MICHAEL H. PARK, *Circuit Judge*, joined by DEBRA ANN LIVINGSTON, *Chief Judge*, and RICHARD J. SULLIVAN, WILLIAM J. NARDINI, and STEVEN J. MENASHI, *Circuit Judges*, dissenting from the order denying rehearing *en banc*:

This case arises from a minister's suspension by his church. The church autonomy doctrine, which is rooted in the Religion Clauses of the First Amendment, generally requires courts to stay out of such matters. But the panel decision leaves the church defendants subject to litigation, including discovery and possibly trial, on matters relating to church governance. This imperils the First Amendment rights of religious institutions. Denials of church autonomy defenses should be included in the narrow class of collateral orders that are immediately appealable.

The panel decision adopts a "neutral principles of law" limitation on the church autonomy doctrine that would allow courts to resolve "secular components of a dispute involving religious parties." *Belya v. Kapral*, 45 F.4th 621, 630 (2d Cir. 2022). Here, that means that a minister's lawsuit against his former church—because it is styled as a defamation claim—must proceed to final judgment before the church can appeal the denial of its religious autonomy defense. The panel's extension of this "neutral principles" test from an entirely different line of cases involving church property disputes will invite courts to

wade into the details of ecclesiastical matters. And although the panel attempts to cabin its decision to these defendants on the facts available at this stage of their case, its holding will categorically deny interlocutory appeals for church autonomy defenses and reduce the doctrine to a defense against liability only.

In my view, the First Amendment provides more protection to religious institutions than that, so I would have granted the petition for rehearing *en banc*.

I. BACKGROUND

A. Factual Allegations

Plaintiff Alexander Belya was a priest in the Russian Orthodox Church Outside of Russia ("ROCOR"), which is a "semi-autonomous" part of the Russian Orthodox Church. J. App'x at 88. Church rules govern the relationship between ROCOR and the Russian Orthodox Church, including elections of ROCOR bishops, which must be approved by the Russian Orthodox Church.

In December 2018, ROCOR's bishops elected Belya as Bishop of Miami. Defendant Hilarion Kapral—then the leader of ROCOR—sent a letter to the Russian Orthodox Church seeking approval of Belya's election. But a group of church leaders opposed to Belya urged Hilarion to "undo" the appointment. *Id.* at 95. These church leaders sent a letter to Hilarion and ROCOR leaders

questioning the authenticity of the letters announcing Belya's election. Hilarion suspended Belya from his "priestly duties," pending an investigation. Belya then left ROCOR for the Greek Orthodox Church.

B. Procedural History

In August 2020, Belya sued ROCOR and its leadership, including the church leaders who opposed his elevation. Belya alleged defamation and sought damages for reputational injury and losses from the decline in his church membership.

Defendants sought to file a motion to dismiss in a three-page pre-motion letter as required by the district court's individual practices. This letter previewed Defendants' argument that the district court lacked subject-matter jurisdiction under the church autonomy doctrine. The district court *sua sponte* construed the letter as a Rule 12(b)(6) motion to dismiss and denied it.[1] *Belya v. Hilarion*, No. 20-CIV-6597, 2021 WL 1997547, at *1 (S.D.N.Y. May 19, 2021). The court was "persuaded Belya brings a suit that may be resolved by appealing to neutral principles of law." *Id.* at *4.

[1] We have repeatedly urged district courts against using this practice to dispose of complex matters. *See Int'l Code Council, Inc. v. UpCodes Inc.*, 43 F.4th 46, 53–56 (2d Cir. 2022) (collecting cases and noting that "the district court's course of action did nothing to conserve judicial resources").

Defendants moved to certify an interlocutory appeal, arguing that the application of the church autonomy doctrine is a "controlling question of law as to which there is substantial ground for difference of opinion." District Ct. Doc. No. 54 at 1 (quoting 28 U.S.C. § 1292(b)). The district court summarily denied the motion, concluding that "the controlling legal doctrines . . . are well established" and "Defendants' arguments amount to . . . factual disputes." *Belya v. Kapral*, No. 20-CIV-6597, 2021 WL 2809604, at *2 (S.D.N.Y. July 6, 2021).

