No. 21-2683

In the United States Court of Appeals for the Seventh Circuit

JANAY E. GARRICK,

Plaintiff-Appellee,

v.

MOODY BIBLE INSTITUTE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:18-cv-00573—Hon. John Z. Lee

BRIEF OF *AMICI CURIAE* LAW & RELIGION SCHOLARS IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL OF THE DISTRICT COURT'S ORDER

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2683

Short Caption: Garrick v. Moody Bible Institute

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Thomas Berg, Elizabeth Clark, Richard W. Garnett, Douglas Laycock, Christopher Lund, Michael W. McConnell, Michael P. Moreland, Michael Paulsen, Robert J. Pushaw, Eugene Volokh

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gibson, Dunn & Crutcher LLP

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Attorney's Signature: /s/ Thomas G. Hungar Date: 8/7/2023

Attorney's Printed Name: Thomas G. Hungar

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Russell B. Balikian Date: 8/7/2023

Attorney's Printed Name: Russell B. Balikian

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal scholars who research, write, and teach about the First Amendment's Religion Clauses and the interplay of law and religion. *Amici* believe that a robust church-autonomy doctrine is critical to safeguarding the Clauses' guarantee that religious institutions may decide who performs religious functions, free from government interference. *Amici* write to explain that the church-autonomy doctrine is best understood as an immunity from suit that courts should resolve at the first opportunity—including on interlocutory appeal—rather than exposing religious organizations to costly litigation before concluding that the exception applied all along.

Amici are the following 10 legal scholars:

Berg, Thomas
Clark, Elizabeth
Garnett, Richard W.
Laycock, Douglas
Lund, Christopher
McConnell, Michael W.
Moreland, Michael P.
Paulsen, Michael
Pushaw, Robert J.
Volokh, Eugene

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties previously consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or any person other than *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

Professor Laycock argued *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Articles authored by Professor McConnell were cited in the *Our Lady of Guadalupe* and *Hosanna-Tabor* majority opinions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 n.9 (2020); *Hosanna-Tabor*, 565 U.S. at 183. All *Amici* have written extensively on matters relevant to this case; an overview of *Amici*'s relevant scholarship is included in the Appendix.

SUMMARY OF ARGUMENT

The church-autonomy doctrine "respects the authority of churches to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions' free from governmental interference." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981) (footnotes omitted)). By preventing civil courts from "becom[ing] entangled in essentially religious controversies," *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), the doctrine "mark[s] a boundary between two separate polities, the secular and the religious," and "acknowledg[es] the prerogatives of each in its

own sphere," *Korte*, 735 F.3d at 677. It therefore provides essential protections bearing on the administration, operation, and leadership of churches and other religious institutions. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952).

The church-autonomy doctrine would be little more than a paper tiger if a judicial decision rejecting its application could not be appealed until final judgment—after the intrusion and expense of discovery, depositions, and potentially even trial. At that point, a religious institution has already suffered substantial harm to its autonomy. The church-autonomy doctrine is thus best understood as an immunity analogous to those applicable to government officials, as at least two circuit courts (including this Court) have so held.

In determining whether a governmental official is entitled to immunity from suit, the Supreme Court has "been guided by the Constitution," "history," "common law," and "concerns of public policy, especially as illuminated by our history and the structure of our government." *Nixon v. Fitzgerald*, 457 U.S. 731, 747–48 (1982). The Court has held that the President, legislators, judges, prosecutors, and other government officials enjoy immunity from suit for their official actions because

of structural aspects of the Constitution, common-law practice and history, and practical concerns that government actors would shy from performing their duties with vigor if they could be dragged into court to defend meritless suits.

The justifications underlying the church-autonomy doctrine are directly analogous, and indeed more compelling. In addition to concerns for individual freedom, the church-autonomy doctrine is mandated by structural constitutional principles embodied in the Establishment Clause, a position that is fortified by the historical record and the common law in the United States. And without the doctrine, courts would be pressed to answer fundamentally religious questions that they are not qualified to answer, chilling religious expression and organization.

Because the church-autonomy doctrine functions as an immunity, its applicability must be resolved at the earliest possible stage of litigation. The Supreme Court has endorsed early resolution of official immunities, often at the pleadings stage, because "even such pretrial matters as discovery . . . 'can be peculiarly disruptive.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted). So too in cases implicating the church-autonomy doctrine. A religious organization's motion to dismiss invoking

the church-autonomy doctrine should be granted if, on the face of the complaint, the immunity applies. If applicability of the doctrine cannot be resolved at the pleadings stage, discovery may be taken, but it must be focused on gathering the information relevant to resolving the church-autonomy question on an early motion for summary judgment, as multiple courts have held. And the district court's denial of a religious organization's church-autonomy defense should be immediately appealable because the interests protected by that defense, like those protected by official-immunity defenses, are "effectively lost if a case is erroneously permitted to go to trial." *Id*.

