

No. 22-824

---

---

IN THE  
**Supreme Court of the United States**

---

THE SYNOD OF BISHOPS OF THE RUSSIAN  
ORTHODOX CHURCH OUTSIDE OF RUSSIA, ET AL.,  
PETITIONERS,

v.

ALEXANDER BELYA, RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

**BRIEF OF *AMICI CURIAE* ETHICS AND  
PUBLIC POLICY CENTER, THE ISLAM AND  
RELIGIOUS FREEDOM ACTION TEAM OF  
THE RELIGIOUS FREEDOM INSTITUTE, AND  
THE ANGLICAN CHURCH IN NORTH  
AMERICA IN SUPPORT OF PETITIONERS**

---

MATTHEW T. NELSON

*Counsel of Record*

CONOR B. DUGAN

WARNER NORCROSS +

JUDD LLP

150 Ottawa Avenue NW,

Suite 1500

Grand Rapids, MI 49503

(616) 752-2539

mnelson@wnj.com

TIMOTHY H. SMITH

WARNER NORCROSS +

JUDD LLP

2715 Woodward

Avenue

Suite 300

Detroit, MI 48201

*Counsel for Amici Curiae*

---

---

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT .....	6
I. The ministerial exception protects the courts from exercising governmental authority to review religious determinations.....	6
II. Because of the protections afforded by the ministerial exception, it should be treated as a legal issue, and its application should be determined before courts reach the merits .....	10
A. If discovery is needed to decide if the ministerial exception applies, discovery should be limited to that issue.....	12
B. If trial is necessary, courts should bifurcate trial on the ministerial exception from trial on the merits.....	16
C. Orders denying the application of the ministerial exception should be immediately appealable under the collateral order doctrine.....	17
CONCLUSION .....	20

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	15
<i>Backe v. LeBlanc</i> , 691 F.3d 645 (5th Cir. 2012).....	16
<i>Belya v. Kapral</i> , 59 F.4th 570 (2d Cir. 2023).....	6, 18, 19
<i>Bernstein v. Bernstein Litowitz Berger &amp; Grossmann LLP</i> , 814 F.3d 132 (2d Cir. 2016) .....	14
<i>Center for Auto Safety v. Chrysler Group, LLC</i> , 809 F.3d 1092 (9th Cir. 2016).....	14
<i>Cohen v. Beneficial Industries Loan Corp.</i> , 337 U.S. 541 (1949).....	17
<i>Collette v. Archdiocese of Chicago</i> , 200 F. Supp. 3d 730 (N.D. Ill. 2016).....	15
<i>Conlon v. InterVarsity Christian Fellowship</i> , 777 F.3d 829 (6th Cir. 2015).....	10
<i>Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos</i> , 483 U.S. 327 (1987).....	13

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Demkovich v. St. Andrew the Apostle Parish, Calumet City, 3 F.4th 968 (7th Cir. 2021) .....</i>	3
<i>Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004) .....</i>	4
<i>Fassl v. Our Lady of Perpetual Help Roman Catholic Church, No. CIV.A. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005).....</i>	15
<i>Fitzgerald v. Roncalli High School, Inc., No. 1:19-cv-04291RLYTAB, 2021 WL 4539199 (S.D. Ind. Sept. 30, 2021).....</i>	14
<i>Fratello v. Roman Catholic Archdiocese of New York, 175 F. Supp. 3d 152 (S.D.N.Y. 2016).....</i>	15
<i>Grussgott v. Milwaukee Jewish Day School, Inc., 882 F.3d 655 (7th Cir. 2018).....</i>	11
<i>Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012).....</i>	15
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; School v. Morrissey-Berru, 565 U.S. 171 (2012).....</i>	5, 6, 7, 8, 9, 10, 12
<i>Johnson v. Jones, 515 U.S. 304 (1995).....</i>	18

