastical-abstention doctrine are often denied because, just like the district court determined here, it is unclear at that early point in the litigation whether the facts "will require the court to address purely ecclesiastical questions." *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention*, 966 F.3d 346, 349 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2852 (2021). Because "fact-based determinations" are essential to establishing whether the defense applies, "[t]he analogy to qualified immunity does not hold together." *Ernst*, 814 F.3d at 121-22.

b. Defendants also cannot satisfy *Cohen*'s requirement that the ecclesiastical-abstention issue has been conclusively determined, because there has been no "complete, formal, and, in the trial court, final rejection" of the defense. *See Abney*, 431 U.S. at 659.

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[10] What is more, the pretrial procedures through which qualified immunity protects government officials are derived from procedures that date back to English and early American common law. *See* Andrew Oldham, *Official Immunity at the Founding* (manuscript, at 8-22, available at https://ssrn.com/abstract=3824983). Defendants point to no similar tradition of freedom from pretrial burdens underlying the Religion Clauses.

The district court's ruling, like most denials of motions to dismiss, was "'inherently tentative'" because it was "not 'made with the expectation that [it would] be the final word on the subject addressed,'" *Gulfstream Aerospace*, 485 U.S. at 278 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983)). The Complaint alleged that Defendants labeled Belya a forger and publicly accused him of "falsifying" documents and "fabricating" election results. Dkt. 1 ¶¶ 43-47. The district court correctly treated these factual allegations as true and determined that they "raise secular inquiries that the ultimate finder of fact may make without weighing matters of ecclesiastical concern." JA77. But the court also noted that if later proceedings were to reveal that the claims cannot be resolved without "interfering in or determining religious disputes," then the "doctrine of ecclesiastical abstention" would forbid the court to resolve the claims. JA76-77. That determination is in no way final.

Defendants nonetheless ask this Court to determine that denials of motions to dismiss, as a class, conclusively resolve the issue of ecclesiastical abstention because they "conclusively foreclose[]" "claimed immunity from merits discovery." Br. 55. But as just explained, ecclesiastical abstention means that civil courts may not decide "strictly and purely ecclesiastical" questions, *Watson*, 80 U.S. at 733-34, or make religious determinations, *see*

Bryce, 289 F.3d at 657. It is not an absolute immunity from trial—or from discovery.

c. Finally, the denial of a motion to dismiss based on ecclesiastical abstention does not "'resolve an important issue completely separate from the merits of the action,'" *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 343 (2d Cir. 2021) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). That is because whether ecclesiastical abstention is warranted at this stage turns on many of the same "'fact-related legal issues that likely underlie the plaintiff's claim on the merits,'" *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) (quoting *Johnson*, 515 U.S. at 314).

Because the collateral-order doctrine makes entire categories of claims appealable, the key question is whether ecclesiastical-abstention defenses as a class are severable from the merits in every case in which they are invoked. They are not. Whether the defense applies will often be bound up with the merits of a plaintiff's claim. In *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), for example, a religious school argued that because its actions were religiously based, it did not unlawfully discriminate against a lay teacher. *Id.* at 171. This Court recognized that the school's argument *might* raise ecclesiastical-abstention concerns. *Id.* But the Court also concluded that the mere potential for those problems did not justify

dismissal, in part because the school's argument went to the heart of the merits. *Id.* at 171-72.

Those concerns are present here too. For example, Defendants allege that the truth or falsity of allegations in the September 3 letter must be "determined by ROCOR and its policies, not civil courts." Br. 25. In other words, they argue that on their view of the facts, the statements were not false. But the veracity of contested statements is not separate from the merits of a defamation claim; it *is* the merits of the claim. The district court's rejection of Defendants' reading of the Complaint was based on the court's conclusion that, at this time, Belya's suit could "be resolved by appealing to neutral principles of law," JA77, a determination that is unquestionably linked to the merits.