Finally, Defendants submitted another pre-motion letter seeking leave to file a motion to bifurcate discovery in order to protect against disclosures that might infringe on church autonomy. In the alternative, Defendants sought a stay pending appeal. The district court again *sua sponte* construed the letter as a fully briefed motion and summarily denied it, stating that bifurcation was "unwarranted" and that it "w[ould] not pass judgment on the internal policies and or determinations of the Russian Orthodox Church Outside Russia." J. App'x at 147. The district court also denied a stay as "unnecessary" without explanation. *Id.*

II. LEGAL PRINCIPLES

This case involves a conflict between two legal doctrines. On one hand, the church autonomy doctrine protects religious institutions from court interference in matters of faith and church governance. On the other hand, the collateral order doctrine permits appellate review of only a narrow set of non-final decisions.

A. The Church Autonomy Doctrine

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Religion Clauses together establish the "independence" of churches "in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). That independence includes "autonomy with respect to internal management decisions that are essential to the institution's central mission," including "the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Id.* at 2060.

The church autonomy doctrine has a "rich historical pedigree" that "informed the meaning of the Constitution and its Religion Clauses at the Founding." *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d

1066, 1075–76 (5th Cir. 2020) (Oldham, *J.*, dissenting from denial of rehearing *en banc*). "[T]he jurisdictional line prohibiting civil courts from intruding on ecclesiastical matters is an ancient one." *Id.* at 1077, 1076–78 (tracing the jurisdictional boundaries between civil and ecclesiastical courts from the Middle Ages and English law). The Founders incorporated this jurisdictional understanding of religious institutional autonomy into the First Amendment. *See id.* at 1078–80. This meant that the state had no role in church governance, including the selection of ministers, rulemaking, and organization. Indeed, James Madison, "the leading architect of the religion clauses," vetoed a bill that established "rules and proceedings relative purely to the organization and polity of the church." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184–85 (2012) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011), and 22 Annals of Cong. 982–983 (1811)).

The Supreme Court first explicitly articulated a form of the church autonomy doctrine in *Watson v. Jones*, 80 U.S. 679 (1871). *Watson* explained that the First Amendment gives churches independence in matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Id.* at 733.

Subsequent cases clarified the reach of the doctrine. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Supreme Court held unconstitutional a New York law that recognized the Russian Orthodox Church in the United States as the true owner of church property instead of the Russian Orthodox Church in Russia. *See id.* at 107–08. The Court reasoned that "[*Watson*] radiates . . . 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." *Id.* at 116.

The Supreme Court later held that the Illinois Supreme Court should not have intervened in a dispute involving a church's suspension of a minister. *See Serb. E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 718–20 (1976). The Court also interpreted the National Labor Relations Act to deny the National Labor Relations Board jurisdiction over religious schools because there was a significant risk of excessive entanglement with religion. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979). More recently, the Supreme Court has held that the ministerial exception "precludes application of [employment discrimination

laws] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188.

In sum, the church autonomy doctrine has long prohibited court interference with "matters of church government as well as those of faith and doctrine." *Our Lady*, 140 S. Ct. at 2055 (quoting *Kedroff*, 344 U.S. at 116).

B. The Collateral Order Doctrine

The courts of appeals have jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. "Although 'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

The collateral order doctrine is "best understood not as an exception to the 'final decision' rule . . . but as a 'practical construction' of it." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted). Under the collateral order doctrine, the courts of appeals have jurisdiction over certain non-final decisions involving claims that are "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*, 337 U.S. at 546. Appeals are thus permitted from collateral orders "[1] that are conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995).

In deciding whether a collateral order is appealable, "we do not engage in an individualized jurisdictional inquiry"—"[r]ather, our focus is on the entire category to which a claim belongs." *Mohawk*, 558 U.S. at 107 (cleaned up). The Supreme Court has emphasized that the scope of the doctrine is modest and membership in the "small class" of collaterally appealable orders is "narrow and selective." *Will*, 546 U.S. at 350. "[T]he decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352–53).