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America</i> , 344 U.S. 94 (1952).....	8
<i>Lee v. Sixth Mount Zion Baptist Church of Pittsburgh</i> , 903 F.3d 113 (3d Cir. 2018) .....	10, 11
<i>Lishu Yin v. Columbia International University</i> , No. 3:15-CV-03656-JMC, 2017 WL 4296428 (D.S.C. Sept. 28, 2017) .....	15
<i>McCarthy v. Fuller</i> , 714 F.3d 971 (7th Cir. 2013).....	18
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985).....	19
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	11
<i>N.L.R.B. v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979).....	11, 13
<i>Our Lady of Guadalupe School v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020).....	5, 9
<i>Plumhoff v. Rickard</i> , 572 U.S. 765 (2014).....	18, 19
<i>Presbyterian Church (U.S.A.) v. Edwards</i> , 566 S.W.3d 175 (Ky. 2018).....	14

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Rayburn v. General Conf. of Seventh-Day Adventists</i> , 772 F.2d 1164 (4th Cir. 1985).....	4, 13
<i>Robertson v. Lucas</i> , 753 F.3d 606 (6th Cir. 2014).....	16
<i>Serbian Eastern Orthodox Diocese for United States of America &amp; Canada v. Milivojevich</i> , 426 U.S. 696 (1976).....	8
<i>Solomon v. Petray</i> , 795 F.3d 777 (8th Cir. 2015).....	16
<i>Stabler v. Congregation Emanu-El of the City of New York</i> , No. 16 CIV. 9601 (RWS), 2017 WL 3268201 (S.D.N.Y. July 28, 2017) .....	15
<i>Sterlinski v. Catholic Bishop of Chicago</i> , No. 16 C 00596, 2017 WL 1550186 (N.D. Ill. May 1, 2017) .....	15
<i>Tomic v. Catholic Diocese of Peoria</i> , 442 F.3d 1036 (7th Cir. 2006).....	10
<i>Tucker v. Faith Bible Chapel International</i> , 36 F.4th 1021 (10th Cir. 2022) .....	4
<i>U.S. Catholic Conference v. Abortion Rights Mobilization</i> , 487 U.S. 72 (1988).....	14

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Watson v. Jones</i> , 80 U.S. 679 (1871).....	7
<i>Will v. Hallock</i> , 546 U.S. 345 (2006).....	17
 <b>Statutes</b>	
28 U.S.C. § 1291 .....	17
28 U.S.C. § 1292 .....	17
 <b>Rules</b>	
Fed. R. Civ. P. 16.....	12
Fed. R. Civ. P. 26.....	12
Fed. R. Civ. P. 42.....	17
S. Ct. Rule 37.6.....	1
 <b>Other Authorities</b>	
Mark E. Chopko, Marissa Parker, <i>Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna- Tabor</i> , 10 First Amend. L. Rev. 233 (2012).....	13
Peter J. Smith & Robert W. Tuttle, <i>Civil Procedure and the Ministerial Exception</i> , 86 Fordham L. Rev. 1847 (2018) .....	5

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

*Of Priests, Pupils, and Procedure: The  
Ministerial Exception as a Cause of  
Action for On-Campus Student  
Ministries*, 133 HARV. L. REV. 599 (2019)..... 12

**BRIEF OF *AMICI CURIAE* ETHICS PUBLIC  
POLICY CENTER, THE ISLAM AND  
RELIGIOUS FREEDOM ACTION TEAM OF  
THE RELIGIOUS FREEDOM INSTITUTE, AND  
THE ANGLICAN CHURCH IN NORTH  
AMERICA IN SUPPORT OF PETITIONERS**

---

*Amici curiae*, Ethics and Public Policy Center, The Islam and Religious Freedom Action Team of the Religious Freedom Institute, and the Anglican Church in North America respectfully submit that this Court should grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.<sup>1</sup>

**INTEREST OF THE *AMICI CURIAE***

*Amicus curiae* Ethics and Public Policy Center (“EPPC”) is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC’s work. EPPC’s HHS Accountability Project regularly submits regulatory comments and amicus briefs on religious liberty issues, and is led by two lawyers, Rachel Morrison and Eric Kniffin, with extensive religious liberty experience. EPPC Distinguished Senior Fellows George Weigel and Ed Whelan have

---

<sup>1</sup> Pursuant to this Court’s Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief.

written about the theological and constitutional aspects of religious liberty. EPPC's president, Ryan T. Anderson, has published several books and law review articles on religious liberty disputes. EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life.