The collateral-order doctrine's requirement that an issue be separate from the merits prevents piecemeal appeals that would clog this Court's docket and potentially leave cases to languish in the district court for years. *See, e.g.*, *Ashmore v. CGI Grp.*, 860 F.3d 80, 84 (2d Cir. 2017). If denials of motions to dismiss based on ecclesiastical-abstention defenses are categorically appealable under the collateral-order doctrine, defendants would ultimately be able to appeal those interlocutory rulings at least three

times: on motions to dismiss, on summary judgment, and after final judgment.[11]

That concern is not hypothetical. In *Starkey v. Roman Catholic Archdiocese*, No. 20-3265 (7th Cir. 2020), the defendant—represented by defense counsel here—attempted to appeal the district court's denial of a motion for judgment on the pleadings. And in *Tucker v. Faith Bible Chapel International*, No. 1:19-cv-01652, *appeal docketed*, No. 20-1230 (10th Cir. 2020), defense counsel here attempted an interlocutory appeal after the district court denied the defendant summary judgment on the ministerial exception and denied a motion for reconsideration that for the first time raised an ecclesiastical-abstention defense. Making denials of motions to dismiss on ecclesiastical-abstention defenses a collateral-appeals category would only encourage a similar constant stream of appeals and further risk "leav[ing] the final order requirement of § 1291 in tatters." *Hallock*, 546 U.S. at 351.

The finality requirement also respects "the district court's central role in managing ongoing litigation." *Linde*, 706 F.3d at 103. The district court's

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[11] And given Defendants' apparent view that each order need not be separately justified as collaterally appealable, it's hard to see why a defendant would not appeal many more times than that—say, for every individual discovery order that even tangentially involves the Religion Clauses.

orders here explained that the decisions to deny Defendants' motions to dismiss, not to certify the ecclesiastical-abstention question under Section 1292(b), and to proceed to regular discovery were all premised on the court's "fact-based inquiry" into Belya's claims. JA147. The court made clear that it would "not pass judgment on the internal policies and or determinations" of the Defendants in violation of "the doctrine of ecclesiastical abstention." JA147; *see also* JA77, 117. Defendants might not like these decisions, but that is no reason to usurp the district court's "special role" within the federal-court system for entire categories of appeals. *Risjord*, 449 U.S. at 374.

2. There is no jurisdiction to address a ministerial-exception defense.

a. As with ecclesiastical abstention, this Court can and should reject Defendants' ministerial-exception arguments based on *Cohen*'s requirement that a decision be final. Because Defendants procedurally defaulted on their ministerial-exception arguments in the district court, they were never considered, much less finally resolved.

Defendants did not raise the ministerial exception in any pleading before the district court denied their motion to dismiss. *See* JA16-18, 27-29, 35-37. After that motion was denied, JA67-85, Defendants attempted to float a ministerial-exception defense for the first time, through what they

styled as a Rule 59(e) motion to alter or amend a judgment. Dkt. 51 at 7-12. Because there had been no "entry of judgment," Fed. R. Civ. P. 59(e), their motion was properly deemed a motion for reconsideration under Local Rule 6.3 and rejected as untimely because it was brought well outside that Rule's fourteen-day window. JA115.

So while it would be ambitious enough for Defendants to ask for a new collateral-appeals category for denials of motions to dismiss when there are ministerial-exception defenses, they in fact ask this Court to create a yet more remarkable collateral-order category: Denials for procedural default of motions for reconsideration. But this Court has already rejected that category, and for good reason: When the district court denies reconsideration of an issue based on procedural default, that denial "does not resolve an important issue, but merely resolves whether to revisit an important issue." *Lora v. O'Heaney*, 602 F.3d 106, 112 (2d Cir. 2010). When an issue—like the ministerial-exception defense here—is procedurally defaulted, its merits are simply not considered by the district court, leaving this Court with no decision to review, final or otherwise.