III. DISCUSSION

The panel dismissed Defendants' appeal, holding that it lacked appellate jurisdiction to review the district court's denials of Defendants' church autonomy

defenses. The panel concluded that the district court's orders (1) were not a "final rejection" of Defendants' church autonomy defenses, (2) did not deny "a claim of right separable from the merits," and (3) were not "effectively unreviewable on appeal" because the case turned on "outstanding secular fact questions" that "would not require a fact-finder to delve into matters of faith and doctrine." *Belya*, 45 F.4th at 631–34.

The panel erred in two ways. First, it misapplied the collateral order doctrine. Rejections of church autonomy defenses should be immediately appealable, in the same way that denials of qualified immunity are appealable. Second, the panel's novel extension of the "neutral principles" approach is inconsistent with precedent and will substantially limit the church autonomy doctrine.

A. Denials of Church Autonomy as Appealable Collateral Orders

1. *The Panel's Misapplication of the Collateral Order Doctrine*

The panel misapplied each prong of the collateral order doctrine. First, the district court's decision is "conclusive" because it subjects Defendants to litigation over religious matters. The church autonomy doctrine protects religious institutions from the litigation process itself where the dispute concerns "matters

of church government as well as those of faith and doctrine." *Our Lady*, 140 S. Ct. at 2055 (citation omitted); *see also Cath. Bishop of Chi.*, 440 U.S. at 502 ("It is not only the conclusions that . . . may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *Milivojevich*, 426 U.S. at 718 (describing the Illinois Supreme Court's "detailed review" of "internal church procedures" as "impermissible under the First and Fourteenth Amendments"); *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, *J.*, concurring) ("[T]he mere adjudication of such questions would pose grave problems for religious autonomy.").[2] 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," which is the "critical part of this inquiry." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147 (2d Cir. 2013) (cleaned up).

The panel decided that the district court's orders were not "conclusive because they d[id] not bar any defenses, they did not rule on the merits of the church autonomy defense, and they permit Defendants to continue asserting the

[2] To be sure, none of these cases arose at the motion to dismiss stage, so none explicitly held that the church autonomy doctrine shields churches from the litigation process altogether. *See Our Lady*, 140 S. Ct. at 2058–59 (appeal from summary judgment); *Hosanna-Tabor*, 565 U.S. at 180–81 (same); *Cath. Bishop of Chi.*, 440 U.S. at 495 (petition for review of agency proceeding); *Milivojevich*, 426 U.S. at 707 (appeal from judgment after trial). But the reasoning of these cases leads to the same conclusion: that "the very process of inquiry" into matters of faith and church governance offends the Religion Clauses. *Cath. Bishop of Chi.*, 440 U.S. at 502.

defense." *Belya*, 45 F.4th at 631; *see also* Statement of Judge Chin ("Statement") at 5 (noting that "at a later point," "the scope of Belya's claims and discovery might have to be limited and dismissal . . . might even be warranted"). But here, "conclusiveness" does not turn on whether the church autonomy defense may be raised again later because subjecting Defendants to further litigation would itself burden their First Amendment rights. *See Liberty Synergistics*, 718 F.3d at 151 ("[W]hen the essence of a right is to shield certain defendants from the burdens of litigation, collateral review is not defeated by the opportunity for post-judgment review of the same legal question that arose when considering the earlier order.").

Second, the church autonomy doctrine involves a "claim[] of right separable from, and collateral to, rights asserted in the action" that is "too important to be denied review." *Cohen*, 337 U.S. at 546. A church autonomy defense is distinct from the merits of a defamation claim. *Cf. Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1036 (10th Cir. 2022) (agreeing that the applicability of the ministerial exception is "clearly . . . separate from the merits," even while ruling against the defendant on other grounds).