*Amicus curiae* The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

*Amicus curiae* the Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations and twenty-eight dioceses across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates - leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined

with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion

EPPC's, IRF's, and ACNA's interest in this case arises from the centrality of the ministerial exception to the First Amendment's parallel guarantees of the free exercise and non-establishment of religion. A religious group's choices as to who will lead its religious exercises like prayer and communal worship, and who will convey the tenets of religious faith, are at the very heart of religious exercise. Government interference in such decisions—including by allowing the judicial process to proceed beyond the point necessary to determine if the ministerial exception applies—undermines the protections afforded by the First Amendment and the consequent limitations on the judicial branch of government. As this Court and other courts have cautioned, such judicial intrusions into religious organizations' internal affairs may chill religious exercise and distort religious communities' process of self-definition.

### **SUMMARY OF ARGUMENT**

Before last year, courts were coalescing around a common approach to certain procedural issues related to the ministerial exception. In cases where the application of the exception could not be resolved on the pleadings, courts agreed that discovery should be bifurcated to focus on the ministerial exception first. See *infra* n.3 (collecting cases); see, e.g., *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc) (noting that the

ministerial exception makes a threshold inquiry necessary and that this discovery is materially different from discovery to determine how that minister was treated); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (explaining that discovery was limited to focus on the nature of an associateship in pastoral care); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 957 (9th Cir. 2004) (noting the “restricted inquiry” of the affirmative defense of the ministerial exception).

The Second Circuit’s decision below departs from that emerging consensus. After denying Petitioners’ motion to dismiss on the basis of the ministerial exception and the church autonomy doctrine, the district court refused to bifurcate discovery to focus on the exception. The Second Circuit then left the district court’s orders in place, over a strenuous dissent of six judges calling for rehearing en banc.

Echoing the Tenth Circuit’s recent decision that a ruling regarding the ministerial exception is not immediately appealable, *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021 (10th Cir. 2022)—which is subject to a parallel petition for certiorari, *Faith Bible Chapel v. Tucker* (22-741)—the panel below held that it could not immediately review the district court’s orders under the collateral-order doctrine. As a result, courts in the Second Circuit can now order merits discovery, consider the merits, and submit the case to a jury—all before resolving whether the ministerial exception applies.

This outcome is fundamentally at odds with this Court’s analyses in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and *Our Lady of*

*Guadalupe School v. Morrissey-Berru*, which demonstrate that the ministerial exception’s function is to protect personal and organizational religious liberty, *and also* to protect government institutions from becoming entangled with religious disputes that the First Amendment recognizes they are incapable of resolving. See 565 U.S. 171, 189 (2012); 140 S. Ct. 2049, 2060 (2020). This structural function is further reflected in the three main cases the Court discussed in *Hosanna-Tabor*. In each of those cases, the Court concluded that the state was categorically forbidden from revisiting religious decisions made by religious organizations.

Because the ministerial exception protects the judiciary from entangling itself in religious affairs that it is incompetent to resolve, and not just the religious entity’s right to choose its ministers free from the chilling effect of judicial regulation, the ministerial exception is analogous to official immunity. With regard to both complete and qualified immunity, the defendant is harmed by the very act of being sued. Here, *both* the judiciary and the religious entity are harmed when a religious entity is dragged into the secular courts for exercising its right to select its ministers. See Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018) (observing that the doctrine “imposes a disability on civil government with respect to specific religious questions”).

The purposes of the ministerial exception answer the procedural questions at issue here and in *Tucker*. Because the very maintenance of litigation where the ministerial exception applies harms the structural and personal interests that the doctrine protects,

courts should address the doctrine expeditiously (as they do when resolving immunity questions) and limit discovery to whether the plaintiff is or was a ministerial employee. And if a court determines that the ministerial exception does not apply, the party asserting the exception should be allowed to immediately appeal under the collateral-order doctrine.

This case offers this Court an important opportunity to clarify further the protections afforded by the ministerial exception and to give practical guidance on how those protections affect the procedure for applying the doctrine. As Judge Cabranes observed in dissenting from denial of rehearing en banc, “the issues at hand are of ‘exceptional importance’ and surely deserve further appellate review . . . by the Supreme Court.” *Belya v. Kapral*, 59 F.4th 570, 573 (2d Cir. 2023) (Cabranes, J., dissenting).