ARGUMENT

I. The Church-Autonomy Doctrine Shields Religious Organizations And Government From Entanglement.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. The Supreme Court has interpreted these Religion Clauses to support a "general principle of church autonomy" that guarantees churches and religious institutions "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061. The doctrine

"mark[s] a boundary between two separate polities, the secular and the religious, and acknowledg[es] the prerogatives of each in its own sphere." *Korte*, 735 F.3d at 677. Although the doctrine does not grant religious organizations "a general immunity from secular laws," "it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. As the Supreme Court has explained, "[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." *Id.*

One component of the church-autonomy doctrine is the ministerial exception, which creates a bar to employment-discrimination claims brought by individuals who hold "important positions" within religious organizations. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. The ministerial exception reflects the reality that certain employees play an important "role in conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192. Government oversight of a religious organization's internal decision-making about such "important"

personnel would inject state regulation into essentially religious matters. As the Supreme Court articulated in *Hosanna-Tabor*, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. Thus, when a religious organization facing a discrimination suit establishes the necessary elements to invoke the ministerial exception, the litigation should be at an end. *See id.* at 196.

The church-autonomy doctrine extends beyond the ministerial exception but is rooted in the same principles. *See Our Lady of Guadalupe*, 140 S. Ct. at 2061. The "constitutional foundation" for the ministerial exception in *Hosanna-Tabor* "was the general principle of church autonomy," and a survey of the precedents from which the Court derived the exception reveals that "none was exclusively concerned with the selection or supervision of clergy." *Id.*; *see also Hosanna-Tabor*, 565 U.S. at 185–87. An important component of this doctrine is religious organizations' ability to "define their own doctrine, membership, organization, and internal requirements"—including the religious qualifications that apply to their members and employees—"without state interference." Michael

W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1464–65 (1990).

This Court has recognized that the Religion Clauses prevent a court from "tak[ing] sides on issues of religious doctrine" or "mak[ing] religious judgments." *McCarthy v. Fuller*, 714 F.3d 971, 975–76 (7th Cir. 2013). Among other issues, *McCarthy* involved dueling counterclaims of defamation and fraud over defendant Fuller's membership in a Roman Catholic religious order. *Id.* at 976–78. The district court ruled that a federal jury should decide the question of membership, but this Court reversed, holding that "submitting the question of Fuller's religious status to a jury would undermine the authority and autonomy of the Church." *Id.* at 978.

Similarly, in *Demkovich v. St. Andrew the Apostle Parish*, this Court noted that "the doctrine of 'church autonomy'" "teaches that avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance." 3 F.4th 968, 975 (7th Cir. 2021) (en banc). Thus, while "employment discrimination statutes serve 'undoubtedly important' societal interests," church autonomy "must prevail" when these statutes "'impinge on rights guaranteed by the Religion Clauses.'" *Id.* at 983 (quoting *Hosanna-Tabor*, 565 U.S. at 196;

NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979)); *see also Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994) ("the interest in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII"). These rights include not only immunity from liability, but also immunity from "an 'extensive inquiry' into religious law and practice" by a "civil court." *Young*, 21 F.3d at 187; *see also Milivojevich*, 426 U.S. at 713 ("religious controversies are not the proper subject of civil court inquiry").

These precedents establish two related principles: (1) the state has no authority over internal religious governance, and (2) secular judges should defer to ecclesiastical authorities regarding these internal religious issues. *See Demkovich*, 3 F.4th at 975. The church-autonomy doctrine thus prevents state entanglement with the internal governance of a religious organization by erecting a near-absolute bar, in the nature of a categorical immunity, to secular courts' interference.

II. The Church-Autonomy Doctrine Is An Immunity Similar To Immunities For Governmental Officials.

This Court has analogized the church-autonomy doctrine's bar on civil courts' interference with religious matters to the immunities enjoyed by government officials. *See McCarthy*, 714 F.3d at 975. Just as government officials are immune "from the travails of a trial and not just from an adverse judgment," religious institutions must be protected from "governmental intrusion into religious affairs" because "[a] secular court may not take sides on issues of religious doctrine." *Id.* at 975–76. Indeed, "where it applies, the church-autonomy principle operates as a complete immunity, or very nearly so." *Korte*, 735 F.3d at 678.

This Court's treatment of the church-autonomy doctrine as an immunity is sound. As explained below, the church-autonomy doctrine is built on foundations analogous to immunities enjoyed by government officials. It applies a constitutional structural limitation that is rooted in history, the common law, and constitutional text. And the doctrine reflects substantial concerns about the competency of secular courts to adjudicate religious disputes, which would lead to impermissible chilling of free-exercise rights and excessive judicial entanglement with religion. As

the Third Circuit has similarly concluded, the closely related ministerial exception "is akin to a government official's defense of qualified immunity." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006).