The panel decision does not seriously contest this point. Indeed, the panel itself emphasized that Belya's defamation claim raised "secular fact questions"

that "would not require a fact-finder to delve into matters of faith and doctrine." *Belya*, 45 F.4th at 634. And the panel acknowledged that "it is possible that, in some circumstances, the church autonomy doctrine can present questions separable from the merits of a defamation claim," but it ultimately concluded that it was "too soon to say at this point." *Id.* at 632. The panel's effort to cabin its holding to the specific procedural posture and the facts available to it at the time, however, is inconsistent with the Supreme Court's repeated "warn[ing] that . . . appealability under § 1291 is to be determined for the entire category to which a claim belongs," and is *not* "a case-by-case . . . determination." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (cleaned up). Whether the church autonomy defense applies is a separate—and important—question from the merits of a defamation claim.

Third, the district court's order is not "effectively reviewable" on appeal from final judgment. *Mohawk*, 558 U.S. at 107. As noted above, the First Amendment "prohibits" the very "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow." *Milivojevich*, 426 U.S. at 713; *see supra* at 10–11. "[A] civil court must accept the ecclesiastical decisions of church tribunals as it finds them," and no more.

Milivojevich, 426 U.S. at 713; *accord Our Lady*, 140 S. Ct. at 2069 (warning against "judicial entanglement in religious issues"); *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (*en banc*) ("[A]voidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance."). Thus, after final judgment, the harm from judicial interference in church governance will be complete.

The panel relied on the Supreme Court's statement in footnote four of *Hosanna-Tabor* that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." 565 U.S. at 195 n.4. But that does not resolve the issue because affirmative defenses, such as qualified immunity, may still be immediately appealable. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified . . . immunity is an affirmative defense."); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that denials of qualified immunity are appealable under the collateral order doctrine).

The panel thus misapplied the collateral order doctrine. The denial of a church autonomy defense is conclusive, separate from the merits, and effectively unreviewable on appeal after final judgment.

2. *Comparison to Qualified Immunity*

Denial of a church autonomy defense should be an appealable collateral order in light of its strong resemblance to qualified immunity. First, both are rooted in foundational constitutional interests. In the case of qualified immunity, "subjecting officials to the risks of trial" may "implicate separation-of-powers concerns." *Harlow*, 457 U.S. at 816, 817 n.28. Similarly, the church autonomy doctrine is "a structural [constitutional protection] that categorically prohibits federal and state governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *see supra* at 5–6.

And second, both are protections against the burdens of litigation itself. Qualified immunity recognizes "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question" whether the doctrine applies. *Mitchell*, 472 U.S. at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (emphasis omitted)). Similarly, subjecting churches to litigation and trial over matters of church government itself infringes their First Amendment

rights. *See supra* at 11 (citing *Cath. Bishop of Chi.*, 440 U.S. at 502; *Milivojevich*, 426 U.S. at 718).

Several courts have acknowledged the similarities between church autonomy and qualified immunity. *See, e.g.*, *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013) (justifying collateral review of the denial of church autonomy because it is "closely akin to a denial of official immunity"); *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) ("[T]he ministerial exception, like the broader church autonomy doctrine, can be likened 'to a government official's defense of qualified immunity.'" (citation omitted)); *Petruska v. Gannon Univ.*, 462 F.3d 294, 302–03 (3d Cir. 2006) (agreeing that the church autonomy doctrine is similar to a defense of qualified immunity because "[t]he exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them").

The panel's rejection of the analogy is unpersuasive. It stated that a denial of qualified immunity is immediately appealable only "to the extent that it turns on an issue of law." *Belya*, 45 F.4th at 634 (citation omitted). And in this case, the panel concluded that "[d]ecidedly non-ecclesiastical questions of fact remain." *Id.* But the applicability of the church autonomy doctrine, like qualified

immunity, is at bottom a question of law. Both inquiries require applying law to facts—here, assessing whether the dispute involves "matters of church government" or "of faith and doctrine," *Our Lady*, 140 S. Ct. at 2055—but that does not change the nature of the inquiry. Answering the question whether the church autonomy defense applies is not somehow prohibitively more fact-bound than determining whether a defendant is entitled to qualified immunity.[3]