At the very least, to plausibly assert a reason for this Court to consider interlocutory review, Defendants would first have had to explain why the district court was wrong about the untimeliness of their motion *and* wrong to decline to consider entirely new arguments first raised in a motion to

reconsider. But defendants do not even mention those procedural defaults. *Cf.* Br. 10 ("On June 16, 2021, the Church filed a timely Rule 59(e) motion to alter the judgment."). So they forfeited those arguments, *see McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005), meaning that this Court cannot consider the ministerial exception at all.[12]

b. Defendants' arguments also fail *Cohen*'s requirement that the issue for the category of appeals be separate from the merits. The most crucial inquiry in assessing applicability of the ministerial exception is "what an employee does." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). And the Supreme Court has underscored that this inquiry is highly fact-bound, requiring a court to look closely at what the employee actually does day-to-day, while also and secondarily considering details like titles, training, job description, job duties, and qualifications. *Id.*

[12] In this Court, Defendants opposed Belya's motion to dismiss this appeal by arguing that the ministerial exception cannot be waived. ECF 41, at 12 n.4. Though they are wrong on that score, even if that were not so, they conflate waiver with forfeiture of an issue for the sake of a particular appeal. Belya does not contend that Defendants can *never* argue the ministerial exception in the district court. Nor did the district court. Instead, the dispositive consideration now is that because Defendants failed to raise the issue properly, there is nothing for this Court to review. (And because they can raise and argue the defense at other points in the district-court proceedings, that is yet another reason why there is no appellate jurisdiction now.)

at 2062; *accord Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

These same questions about qualifications and what an employee does are also at the heart of the merits determination for defamation and other tort claims. *See, e.g.*, *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 72 (2d Cir. 2004) (noting "fact-specific" issues in employee-employer defamation claims). Likewise, employment-discrimination claims frequently require the same factual considerations as the ministerial exception. *Compare Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206-09 (2d Cir. 2017) (considering, among other things, a principal's evaluations in determining that she was a minister under the ministerial exception), *with Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 92 (2d Cir. 2015) (explaining the role that a teacher's evaluations could play in the merits of a Title VII claim).

Recognizing interlocutory appellate jurisdiction for the category of ministerial-exception determinations would open the door to interlocutory appeals involving all manner of nonfinal district-court rulings respecting fact-bound questions of qualifications, job duties, and functions—the same factors frequently examined in defamation and employment claims.

c. Nor is the denial of a motion to dismiss under the ministerial exception effectively unreviewable on final judgment. The exception

"operates as an affirmative defense to an otherwise cognizable claim," *Hosanna-Tabor*, 565 U.S. at 195 n.4, designed to protect religious organizations' power to select who serves as a minister of the faith, *see id.* at 188-89. As with most affirmative defenses, if the trial court gets it wrong, this Court can protect religious organizations' employment decisions by correcting the error on appeal from final judgment. *See, e.g.*, *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1069, 1070 (5th Cir. 1997).[13] Because the ministerial exception is a "right not to be subject to a binding judgment of the court" if that judgment intrudes on the selection of ministers, it can "therefore 'be effectively vindicated following final judgment,'" *Digit. Equip.*, 511 U.S. at 874 n.4 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988)).

[13] Qualified immunity is an exception to the general rule that affirmative defenses are reviewable after final judgment because only by protecting government officials from "pretrial matters" can the doctrine ensure "the public interest." *Mitchell*, 472 U.S. at 525-26. Because the ministerial exception is not an immunity from suit, Defendants' interests can be protected via appeal from final judgment. *See* Peter J. Smith & Robert W. Tuttle, *Civil Procedure & The Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) ("Unlike qualified immunity . . . the fundamental value of the ministerial exception would not be entirely lost by waiting for final judgment before permitting an appeal.").

3. There is no jurisdiction now to decide the propriety of the discovery order.

Defendants do not even attempt to explain how the district court's decision not to bifurcate discovery or stay the proceedings might, on its own, satisfy the collateral-order doctrine. *See* Br. 57-59. Instead, Defendants repeat their general arguments about the Religion Clauses. *Id.* That is not enough for *Cohen*.

Again, *Cohen* does not generally "provide jurisdiction to review interlocutory discovery orders." *Chase Manhattan*, 964 F.3d at 163. That is because most "orders granting discovery are not final decisions because they are effectively reviewable on appeal from a final judgment." *EM Ltd.*, 695 F.3d at 206. So this Court has rejected, among others, attempted collateral appeals of discovery orders adverse to a claim of privilege or privacy, *see Rajaratnam*, 622 F.3d at 168, determinations of discovery sanctions under Federal Rule of Civil Procedure 37, *see Linde*, 706 F.3d 104-05, and denials of motions to quash subpoenas, *Punn*, 737 F.3d at 13-14.

