UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

MOTION INFORMATION STATEMENT

Docket Number(s): 21-1498 Caption [use short title]

Motion for: leave to file amicus brief

Set forth below precise, complete statement of relief sought:

Leave to file amicus brief in support of Defendants-Appellants' Petition for Rehearing En Banc

Belya v. Kapral, et al.

MOVING PARTY: Constitutional Law Scholars **OPPOSING PARTY:** Alexander Belya

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Matthew Nelson **OPPOSING ATTORNEY:** Oleg Rivkin

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Court- Judge/ Agency appealed from: United States District Court for the Southern District of New York (Marrero, J.)

Please check appropriate boxes:

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

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

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

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

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

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

Requested return date and explanation of emergency:

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

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

Signature of Moving Attorney:

/s/ Matthew Nelson **Date:** 09/07/2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

21-1498

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

HILARION KAPRAL, AKA METROPOLITAN HILARION, NICHOLAS OLKSHOVSKIY, 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.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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Dated: September 7, 2021

Pursuant to Federal Rule of Appellate Procedure 29(b)(3), *Amici Curiae* constitutional law scholars respectfully request leave to file the accompanying brief in support of Appellant and rehearing en banc. Counsel for Appellants and Appellee consent to the filing of the *amici curiae* brief.

Amici are constitutional law scholars with a particular interest in First Amendment Free Exercise and Establishment Clause issues. They write to aid the Court in understanding the importance of the issues presented in this case.

Robert Cochran is the Louis D. Brandeis Professor of Law Emeritus and founder of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine University. He has made the Religion Clauses of the Constitution an important part of his work as a teacher and scholar.

Carl H. Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lydia Emeritus Professor of Law at the University of Missouri. He has published widely in religious liberty, church-state relations, and federal civil rights litigation, including articles discussing the ministerial exception and the principles of church autonomy.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He

has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's new Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Michael P. Moreland is University Professor of Law and Religion and Director of the Eleanor H. McMullen Center for Law, Religion and Public Policy at Villanova University's Charles Widger School of Law. Professor Moreland is a religious liberty scholar who holds a Ph.D in theological ethics from Boston College. His scholarship on questions of church autonomy and religious freedom has appeared in books published by Oxford University Press and Cambridge University Press.

Robert J. Pushaw is the James Wilson Endowed Professor of Law at Pepperdine University School of Law and has taught at eight other law schools. He is a prolific constitutional law scholar. Many of his works explore the dangers of government interference with individual constitutional rights, including the institutional free exercise rights of parochial schools.

Amici are scholars whose scholarship and teaching focus on the First Amendment Free Exercise and Establishment Clauses. For decades, they have

closely studied constitutional law and religious liberty, published numerous books and scholarly articles on the topic, and addressed it in litigation.

Defendant-Appellant's Petition for Rehearing *en banc* raises the important issue whether an order denying a motion to dismiss or for summary judgment based on the argument that the church-autonomy doctrine is immediately appealable under the collateral-order doctrine. The district court denied Defendants-Appellants' motion to dismiss, their motion for reconsideration, and their motion to limit discovery.

Defendants-Appellants appealed from all three interlocutory orders, arguing that this Court had jurisdiction under the collateral-order doctrine to review the district court's denials of their motions. A Panel of this Court held that it did not have jurisdiction under the collateral-order doctrine and dismissed the appeals.

The question whether there is appellate jurisdiction is of critical importance to *Amici*, all of whom who share an interest in advancing the understanding of how courts should handle church-autonomy and ministerial-exception arguments as a matter of civil and appellate procedure. The church-autonomy doctrine and the ministerial exception exist to protect the independence of religious entities and serve a structural function of protecting courts from becoming entangled in religious controversies that courts are simply not competent to resolve. Because these complementary interests are irreparably harmed by judicial proceedings, the

Panel's decision that the denial of these motions premised on the church-autonomy doctrine or ministerial exception is *not* immediately appealable under the collateral-order doctrine is erroneous and imposes the very harm that the First Amendment prohibits. The Panel's decision conflicts with the reasoning underlying the Supreme Court's ministerial-exception and religious-autonomy cases, various decisions of other circuits, and this Court's own decisions. The Panel's decision puts this Court on a path that is divergent from the well-reasoned understanding of the First Amendment that prevails throughout the country.