In light of these doctrinal similarities, denial of a church autonomy defense, like denial of qualified immunity, should be an appealable collateral order.[4]

B. The "Neutral Principles" Approach

Finally, the panel's novel extension of the "neutral principles" approach is inconsistent with precedent and threatens to eviscerate the church autonomy doctrine. The panel held that "[w]hen a case can be resolved by applying well-established law to secular components of a dispute, such resolution by a secular

[3] Both the Statement and Concurrence correctly note that denials of qualified immunity cannot be appealed when they turn on facts. *See* Statement at 8–9; Concurrence at 2–3. But this is of little relevance here. First, when the district court denied the church autonomy defense, Defendants did not dispute the sufficiency of the evidence. *Franco v. Gunsalus*, 972 F.3d 170, 174 (2d Cir. 2020); J. App'x at 16–18. Second, the panel decision categorically denies immediate appealability of any church autonomy defense, no matter what the facts might be. *See supra* at 13.

[4] Sovereign immunity provides another helpful comparator for immediately appealable orders. Like qualified immunity and church autonomy, sovereign immunity is "implicit in the constitutional design," *Alden v. Maine*, 527 U.S. 706, 730 (1999), and protects states from the burdens of litigation, *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

court presents no infringement upon a religious association's independence." *Belya*, 45 F.4th at 630; *see also* Statement at 11 ("Using neutral principles of law to resolve secular components of a dispute involving religious parties does not infringe on religious parties' independence."). There are several problems with this.

First, the Supreme Court has already rejected this approach in the context of church employment disputes. Even "valid and neutral" employment discrimination laws cannot apply to "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. The same principle applies here.

Second, the panel's extension of the "neutral principles" approach from a different context involving church property disputes is unfounded. *See Jones v. Wolf*, 443 U.S. 595, 604 (1979) ("[A] State is constitutionally entitled to adopt neutral principles of law *as a means of adjudicating a church property dispute*." (emphasis added)). Courts have generally declined to extend this approach to other areas. *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) ("The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be."); *Simpson v. Wells*

Lamont Corp., 494 F.2d 490, 493–94 (5th Cir. 1974) (rejecting a dismissed minister's claim that "neutral principles" could apply to his civil rights and constitutional claims for being evicted from the church parsonage). *But see McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 350 (5th Cir. 2020) (relying on "neutral principles" to reverse a district court's dismissal of a church official's tort claims against a church).

Finally, the "neutral principles" approach does not make sense for disputes about church governance. The panel decision appears at times to limit the scope of the church autonomy defense to "matters of faith and doctrine" only. *See, e.g.*, *Belya*, 45 F.4th at 634; *see also* Statement at 7 (describing the defense as applying to "matters of 'religious doctrine[]' or 'religious belief'"). But Supreme Court precedent is clear that the defense is broader and covers "matters of church government" as well. *Our Lady*, 140 S. Ct. at 2055.

In *Jones*, the "true" owner of church property was disputed, so there was not a church government to which the court could defer.[5] *See* 443 U.S. at 597–98

[5] The "neutral principles" approach makes sense only when churches themselves invite judicial scrutiny. *See McRaney*, 980 F.3d at 1071 (Ho, *J.*, dissenting from denial of rehearing *en banc*) (explaining that *Jones*'s "neutral principles" approach will "*protect* religious autonomy . . . by assuring that secular courts would intervene in religious affairs *only* when the religious community itself had expressly stated in terms accessible to a secular court how a particular controversy should be resolved" (quoting W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS & THE LAW § 5:16 (2017))).