Discovery orders are immediately appealable only in the rare instance when the appellant satisfies its burden to show that, in addition to involving a critical right, the category of discovery order at issue satisfies each of *Cohen*'s requirements. In *EM Ltd.*, for example, this Court allowed immediate appeal of a discovery order concerning foreign sovereign

immunity. 695 F.3d at 206. That was so not just because foreign sovereign immunity represents a pretrial immunity, *see Gingras v. Think Fin., Inc.*, 922 F.3d 112, 120 (2d Cir. 2019), but also because the "district court indicated that the Discovery Order represented its final determination" on the issue, "the scope of discovery" was "separate from the merits issue," and the foreign nation subject to discovery would be "unable to obtain effective review in a United States court of the Discovery Order through a later appeal of a final judgment." *EM Ltd.*, 695 F.3d at 206.[14]

Unlike the appellants in *EM Ltd.*, Defendants raise affirmative defenses that are not absolute immunities. And they have failed to show that the order here satisfies *any* of the *Cohen* requirements—much less all of them.

At least one circuit has specifically held that even discovery orders that are actually and directly "adverse to a claimed First Amendment privilege are not immediately appealable under the *Cohen* doctrine." *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 482 (10th Cir. 2011). But here, whatever Defendants might imagine could become the subject of possible future discovery requests, *see* Br. 31-32, the district court's order

[14] Similarly, the only Court to have granted collateral appeal of a discovery order in the Religion Clause context did so because "a new trial order [could] hardly avail [the] *third-party* witness" seeking appeal, making the challenged order truly unreviewable on final judgment. *See Whole Woman's Health*, 896 F.3d at 367 (emphasis added).

was merely to *proceed* to discovery, and did not require that any specific material be disclosed. JA146-148. And the court explained that if specific discovery requests implicated ecclesiastical-abstention concerns, they would be prohibited. JA147. That order, which assured that Defendants would receive any protections to which they may be entitled—if those protections are ever actually threatened—is not effectively unreviewable on final judgment. *See Herx*, 772 F.3d at 1091-92.

On Defendants' theory, every discovery order would be immediately appealable in any case in which a Religion Clause defense has been raised, whether or not the discovery order implicates in any way any asserted First Amendment interest. This Court should not open those floodgates.

* * *

The Supreme Court reiterated in *Hallock*: "We have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." 546 U.S. at 350. There is no cause to expand that small class here.

II. Defendants' arguments fail on the merits.

A. The district court correctly denied the motion to dismiss based on Defendants' ecclesiastical-abstention defense.

If this Court were to expand appellate jurisdiction to decide the classes of issues that Defendants raise here, the Court would then need to "accept[]

as true the material facts alleged in the complaint and draw[] all reasonable inferences in [Belya's] favor" in determining whether the district court's rulings were erroneous or abuses of discretion. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001). That means Belya's allegations with respect to the September 3 letter must be taken as true.

The Complaint alleges that Defendants falsely stated that Belya (1) forged Defendant Kapral's signature on a fabricated letter, (2) fabricated the results of an election, (3) and falsified an additional letter. Dkt. 1 ¶¶ 43, 45-46. The Complaint further asserts that some Defendants republished those lies by forwarding them to online media outlets, Dkt. 1 ¶ 50, that one Defendant published the forgery allegation on his church's social-media account, Dkt. 1 ¶ 53, and that the false accusations soon spread on the internet, Dkt. 1 ¶¶ 53-56. This series of events "ruined" Belya's "reputation and good name." Dkt. 1 ¶ 58.