Amici bring to this case a theoretical and practical understanding of the First Amendment's Religion clauses and the jurisprudence applying them. Thus, *Amici*'s analysis will contribute to the Court's consideration of whether the Panel's decision should be revisited by the entire Court.

For these reasons, *Amici* respectfully request that the Court grant their motion for leave to file a brief in support of Defendant-Appellant and rehearing *en banc* and direct the Clerk to deem the accompanying brief properly filed.

Dated: September 7, 2022

s/ Matthew T. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Appellate CM/ECF system on September 7, 2022.

I certify that all participants in the case have been served a copy of the foregoing by the Appellate CM/ECF system or by other electronic means.

September 7, 2022 *s/ Matthew T. Nelson*
Matthew T. Nelson

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BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

21-1498

UNITED STATES COURT OF APPEALS
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ALEXANDER BELYA,

Plaintiff-Appellee,

v.

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Dated: September 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Page(s)

Statutes

Rules

INTEREST OF *AMICI CURIAE*[1]

Amici are scholars whose work focuses on the First Amendment. For decades, they have closely studied constitutional law and religious liberty, published numerous books and scholarly articles on the topic, and addressed it in litigation. They write to aid the Court in understanding the importance of the issues presented in this case.

Robert F. Cochran Jr. is Professor Emeritus at Pepperdine University's Caruso School of Law.

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Robert J. Pushaw is the James Wilson Endowed Professor of Law at Pepperdine Caruso School of Law.

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[1] Pursuant to this Court's Rule 29.1(b) and Fed. R. App. P. 29(a)(4)(E), *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 their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Supreme Court's decisions recognizing the church-autonomy doctrine and related ministerial exception confirm that the First Amendment's Free Exercise and Establishment Clauses guarantee religious organizations freedom from government interference with their internal affairs. The church-autonomy doctrine categorically forbids the state from revisiting certain religious decisions made by religious organizations. And the ministerial exception is a specific application of the church-autonomy doctrine to the selection, supervision, and removal of those holding certain important religious positions. This Court should grant rehearing *en banc* to safeguard the interests underlying these critical doctrines.

As explained in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the church-autonomy doctrine and ministerial exception serve not only to protect religious liberty, but also to protect the Establishment Clause's *structural* limitations on government action. These rationales implicate how courts administer cases where either church autonomy or the ministerial exception is raised as a credible defense. Because these doctrines protect structural interests, the question of whether they apply should be determined at the outset of a case. Failure to correctly answer this question at the

beginning of a case causes the very harms the doctrines are intended to prevent and in so doing unconstitutionally entangles the courts in religious questions.

The Panel's decision discounts the judicial system's structural protections provided by the church-autonomy doctrine and the related ministerial exception. The ruling here that decisions rejecting the application of these doctrines cannot be appealed under the collateral-order doctrine means that courts will lose the structural protection provided by these doctrines, and inflict the very harm of government interference with religious autonomy that the First Amendment prohibits.

Because of the fundamental rights at issue and the momentous consequences of the Panel's error, this Court should grant rehearing *en banc*.

ARGUMENT

I. The federal courts have appellate jurisdiction to address decisions denying the application of the church-autonomy doctrine and the ministerial exception.

The Panel's decision contains various errors regarding the church-autonomy doctrine and the related ministerial exception. Many of those errors are identified in Defendants-Appellants' petition. But the Panel's holding that decisions denying the application of the religious-abstention doctrine are not subject to immediate appellate review will cause the most harm to the Circuit's jurisprudence.

The church-autonomy doctrine and the related ministerial exception exist to ensure that the government does not trespass across the boundary between the secular and the religious. *See Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (en banc). Within our constitutional government, the people have determined that the government cannot interfere with the internal governance of religious organizations, including in matters of "faith, doctrine, church governance, and polity." *Bryce v. Episcopal Church in the Diocese of Co.*, 289 F.3d 648, 655 (10th Cir. 2002). The church-autonomy doctrine enforces this separation between church and state, protecting both religious institutions *and* the courts.

By injecting themselves into religious questions, courts undermine their own credibility and authority. Courts are not competent to answer religious questions. As this Court acknowledged: "The notion of judicial incompetence with respect to strictly ecclesiastical matters can be traced at least as far back as James Madison, the leading architect of the religious clauses of the First Amendment." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017).