## ARGUMENT

### **I. The ministerial exception protects the courts from exercising governmental authority to review religious determinations.**

In *Hosanna-Tabor*, the Court determined that “it is impermissible for the government to contradict a church’s determination of who can act as its ministers.” 565 U.S. at 185. One reason for this conclusion is that according the state such power violates the Establishment Clause. *Id.* at 188–189.

This Court began its analysis of whether a ministerial exception exists by tracing the history of

legal protections for religion in America. *Id.* at 182–187. The Court focused on three cases dating back nearly 150 years, all involving property disputes, and all of which recognized that the government is categorically prohibited from contradicting ecclesiastical decisions. *Id.* at 185–187.

In *Watson v. Jones*, 80 U.S. 679 (1871), this Court declined to interfere with a denomination’s determination as to which faction of a church rightly controlled the church’s property. There the Court stated:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Id.* at 728–729.]

Accordingly, the Court adopted the common-law rule that courts could not review or overturn decisions by religious bodies on “questions of discipline, or of faith, or ecclesiastical rule, custom, or law.” *Id.* at 727.

Some 80 years later, this Court declared that the decision in *Watson* “radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). In *Kedroff*, the Court first recognized that the freedom to select clergy is protected under the First Amendment. See *Hosanna-Tabor*, 565 U.S. at 186; *Kedroff*, 344 U.S. at 116. Ecclesiastical questions, the Court declared, are “forbidden” to the “power of the state.” *Kedroff*, 344 U.S. at 119.

This Court returned to the harm caused by the interjection of the courts into ecclesiastical or religious questions in *Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976). In *Milivojevich*, the Court determined that courts cannot “delve into the various church constitutional provisions” because to do so would repeat the lower court’s error of involving itself in “internal church government, an issue at the core of ecclesiastical affairs.” *Id.* at 721.

In short, in the three cases that animated this Court’s recognition of the ministerial exception in *Hosanna-Tabor*, the Court emphasized that the state, and courts in particular, are categorically forbidden from resolving religious disputes.

The Court’s adoption of the ministerial exception applied this categorical prohibition to religious organizations’ decisions about who will serve as the organizations’ ministers. In *Hosanna-Tabor*, this Court recognized that “[r]equiring a church to accept

or retain an unwanted minister, or punishing a church for failing to do so” similarly enmeshes the state in the affairs of religious bodies in the same fashion as deciding doctrinal disputes. 565 U.S. at 188–189. Doing so “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs,” thereby interfering with “a religious group’s right to shape its own faith and mission through its appointments.” *Id.* at 188. This in turn “violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.” *Id.* at 189. Because the Establishment Clause “prohibits government involvement in ecclesiastical matters,” *id.*, it is “impermissible for the government to contradict a church’s determination of who can act as its ministers,” *id.* at 185.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, this Court reaffirmed the structural nature of the ministerial exception and explained that “[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.” 140 S. Ct. at 2060. Accordingly, “courts are *bound* to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.” *Id.* (emphasis added).

Thus, the ministerial exception protects religious liberties and the courts’ structural interest in avoiding the establishment of religion. The federal courts of appeals have recognized the structural protection afforded by the ministerial exception and so have

declined to allow parties to waive the doctrine and thereby drag courts into religious controversies by choice or neglect. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). Accord *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds*, *Hosanna-Tabor*, 565 U.S. 171.

**II. Because of the protections afforded by the ministerial exception, its application should be determined before courts reach the merits.**

When the Court adopted the ministerial exception, it addressed only one procedural aspect of the doctrine. Before *Hosanna-Tabor*, courts were split on whether the ministerial exception was jurisdictional or an affirmative defense. This Court determined that the ministerial exception is an affirmative defense and not a jurisdictional bar. 565 U.S. at 195 n.4.

Before the Second Circuit's decision here and the Tenth Circuit's decision in *Tucker*, courts were uniformly coalescing around a common approach towards some of the other procedural issues related to the ministerial exception. Generally, courts were treating the ultimate application of the exception as a legal issue well suited for early resolution and were bifurcating discovery to focus on that issue.