Defendants say (at 15) that their argument for ecclesiastical abstention is based "solely on the allegations in the complaint." But they then ignore the Complaint and attempt to introduce statements that are outside it and hence were not considered by the district court. *See* Br. 21-22, JA79 n.4. Defendants contend that the district court should have incorporated into the Complaint other statements from the September 3 letter and evaluated the motion to dismiss with those statements in the mix. Br. 23. All of that

is predicate to Defendants' argument that Belya's "claims interfere with Church discipline." Br. 21. But decisions concerning incorporation by reference are committed to the district court's discretion. *See, e.g.*, *Am. Bird Conservancy*, 232 F. Supp. 3d at 298. The district court did not abuse that discretion by limiting itself to the Complaint—the normal and proper approach on a motion to dismiss, and one that is especially appropriate here, given the disputes concerning the "accuracy of the [letter]," *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006), which are central to the defamation claims.[15]

On the Complaint's allegations, and the legal claims based on them, the district did not err in determining at this stage that the case can be adjudicated according to "neutral principles of law," without implicating the ecclesiastical-abstention doctrine. *Wolf*, 443 U.S. at 602. For that doctrine represents only a limited exception to the general rule that "[r]eligious organizations come before [civil courts] in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law,

[15] More broadly, allowing Defendants to inject religious matters into a proceeding and then to use those statements as the basis for an ecclesiastical-abstention defense, when the plaintiff did not rely on the statements, would run counter to basic principles of civil procedure. *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) ("[T]he plaintiff is the master of the complaint.").

and the actions of their members subject to its restraints." *Watson*, 80 U.S. at 714. So, for instance, a court cannot decide whether church doctrine requires the defrocking of a bishop. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 718 (1976). Nor may a court determine which ecclesiastical authority controls a church, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952), or whether someone is a nun, *McCarthy*, 714 F.3d at 979. But the prohibition against courts' making *religious* decisions does not preclude adjudication of claims over a religious entity or its members' *secular* actions, *Bryce*, 289 F.3d at 657, or of secular disputes between religious parties, *see DeMarco*, 4 F.3d at 169-70.

This Court's most recent decision on the doctrine, *Moon v. Moon*, 833 F. App'x 876 (2d Cir. 2020), confirms the application of neutral principles (and the inapplicability of ecclesiastical abstention) to this case. In *Moon*, a purported church leader brought suit against a church and church officials, asserting six different tort claims and seeking a declaratory judgment that he was the proper leader of the church. *Moon v. Moon*, 431 F. Supp. 3d 394, 410-13 (S.D.N.Y. 2019), *modified by* 833 F. App'x 876 (2d Cir. 2020). The district court found that while a tortious-interference claim was time-barred, all the plaintiff's other claims—and his request for a declaratory judgment—were precluded under the ecclesiastical-abstention doctrine. *See id.* at 414. On appeal, this Court agreed that the ecclesiastical-abstention

doctrine precluded it from deciding whether the plaintiff was the rightful successor to a church. *Moon*, 833 F. App'x at 879-80. And it noted that some of the plaintiff's claims "depend[ed] squarely on the resolution of the plaintiff's core claim that he . . . is the rightful leader" of his church. *Id.* at 880. But that rationale did not apply to "claims for defamation[,] . . . tortious interference, and violation of New York's whistleblower protection statute," which could each be resolved via neutral principles. *Id.* The "neutral principle" of the "statute of limitations" could "adjudicate" the tortious-interference and defamation claims, making application of ecclesiastical abstention inappropriate as to those claims. *Id.* And because the whistleblower-protection claim could "be evaluated without reference to any religious doctrine," the district court erred by dismissing it based on ecclesiastical abstention. *Id.*

Nor does *Moon* stand alone. This Court previously contrasted claims that "may inexorably entangle [civil courts] in doctrinal disputes" with those that are "less likely to run afoul" of the First Amendment—including a plaintiff's claim, for example, that a "religious employer has deceived him within the meaning of a state's common law of fraud." *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *see also Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99-100 (2d Cir. 2002) (finding jurisdiction over a copyright claim even though a rabbinical court had

previously determined the dispute, because the case could be decided under "secular law principles" of copyright law). So while Defendants imply (at 33) that the neutral-principles doctrine applies only to property disputes, this Court has always evaluated ecclesiastical-abstention defenses on a case-by-case basis, regardless of the type of claim presented, deeming the defense inapplicable when neutral principles can resolve the claims. *See also Watson*, 80 U.S. at 714 (including religious contract disputes as generally subject to civil-court resolution).