In light of the constitutional underpinnings of the church-autonomy doctrine, it rests on more secure foundations than common-law-based governmental immunities, and accordingly the protection it provides to defendants should be at least as substantial. Accordingly, just as immunities for government officials are typically raised as affirmative defenses and decided as threshold inquiries at the beginning of the case, the church-autonomy doctrine's "status as an affirmative defense makes some threshold inquiry" into the doctrine's application "necessary." *Demkovich*, 3 F.4th at 983 (citing *Hosanna-Tabor*, 565 U.S. at 195 n.4).

For this threshold inquiry, both official immunities and the church-autonomy doctrine bar any litigation beyond that necessary to adjudicate the immunity itself. The Supreme Court has made clear that official immunities provide "*immunity from suit* rather than a mere defense to liability." *Mitchell,* 472 U.S. at 526. The Court has correspondingly "'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson v. Callahan*, 555 U.S. 223, 232

(2009) (citation omitted). Like official immunity, the church-autonomy doctrine's protection is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. And because this Court considers a district court's denial of the church-autonomy-doctrine defense "closely akin to a denial of official immunity," interlocutory appeal of an order denying the doctrine's applicability is appropriate to fend off "the travails of a trial and not just from an adverse judgment," *McCarthy*, 714 F.3d at 975.

A. Immunities For Governmental Officials Are Based On The Constitution, History, The Common Law, And Practical Policy Concerns.

In determining whether a governmental official is entitled to immunity from suit, the Supreme Court has "been guided by the Constitution," "history," "common law," and "concerns of public policy, especially as illuminated by our history and the structure of our government." *Nixon*, 457 U.S. at 747–48. The Court has relied on these considerations in fashioning an absolute immunity from suit for "officials whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *accord Mother Goose Nursery Sch., Inc. v. Sendak*, 770 F.2d 668, 671–72 (7th Cir. 1985)

(considering historical, common law, and practical bases to establish a state attorney general's absolute immunity). For example, the Supreme Court has held that the Constitution's Speech or Debate Clause—which provides that, "for any Speech or Debate in either House" of Congress, a legislator "shall not be questioned in any other Place," U.S. Const. art. I, § 6, cl. 1—"is an absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The Clause embodies a "privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" that dates back to the sixteenth century. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). That privilege "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 377. And a lawsuit would "creat[e] a distraction and forc[e] Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503.

Similarly, "a former President . . . is entitled to absolute immunity from damages liability predicated on his official acts" as a "functio[n]" of

his "office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Nixon*, 457 U.S. at 749. "[T]here exists the greatest public interest in providing" the President with "'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (citation omitted). Indeed, "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32.

Judges, too, enjoy immunity "for acts done . . . in the exercise of their judicial functions," a principle that has "'a deep root in the common law.'" *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (citation omitted); *accord Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978). The Supreme Court has expressed concern that "[i]mposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Prosecutors also enjoy a "common-law immunity . . . based upon the same considerations that underlie the common-law immunit[y] of judges." *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976). According to the Court, they receive an immunity from civil suits regarding official actions because of the

"concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties," raising "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Officials who do not receive absolute immunity receive qualified immunity under the Supreme Court's precedents, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson*, 555 U.S. at 231 (quoting *Harlow*, 457 U.S. at 818). The Court has reasoned that this immunity is justified in light of, *inter alia*, "social costs[,] includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," *Harlow*, 457 U.S. at 814, as well as courts' relative inability to competently "second-gues[s]" certain official actions, *White v. Pauly*, 580 U.S. 73, 78 (2017) (per curiam).

All of these official immunities, including those resting on the common law, have been held to be "*immunit*[*ies*] *from suit*," not "mere defense[s] to liability." *Mitchell*, 472 U.S. at 526. Immunities generally

give rise to "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution" of the question whether the exception applies. *Id.* This entitlement is "effectively lost if a case is erroneously permitted to go to trial." *Id.* The Supreme Court has thus "'repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Courts must be "'alert'" to prevent harassing lawsuits, including by "'quickly terminat[ing]'" lawsuits at the motion-to-dismiss or summary-judgment stage when presented with a valid claim of immunity. *Harlow*, 457 U.S. at 808 (citation omitted).

Consistent with these principles, the Supreme Court has also recognized that immunity decisions are subject to interlocutory appellate review. Beginning with *Abney v. United States*, 431 U.S. 651 (1977)—a case involving immunity under the Double Jeopardy Clause—the Court has recognized that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525; *see*, *e.g.*,

Nixon, 457 U.S. at 742–43 (presidential immunity); *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (legislative immunity under the Speech or Debate Clause). The same is true for all qualified immunity appeals that turn on issues of law. *Mitchell*, 472 U.S. at 530.