The rationale for the ministerial exception confirms that this approach is correct. The protection of personal religious liberty encompassed by the ministerial exception includes the recognition that it is not only the decisions made by the court that

“impinge” on religious liberty but the “very process of inquiry” leading to those decisions that impinges on that liberty. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Indeed, “it is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (cleaned up).

The structural interest in avoiding the establishment of religion also commends limiting the scope of courts’ involvement in cases before determining if the ministerial exception applies. Indeed, the ministerial exception is unlike most other affirmative defenses. Courts have no interest of their own in whether a party’s claims are barred by unclean hands or whether the statute of limitations has expired. But because of the structural limitation imposed by the ministerial exception on the exercise of judicial authority, courts *do* have an interest in ensuring that the exception is applied even where the parties fail to raise the doctrine or where someone claims that they have waived it affirmatively. See, e.g., *Lee*, 903 F.3d at 117–118, 123 (upholding application of the ministerial exception where trial court raised the issue *sua sponte*); *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (stating that “a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer”), *cert. denied*, 139 S. Ct. 456 (2018).

Accordingly, and as explained in more detail below, in cases where the exception may apply, (1) if the applicability of the exception cannot be resolved at the pleading stage, discovery should be bifurcated to

focus on whether the ministerial exception applies, (2) any trial should be similarly bifurcated, and (3) interlocutory appeals should be available under the collateral order doctrine.<sup>2</sup>

**A. If discovery is needed to decide if the ministerial exception applies, discovery should be limited to that issue.**

If the application of the ministerial exception cannot be resolved at the pleadings stage, courts should limit discovery to topics relevant to whether the ministerial exception applies. See Fed. R. Civ. P. 16(b)(3)(B)(ii), 26(b)(1). The reasons for this are twofold.

*First*, allowing broad discovery in a case such as this will result in inquiries into internal church standards, church disciplinary proceedings, and church communications regarding selection of church leaders. And, in an employment case involving a ministerial employee, allowing broad discovery would result in inquiries into the minister’s fitness for the position, the basis for the termination, and whether that basis was pretextual. These are precisely the inquiries that *Hosanna-Tabor* held that the government cannot make. 565 U.S. at 188–189.

*Second*, the “process of inquiry” harms the rights protected by the Religion Clauses, *Catholic Bishop of*

---

<sup>2</sup> Although the issue is not raised by the present petition, *amici* also believe the church autonomy doctrine should support a claim for relief with respect to challenging a government action when the government infringes on church autonomy. See Note, *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599 (2019).

*Chicago*, 440 U.S. at 502, and discovery is a principal means by which that harm is inflicted. See Mark E. Chopko, Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 First Amend. L. Rev. 233, 293–294 (2012). Subjecting a religious organization to discovery about its choice of its ministers can result in the organization’s leaders being deposed on matters of doctrine and religious orthodoxy, as well as the organization’s fidelity to its beliefs in practice. Discovery may also result in the adversarial inquiry into the spiritual beliefs and failings of religious persons. Such inquiry may chill a religious organization’s articulation and practice of its faith if it knows that it might face discovery. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343–344 (1987) (Brennan, J., concurring) (“While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s process of self-definition would be shaped in part by the prospects of litigation.”); *Rayburn*, 772 F.2d at 1171 (“There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.”).

This problem is compounded by the possibility of contentious motion practice where such information is

likely to be made part of the public record. *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140–141 (2d Cir. 2016) (recognizing presumption of public access to documents filed in a civil proceeding); *Center for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096–1098 (9th Cir. 2016) (recognizing strong presumption of public access to documents filed in a civil proceeding, and requiring a party to demonstrate a compelling reason for documents to be kept under seal).

This Court should provide guidance that, where discovery is necessary to determine whether the ministerial exception is applicable, district courts should limit the discovery to that issue. Courts should not allow discovery that may be moot if the ministerial exception applies. Cf. *U.S. Catholic Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 79–80 (1988) (“It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters.”). Such discovery carries with it the very harms the ministerial exception is intended to prevent.