Other courts agree that ecclesiastical-abstention defenses must be evaluated individually—and must fail if the claims may be adjudicated under neutral principles. Just last year, for example, the Fifth Circuit reviewed a district court's dismissal, at the motion-to-dismiss stage, of defamation and other tort claims brought by a former employee against a religious employer. *McRaney*, 966 F.3d at 347. The court noted that the "'First Amendment does not categorically insulate religious relationships from judicial scrutiny,'" and that, "[a]t this early stage of litigation, it [was] not clear that" the claims would "require the court to address purely ecclesiastical questions," because the claims appeared to turn on neutral determinations of tort law. *Id.* at 348-49 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir. 1998)). If the defendant later "present[ed] evidence" that the plaintiff's claims could not be resolved

without addressing ecclesiastical issues, the court reasoned, "then there may be cause to dismiss," but dismissal at the motion-to-dismiss stage was at the very least premature. *Id.* at 351.

So too here. As in *McRaney*, Belya's Complaint alleges a colorable defamation claim under neutral principles of law. *See* Dkt. 1 ¶¶ 43, 45-47, 50, 53-56, 58. Belya did not ask the district court to decide any "strictly and purely ecclesiastical" questions. *Watson*, 80 U.S. at 733. And his claims do not rely on "religious question[s] governed by church law." Br. 27 n.6. Instead, as the district court recognized, this case can be decided by "secular inquiries" that "can be reviewed by appealing to and applying neutral principles of law," such as "whether, under New York Law, Defendants made the alleged statements, the truth of the alleged statements," and "Defendants' knowledge of the alleged statements' falsity at the time they were made." JA77-78. If at any point the district court is asked to decide any religious questions, the court would reject that request "under the doctrine of ecclesiastical abstention." JA77.

So Defendants' accusation that Belya "ultimately asks this Court to adjudicate his 'religious standing' as a minister," Br. 27 (quoting *Moon*, 431 F. Supp. 3d at 413), is flatly false. And if a *defendant's* construction of a complaint controlled, as Defendants here demand, "religious entities could effectively immunize themselves from judicial review of claims brought

against them." *McRaney*, 966 F.3d at 351. Given the parallels to *McRaney*, finding Belya's claims barred by ecclesiastical abstention would present a direct conflict with the Fifth Circuit, as well as the Sixth, Eighth, and Ninth Circuits and the South Carolina and Alaska Supreme Courts.[16]

Defendants' cases are not to the contrary. For one thing, Belya alleges that the defamatory content was shared not only with church members but also publicly. *Compare* Dkt. 1 ¶¶ 50, 53, *with, e.g.*, *Hubbard v. J. Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1214-16 (D.N.M. 2018) (listing cases concerning allegedly defamatory statements *within* church groups). Nor are his claims based on doctrinal discussions, internal or otherwise. *Compare* Dkt. 1 ¶¶ 43-46, 50, 53, *with, e.g.*, *Bryce*, 289 F.3d at 658. And the claims do not raise an employment dispute—Belya does not, for example, seek

[16] *See Drevlow v. Lutheran Church*, 991 F.2d 468, 472 (8th Cir. 1993) (reversing dismissal of tort claims because plaintiff was "entitled to an opportunity to prove his secular allegations"); *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987) (ecclesiastical abstention doctrine "not pertinent" to defamation claims where plaintiff did not challenge church doctrine); *Ogle v. Hocker*, 279 F. App'x 391, 396 (6th Cir. 2008) (Ecclesiastical abstention did not bar defamation claims at summary judgment because court was "not convinced that [it] will be forced to inquire into doctrinal issues."); *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605, 608 (S.C. 2013) (permitting litigation of defamation claim based on "neutral principles of law"); *Marshall v. Munro*, 845 P.2d 424, 427-28 (Alaska 1993) (permitting litigation of tortious-interference and defamation claims that resulted in termination to be litigated based on "the secular common law of torts").