This Court has also recognized the structural concerns protected by the Religion Clauses, explaining that the Free Exercise Clause "protects a church's right to decide matters of governance and internal organization." *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (cleaned up). Additionally, the

Establishment Clause prevents the court from getting entangled in doctrinal disputes. *Id.* (citation omitted).

Together, the Religion Clauses give rise to the church-autonomy doctrine, which guarantees the independence of religious entities such as churches from government interference with matters of faith, doctrine, polity, church governance, and the decisions regarding who will carry out the church's vision. *See Bryce*, 289 F.3d at 655.

Ultimately, the church-autonomy doctrine is rooted in the structural concern for ensuring that courts do not become entangled in resolving religious disputes over which they have no constitutional power. In *Hosanna-Tabor*, the Supreme Court rooted its analysis in safeguarding the boundary between the secular and the religious by tracing the history of legal protections for religion in America. 565 U.S. at 182-87. The Court focused on three cases dating back 150 years, all involving property disputes, and all of which recognized that the government is categorically prohibited from contradicting ecclesiastical decisions. *Id*. at 185-87.

In the first case, *Watson v. Jones*, 80 U.S. 679 (1871), the Supreme Court declined to interfere with a denomination's determination as to which faction of a church rightly controlled the church's property. Instead, 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, the Supreme 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 applied the First Amendment to an ecclesiastical question for the first time. *See Hosanna-Tabor*, 565 U.S. at 186. There, the Court struck down a New York law regulating which Russian Orthodox faction controlled a cathedral because the issue was "strictly a matter of ecclesiastical government." *Kedroff*, 344 U.S. at 115-19.

Later, the Court determined that courts cannot "delve into the various church constitutional provisions" because doing so would repeat the lower court's error of involving itself in "internal church government, an issue at the core of ecclesiastical affairs." *Serbian Eastern Orthodox Diocese for USA & Canada v. Milivojevich*, 426 U.S. 696, 721 (1976). The Court explained that the First Amendment allows "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," which courts must accept. *Id.* at 724-25.

These cases animated the Supreme Court's recognition of the ministerial exception in *Hosanna-Tabor*, which emphasized that courts are categorically forbidden from resolving religious disputes. And in *Our Lady*, the Supreme Court further clarified that the ministerial exception addresses a structural concern that protects the autonomy of churches *and* courts. "The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady*, 140 S. Ct. at 2060 (cleaned up).

Other courts had already reached the same conclusion, concluding that the "constitutional protection" implicated by the church-autonomy doctrine "is not only a personal one," but also "a structural one 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 also Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n. 4 (3d Cir. 2018) (ministerial exception "is rooted in constitutional limits on judicial authority").

The categorical nature of prohibiting the state from enmeshing itself in religious controversies requires courts to determine whether the church-autonomy doctrine bars a case or part of a case before considering the merits of the plaintiff's claims. *See Bryce*, 289 F.3d at 654 n. 1 ("By resolving the question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement

in church matters."). In cases where it may apply, the church-autonomy doctrine has practical implications for discovery, the possible need to try disputed factual issues related to the church-autonomy doctrine, and interlocutory appeals. All of those issues have arisen in this case.

II. Orders denying the application of the church-autonomy doctrine should be immediately appealable under the collateral-order doctrine.

This appeal involves the precise sort of interlocutory order to which the collateral-order doctrine should apply. As this Court has explained, interlocutory appeal is appropriate where a pleadings-stage denial turns on a legal question and not a factual dispute. *Britt v. Garcia*, 457 F.3d 264, 271-72 (2d Cir. 2006). For this Court to have appellate jurisdiction over a collateral-order appeal, a district court's order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (citation omitted). The Panel misapplied these factors, as explained in Defendants-Appellants' petition. *Amici* here focus on the flaws in the Panel's analysis of the third factor.

With respect to this factor, this Court has stated: "Immediate review must further some particular value of a high order in support of the interest in avoiding trial. That is, it is not mere avoidance of a trial, but avoidance of a trial that would

imperil a substantial public interest." *Id.* at 150 (cleaned up). It is hard to imagine a higher order value than the vindication of the First Amendment. This Court has held as much, recently reaffirming that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020).