Indeed, this was the approach the lower courts uniformly took before *Belya*. See *Fitzgerald v. Roncalli High Sch., Inc.*, No. 1:19-cv-04291RLYTAB, 2021 WL 4539199, at \*1 (S.D. Ind. Sept. 30, 2021) (noting that “courts regularly bifurcate discovery in ministerial cases”); see also *Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (allowing merits discovery before resolving a church’s ministerial exception defense “would result in a substantial miscarriage of justice” since the defense

“includes protection against the cost of trial and the burdens of broad-reaching discovery” (cleaned up)).<sup>3</sup>

It is also the approach this Court has directed trial courts to employ in the analogous context of official immunity. For example, in *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), this Court noted that, where discovery is necessary to resolve whether qualified immunity applies, “any such discovery should be

---

<sup>3</sup> Accord, e.g., *Sterlinski v. Catholic Bishop of Chicago*, No. 16 C 00596, 2017 WL 1550186, at \*5 (N.D. Ill. May 1, 2017) (“[D]iscovery must move forward, but only on a limited basis. Before launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid—it is sensible to limit discovery to the applicability of the ministerial exception.”); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (“The Court allowed limited discovery to determine whether the ministerial exception applies.”); *Collette v. Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) (“To help focus the discovery to be taken in this phase, the Court notes that the scope of the issue subject to discovery is narrow.”); *Lishu Yin v. Columbia Int’l Univ.*, No. 3:15-CV-03656-JMC, 2017 WL 4296428, at \*6 (D.S.C. Sept. 28, 2017) (“[T]his matter is referred . . . for the purpose of developing a scheduling order allowing the parties to conduct limited discovery to determine whether the ministerial exception applied to Plaintiff while employed with Defendant.”); *Stabler v. Congregation Emanu-El of the City of New York*, No. 16 CIV. 9601 (RWS), 2017 WL 3268201, at \*7 (S.D.N.Y. July 28, 2017) (“The parties will meet and confer with respect to discovery and motion schedule limited to the ministerial exception defense.”); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at \*1 (E.D. Pa. Oct. 5, 2005) (“During oral argument, the Court also issued an order, on the record, permitting the parties to conduct very limited discovery . . . .”); *Fratello v. Roman Catholic Archdiocese of New York*, 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2016) (observing the court “directed the parties to engage in limited discovery on the issue”).

tailored specifically to the question of . . . qualified immunity.” Accordingly, the lower courts will allow limited discovery to determine if qualified immunity wholly bars a suit. See, e.g., *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (discussing the “careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.”); *Solomon v. Petray*, 795 F.3d 777, 791 (8th Cir. 2015) (“Limited discovery is sometimes appropriate to resolve the qualified immunity question.” (cleaned up)); *Robertson v. Lucas*, 753 F.3d 606, 623 (6th Cir. 2014) (“Discovery is disfavored in this context, but ‘limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.’” (quoting *Crawford–El v. Britton*, 523 U.S. 574, 593 n.14 (1998))). Given the structural protections served by the ministerial exception, the same approach should be taken here.

**B. If trial is necessary, courts should bifurcate trial on the ministerial exception from trial on the merits.**

The use of Rule 56 as the vehicle for determining the applicability of the ministerial exception freights the risk that a genuine issue of material fact may exist that precludes summary judgment on the ministerial exception. Although *amici* are unaware of any cases where this circumstance has arisen, presumably such factual disputes would be resolved at trial. Under a proper standard for the ministerial exception, such occasions will be quite rare. The same reasons that warrant limited discovery on the ministerial exception’s application also counsel in favor of a

district court exercising its discretion to order a separate trial limited to those disputed facts. Fed. R. Civ. P. 42(b) (allowing courts to order a separate trial of a separate issue to avoid prejudice and expedite resolution).

**C. Orders denying the application of the ministerial exception should be immediately appealable under the collateral-order doctrine.**

Where a district court concludes that the ministerial exception does not apply, such decisions should be immediately appealable on an interlocutory basis under the collateral-order doctrine. This Court has made clear that the litigation process itself may excessively entangle government, including the courts, in religion. There is no unringing the bell after the courts have become excessively entangled in a religious controversy because they erred in declining to apply the ministerial exception and dismiss the case.