reinstatement or argue that he was illegally removed from his position. *Compare, e.g.*, Dkt. 1 ¶ 79 (seeking damages but not reinstatement), *with, e.g.*, *Milivojevich*, 426 U.S. at 718 (whether a bishop may be defrocked); *Rweyemamu*, 520 F.3d at 200 (who was selected to be a bishop). Belya alleges defamation premised on claims of forgery, fraud, and fabrication. *See* Dkt. 1 ¶¶ 43-47. Those are not the kinds of "strictly and purely ecclesiastical" questions that civil courts ought not decide. *Watson*, 80 U.S. at 733.

As for Defendants' reliance on *In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021), that case turned on a church's definition of whether a woman "with a history of mental and emotional disorders" was a minor under canon law. *Id.* at 509, 514. The Texas Supreme Court held that the inquiry would not only "cause a court to evaluate whether the Diocese properly applied Canon Law but would permit the same court to interlineate its own views of a Canonical term." *Id.* at 515. Defendants here contend that determining whether an allegation of forgery is true would somehow similarly require deciding questions of church law. Br. 27 n.6. But Belya's Complaint is that he was wrongly accused, through publication to the world, of "falsifying" and "forg[ing]" letters and a signature and "fabricating" election results, according to the ordinary civil- and criminal-law definitions of those terms. Dkt. 1 ¶¶ 43-46, 53. A court can answer those questions without reference

to church doctrine. At the very least, that a court can *plausibly* do so means that dismissal at this stage would have been improper.

Ultimately, Defendants seek to recast ecclesiastical abstention to cover any communication by a religious entity to anyone else about the "status and character of its ministers," regardless of the form that communication takes, who issues the communication, or how it is shared. Br. 26-27. That approach would stretch the doctrine far beyond its purpose to prevent courts from "interfer[ing] with ecclesiastical hierarchies, church administration, [or] appointment of clergy," *Rweyemamu*, 520 F.3d at 204-05, and leave no space for the application of neutral legal principles to decide any questions about anything, *see Wolf*, 443 U.S. at 602. Because religious entities are not shielded from any and all legal claims, *McRaney*, 966 F.3d at 351, the district court correctly denied the motion to dismiss.

B. The ministerial exception does not bar Belya's claims.

Because there was no district-court decision on the ministerial exception, final or otherwise, the merits of the issue are not before this Court. *See supra* pp. 38-40. But if they were, the exception would not foreclose Belya's claims.

The ministerial exception is a rare departure from the constitutional rule that religious organizations are bound by laws that are neutral with respect to religion and apply generally. *See Hosanna-Tabor*, 565 U.S. at 190.

Because "religious institutions" do not "enjoy a general immunity from secular laws," *Morrissey-Berru*, 140 S. Ct. at 2060, the exception is limited: It protects "internal management decisions that are essential to the institution's central mission," by allowing religious organizations to choose the important teachers and preachers of the faith. *Id.* Applications of the exception must be "tailored to this purpose." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

The exception thus "precludes, on First Amendment grounds, employment-discrimination claims by 'ministers' against the religious organizations that employ or formerly employed them." *Fratello*, 863 F.3d at 192. In applying the exception, therefore, courts must determine whether there was a ministerial relationship *between the parties*. While Defendants insist that Belya was a minister, Br. 35, what matters is whether he was in a ministerial relationship with each Defendant. And given that Belya brings claims against, among others, unnamed Doe Defendants, the allegations in the Complaint cannot possibly resolve that question.

What is more, Defendants ask this Court to declare that the ministerial exception bars defamation claims, though they never presented that question in the district court—and hence the court never decided it. *Cf.* Br. 36-43; JA114-118. The Supreme Court explicitly refused to decide whether tort claims like the ones here are precluded by the ministerial exception.

Hosanna-Tabor, 565 U.S. at 196. And to resolve the question in this case, without the benefit a decision on the merits below (or even any procedurally proper assertion of the defense) would be inappropriate.