In addition, this Court has explained that collateral order appeals are often proper where the interests are as "important [as] the interests implicated in other kinds of cases in which interlocutory review is available." *United States v. Bescond*, 24 F.4th 759, 767-68 (2d Cir. 2021). And this Court has routinely concluded that far less weighty interests than First Amendment freedoms are eligible for interlocutory review. *See*, *e.g.*, *United States v. Pilcher*, 950 F.3d 39, 41 (2d Cir. 2020) (pseudonymous litigation); *Doe v. Lerner*, 688 F. App'x 49, 50 (2d Cir. 2017) (access to partially unsealed judicial proceedings); *Liberty Synergistics*, 718 F.3d at 151 (anti-SLAPP litigation). The First Amendment concerns here are certainly "no less important than the interests implicated in other kinds of cases in which interlocutory review is available." *Bescond*, 24 F.4th at 768.

Indeed, in recent years, courts have repeatedly entertained appeals from interlocutory orders that intrude upon the structural separation between internal church governance and the state. *See*, *e.g.*, *Roman Catholic Archdiocese of San*

Juan P.R. v. Feliciano, 140 S. Ct. 696 (2020) (interlocutory appeal in a church-autonomy case arising under 28 U.S.C. § 1258); *Demkovich*, 3 F.4th at 974 (resolving the ministerial exception on a certified interlocutory appeal); *Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68, 373 (5th Cir. 2018) (requirements of collateral-order doctrine met with regard to discovery order that infringed upon autonomy of religious body).

The treatment of interlocutory appeals from the denial of qualified immunity provides an instructive analog. *See Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1242 (10th Cir. 2010) ("The ministerial exception, like the broader church autonomy doctrine, can be likened to a government official's defense of qualified immunity." (cleaned up)); *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). Qualified immunity arises from the common law, *see*, *e.g.*, *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980) (recognizing that Section 1983 did not abolish common-law immunities), but has a structural justification arising from the separation of powers. *See McMellon v. United States*, 387 F.3d 329, 350 n.1 (4th Cir. 2004) (Wilkinson, J., concurring) ("Of course, qualified immunity is an example of 'reading into' a statute a degree of immunity in order to satisfy, among other things, separation-of-powers concerns."). Qualified immunity, if applicable, means that the defendant is not subject to suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). For this reason, qualified immunity is "effectively lost if

a case is erroneously permitted to go to trial." *Id.* So orders denying qualified immunity are immediately appealable under the collateral-order doctrine. *Id.* at 530.

Qualified immunity is not the only analog. A pretrial order denying a motion to dismiss an indictment on double-jeopardy grounds is another. *See Abney v. United States*, 431 U.S. 651, 659 (1977) (double-jeopardy issue was immediately appealable because defendant was "contesting the very authority of the Government to hale him into court to face trial on the charge against him"). The denial of Eleventh Amendment state immunity and foreign- sovereign immunity are two others. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (Eleventh Amendment); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (foreign-sovereign immunity). In all of these cases, courts recognize the harm simply being haled into court causes. Immediate appeal is necessary if courts are to unwind that harm before it is irreparable.

The same should be true of the church-autonomy doctrine. Indeed, the harm to the parties and the courts is much worse when the church-autonomy doctrine or ministerial exception is not applied. Not only does the defendant lose constitutional rights, like in the context of double jeopardy and sovereign immunity, but because the church-autonomy doctrine also protects against the government's intrusion into

quintessential religious questions, the constitutional harm occurs *because* of the judicial proceedings. And the harm inures to the religious entity and to the state because the court has entangled itself impermissibly with religion.

The Panel distinguishes the immunity analogy by stating that the denial of immunity can only be appealed under the collateral-order doctrine when the denial turns on a question of law. But that distinction goes to the scope of what can be appealed, not whether the failure to dismiss a case on the basis of the religious-autonomy doctrine should be appealable as a collateral order.

CONCLUSION AND REQUESTED RELIEF

The *Amici* urge this Court to grant rehearing *en banc* and conclude that it has jurisdiction under the collateral-order doctrine to hear this appeal.

Dated: September 7, 2022

s/ Matthew T. Nelson

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App P. 29(b)(4) and 2d Cir. L.R. 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App P. 32(f), this document contains 2,546 words.

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Dated: September 7, 2022

s/ Matthew T. Nelson
Matthew T. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Appellate CM/ECF system on September 7, 2022.

I certify that all participants in the case have been served a copy of the foregoing by the Appellate CM/ECF system or by other electronic means.

September 7, 2022 *s/ Matthew T. Nelson*
Matthew T. Nelson