Appellate jurisdiction typically arises either from a district court's final judgment, 28 U.S.C. § 1291, or the district court's certification of an issue for interlocutory appeal, 28 U.S.C. § 1292(b). A "narrow and selective" class of orders, however, are appealable because they meet the requirements of the collateral-order doctrine. *Will v. Hallock*, 546 U.S. 345, 350 (2006). Appellate jurisdiction is proper over "collateral" rulings that are sufficiently final and distinct from the merits to be appealable before a final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The collateral-order doctrine thus contains three elements: (1) the order conclusively determines the disputed question, (2) the order resolves an important issue completely separate from the merits of the action, and (3) will be effectively unreviewable on appeal from the final judgment. *Johnson v. Jones*, 515 U.S. 304, 310 (1995). The Court has found the last element to mean “that failure to review immediately may well cause significant harm.” *Id.* at 311.

The ministerial exception meets all three of these elements. First, a district court’s order conclusively determines the religious body’s immunity from suit. Second, the ministerial exception is a First Amendment issue that is completely separate from the merits of the defamation claim. Third, awaiting an appeal from the final judgment will make the order effectively unreviewable. By that point, the religious body will have already been subject to burdensome discovery, trial, and post-judgment motions and the judiciary, and thus the government, will have already impermissibly entangled itself in ecclesiastical issues.

Here, as the dissenters observed, qualified immunity again provides a useful analog, for church autonomy bears a “strong resemblance” to qualified immunity. *Belya*, 59 F.4th at 579 (Park, J., dissenting); see also *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). “[P]retrial orders denying qualified immunity generally fall within the collateral order doctrine.” *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). This is because orders denying qualified immunity “conclusively determine whether the defendant is entitled to immunity from suit; th[e] ... issue is both important and completely separate from the merits of the action, and th[e] question could not

be effectively reviewed on appeal from a final judgment[.]” *Id.* Qualified immunity is “effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); see also *Plumhoff*, 572 U.S. at 772 (noting that if an order denying qualified immunity cannot be reviewed, “the immunity from standing trial will have been irretrievably lost.”).

The same is true of the ministerial exception. The harm caused to the defendant by the wrongful denial of the ministerial exception is the same harm incurred by the defendant in the qualified immunity context. The defendant loses the First Amendment protection against suit, and the protection from a judicial determination on the religious issue of who should be an organization’s ministerial employee. While a post-judgment appeal can undo any ultimate judgment, it cannot restore the protections of the ministerial exception as guaranteed by the Religion Clauses. The plaintiff and the court will have already trolled through the religious organization’s beliefs and practices. That toothpaste cannot be put back in the tube. See *Belya*, 59 F.4th at 579 (Park, J., dissenting) (observing that “[a] court order denying a church autonomy defense is ‘conclusive’ because it decides the church’s “right not to face the other burdens of litigation.”).

In *Mitchell*, 472 U.S. at 526, this Court determined that a similar partial restoration of qualified immunity was unacceptable. And in the context of the ministerial exception, the harm is much worse. First, the defendant loses constitutional, not merely common-law, rights. Second, because the ministerial exception protects against the government’s intrusion

into quintessential religious questions—who a religious organization’s ministers are—the constitutional harm occurs because of the judicial proceedings. As noted by the Petition, this is precisely the rationale offered by the courts that have allowed interlocutory appeal of this issue. See Pet. at 25–26.

Accordingly, an order declining to apply the ministerial exception should be immediately appealable under the collateral-order doctrine like decisions denying qualified immunity.

### CONCLUSION

For the reasons given above, the Court should grant the petition for certiorari and clarify the procedural issues surrounding application of the ministerial exception.

Respectfully submitted,

MATTHEW T. NELSON

*Counsel of Record*

CONOR B. DUGAN

WARNER NORCROSS +

JUDD LLP

150 Ottawa Avenue

NW, Suite 1500

Grand Rapids, MI 49503

(616) 752-2539

mnelson@wnj.com

TIMOTHY H. SMITH

WARNER NORCROSS +

JUDD LLP

2715 Woodward Avenue

Suite 300

Detroit, MI 48201

*Counsel for Amici Curiae*

March 31, 2023