But if this Court were to consider the question, defamation and similar claims should *not* fall under the exception. Every case in the Supreme Court or this Court applying the exception has applied it only to employment-discrimination claims, because "courts are ill-equipped to assess whether, and to what extent, an *employment dispute* between a minister and his or her religious group is premised on religious grounds." *Fratello*, 863 F.3d at 203 (emphasis added); *see also Hosanna-Tabor*, 565 U.S. at 188 (applying the ministerial exception to employment-discrimination claims); *Morrissey-Berru*, 140 S. Ct. at 2055 (same); *Rweyemamu*, 520 F.3d at 209-10 (same).

While Defendants argue that any claim that could arguably "burden internal church management" is barred by the ministerial exception, Br. 42, that definition is far broader than any court has conceived of the exception. Indeed, even courts that have held that the exception could bar some defamation or other tort claims have limited the exception to precluding tort claims when "all of the defendants' actions . . . complain[ed of] were part of church disciplinary proceedings," *Ogle v. Church of God*, 153 F. App'x 371, 376 (6th Cir. 2005), or when the plaintiff alleged defamation in concert with an employment claim, *see, e.g.*, *Hutchinson v. Thomas*, 789 F.2d 392, 392-

93 (6th Cir. 1986); *Natal v. Christian & Missionary All.*, No. 88-0676, 1988 WL 159169, at *2 (D.P.R. 1988). Defendants' cited cases—most of which predate *Hosanna-Tabor*—do not stand for the proposition that the ministerial exception bars all defamation claims.

Defendants ask for the Court to apply an affirmative defense dispositively on a motion to dismiss when they never properly raised it in the district court; to do so before any factual development; and to decide a question of constitutional law that this Court has not yet considered and the Supreme Court expressly left open. Any one of those requests would be remarkable. Combined, they demonstrate the wholesale inapplicability of the ministerial exception to this case at this stage.

C. The district court did not abuse its discretion by declining to bifurcate discovery or stay the proceedings.

Finally, even if this Court somehow had jurisdiction to review the district court's denial of Defendants' motion to bifurcate discovery or stay the proceedings, there would be no basis for reversal.

A district court's "'rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion.'" *In re Fitch, Inc.*, 330 F.3d at 108 (quoting *In re DG Acquisition Corp.*, 151 F.3d 75, 79 (2d Cir. 1998)). The district court abuses its discretion only if it "'(1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a

clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions.'" *Klipsch Grp., Inc. v. ePRO E-Com. Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018) (quoting *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99-100 (2d Cir. 2012)). That high standard reflects "the district court's central role in managing ongoing litigation." *Linde*, 706 F.3d at 103; *see Mohawk*, 558 U.S. at 106.

The district court did not abuse its discretion here. Rather, it determined that given the nature of Belya's claims, ordinary discovery procedures likely would not require it to "pass judgment" on Defendants' "internal policies or determinations," making bifurcation or a stay "unwarranted." JA147. So while other courts in other cases with different facts and legal claims may have exercised their discretion to limit initial discovery to Religion Clause defenses, *see* Br. at 57-59, Defendants point to no legal error or erroneous factual finding that would make the district court's decision here an abuse of discretion. Instead, they imagine discovery that *could* happen, and that they would prefer not to participate in. *See* Br. 31-32. Unless or until Defendants' hypothesized discovery turns into actual problematic discovery requests, the district court was well within its discretion to conclude that discovery could be a "fact-based inquiry into what occurred" without passing judgment on Defendants' internal policies. JA147.

CONCLUSION

This Court should dismiss for lack of appellate jurisdiction. If the Court were to conclude instead that there is jurisdiction, it should affirm the denials of Defendants' motion to dismiss, motion for reconsideration, and motion to bifurcate discovery or stay proceedings.

Respectfully submitted,

/s/ *Bradley Girard*

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief:

(i) complies with the type-volume limitation of Local Rule 32.1(a)(4) because it contains 13,436 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared using Microsoft Word 365, set in proportionally sized Century Schoolbook typeface in a size equivalent to 14 points or larger.

Date: December 23, 2021 /s/ *Bradley Girard*