(describing the split between two church factions). Giving courts a license to apply "neutral principles" to matters of church government, faith, or doctrine would swallow the church autonomy doctrine altogether. Almost any cause of action has secular components that can be resolved using some facially neutral principles. In *Milivojevich*, the Supreme Court of Illinois concluded that the church "had not followed its own laws and procedures" in suspending a minister.[6] 426 U.S. at 713. The Supreme Court held that this approach was wrong because "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow . . . is exactly the inquiry that the First Amendment prohibits." *Id.* "[R]ecognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry." *Id.*[7]

[6] There were neutral principles in *Milivojevich*. The Supreme Court of Illinois decided that the minister's suspension was not valid because, under church procedures, the minister "was not validly tried within one year of his indictment" by the church tribunals, among other issues. 426 U.S. at 708. The Supreme Court rejected this foray into church governance. Here, the panel assures us that neutral principles govern "non-ecclesiastical questions of fact" raised by Belya, including whether the "bishop's official letterhead" and the "bishop's official seal" were used and whether "the purported signatories actually sign[ed] the letters." *Belya*, 45 F.4th at 634; Statement at 2–3. But these are the same types of factual questions the Court rejected in *Milivojevich*.

[7] *See also* Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 89, 92 (2008) ("There is no way to resolve an issue of church discipline by 'neutral principles.'").

Here, Belya brought a defamation claim, alleging a false campaign by church leaders to remove him. But it is difficult to see how a court could assess that claim without considering the reasons for the church's decisions, including whether Defendants correctly determined that Belya was never elected Bishop of Miami and whether they acted in good faith—all matters of "internal church procedures." *Milivojevich*, 426 U.S. at 718.[8]

The panel's focus on whether there are "secular components of a dispute" that can be resolved using "neutral principles of law" is thus misplaced.[9] Simply accepting Belya's styling of the case as a defamation claim, and reasoning that such a claim can be decided with neutral principles of law, elevates form over substance—almost any ministerial dispute could be pled to avoid questions of

[8] State courts have come to similar conclusions in defamation cases involving church governance and discipline. *See, e.g.*, *Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528, 541 (Minn. 2016) ("[W]e simply recognize that adjudicating a defamation claim based on statements made during the course of a church disciplinary proceeding and published exclusively to members of the religious organization and its hierarchy necessarily fosters an excessive entanglement with religion . . . ."); *Purdum v. Purdum*, 301 P.3d 718, 727 (Kan. 2013) ("[Plaintiff's] defamation action involves an ecclesiastical subject matter, and adjudication of it would entangle the civil courts in a church matter."); *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007) (holding that plaintiff's tort claims against her church, including defamation, could not be adjudicated by neutral principles without "imping[ing] upon [the church's] ability to manage its internal affairs").

[9] The panel decision states that "simply having a religious association on one side of the 'v' does not automatically mean a district court must dismiss the case or limit discovery." *Belya*, 45 F.4th at 630. But this is not a fair characterization of the church autonomy defense. *See Our Lady*, 140 S. Ct. at 2061. The charge that "the Dissent's view is that churches are generally immune from the litigation process" is also wrong. Statement at 6.

religious doctrine. Taken to its logical endpoint, this approach would eviscerate the church autonomy doctrine.

IV. CONCLUSION

Our Court's disagreement in this case reflects the growing number of courts struggling to define the contours of the church autonomy doctrine in the wake of *Hosanna-Tabor*.[10] But under the panel's "neutral principles" approach, this confusion will quickly dissipate as the church autonomy doctrine is reduced to a defense against liability only, eroding the First Amendment's protections for religious institutions. I respectfully dissent from the denial of rehearing *en banc*.

[10] The Concurrence notes that there is no circuit split on the questions raised in this case. Concurrence at 1. That may be true, but our closely divided Court today joins two other closely divided courts of appeals that have narrowly denied petitions for rehearing *en banc*, *see Tucker*, 36 F.4th 1021, *reh'g en banc denied*, 53 F.4th 620 (10th Cir. 2022); *McRaney*, 966 F.3d 346, *reh'g en banc denied*, 980 F.3d 1066 (5th Cir. 2020); and another with internal tension in its own decisions, *compare Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1086, 1090 (7th Cir. 2014), *with McCarthy*, 714 F.3d at 975.