Denials of official immunities are immediately appealable because they satisfy the collateral-order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (interlocutory appeals permitted from collateral orders "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action"). In particular, these immunities have been deemed "an entitlement not to stand trial under certain circumstances," *Mitchell*, 472 U.S. at 525, based on a "substantial public interest" in preserving a "value of a high order"—here, "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual," *Will v. Hallock*, 546 U.S. 345, 352–53 (2006).

B. The Church-Autonomy Doctrine Rests On Foundations Similar To—And Indeed Stronger Than—Those Undergirding Official Immunities.

The church-autonomy doctrine is rooted in justifications that are functionally similar to those underlying the various immunities for government officials: the Constitution, the common law and history, and practical policy concerns. The case for vigorously protecting the church-autonomy doctrine is even stronger, however, because unlike most official immunities, the church-autonomy doctrine is firmly grounded in two constitutional clauses that "work in unison" toward "the common goal" of protecting religious organizations' autonomy. *Demkovich*, 3 F.4th at 975 (citing *Our Lady of Guadalupe*, 140 S. Ct. at 2060).

1. ***Constitutional Text and Structure***—The church-autonomy doctrine is rooted in the text and structure of the Constitution. The Supreme Court has recognized that "the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (quotation marks omitted). "State 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." *Id.* Similarly, the ministerial exception not only protects the free-exercise rights of litigants invoking the defense, but also ensures that private lawsuits do not roll back the guarantee of disestablishment. *See* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012) (the "history of disestablishment [in the States] is persuasive evidence that the freedom of all religious institutions to choose their clergy, free of government interference, was understood to be part and parcel of disestablishment").

The church-autonomy doctrine thus is not just a substantive guarantee of individual rights, but also "a structural limitation imposed on the government by the Religion Clauses," *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (applying the ministerial exception); *see also Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) ("the [ministerial] exception is rooted in constitutional limits on judicial authority"), and therefore prohibits any "[s]tate interference" in the "sphere" of religious institutions' internal governance, *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *see also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial*

Review 94 (1980) (arguing that the Religion Clauses perform a "structural or separation of powers function"). The church-autonomy doctrine reflects the foundational "limit[s] [on] the role of civil courts in the resolution of religious controversies" that prevent courts from becoming "entangled in essentially religious controversies." *Milivojevich*, 426 U.S. at 709–10; *see also Demkovich*, 3 F.4th at 978 (noting that the doctrine bars "civil intrusion into, and excessive entanglement with, the religious sphere"). Indeed, allowing courts to decide questions of faith and doctrine "would risk judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2069; *see also* Helen M. Alvaré, *Church Autonomy After* Our Lady of Guadalupe School, 25 Tex. Rev. L. & Pol. 319, 325–26 (2021) ("courts are constitutionally incompetent" to resolve internal disputes over church operations and religious beliefs).

This structural view of the church-autonomy doctrine finds support dating back to the work of John Locke, which was an "indispensable part of the intellectual backdrop" for the founding generation. McConnell, *The Origins*, *supra*, at 1431; *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 354 (2002) (Locke's ideas "formed the basic theoretical ground for the separation of church

and state in America"). In Locke's view, "the whole jurisdiction of the magistrate reaches only to . . . civil concernments," and "all civil power, right, and dominion, is bounded and confined to . . . promoting these things," such that "it neither can nor ought in any manner to be extended to the salvation of souls." John Locke, *A Letter Concerning Toleration* (1689), *in* 5 The Founders' Constitution 52, 52 (Philip B. Kurland & Ralph Lerner eds., 1987). As Locke recognized, the "joining together of several members into [a] church-society" is "absolutely free and spontaneous" and thus the church has absolute authority in adopting rules for "admitting and excluding members." *Id.* at 53–54.

Founding-era sources further support this view. Early American leaders "embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor*, Religious Freedom, and Constitutional Structure*, 2011–12 Cato Sup. Ct. Rev. 307, 313. For example, when the Ursuline Sisters of New Orleans were concerned about the impact of the Louisiana Purchase on their school for orphaned girls, Thomas Jefferson assured them that "your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority." *Id.* at

312–13. Likewise, James Madison—"the leading architect of the religion clauses of the First Amendment," *Hosanna-Tabor*, 565 U.S. at 184 (citations omitted)—publicly rejected the idea that "the Civil Magistrate is a competent Judge of Religious Truth" and argued that "Religion" was "exempt from the authority" both of "Society at large" and "that of the Legislative Body." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 The Founder's Constitution 82, 82–83.

Madison emphasized this point with respect to religious organizations' selection of their leaders: "[t]he 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs' . . . prevent[s] the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63–64 (1909)). Any attempt by the state to control "'the election and removal of [a] Minister,'" Madison believed, thus "'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and

religious functions.'" *Id.* at 184–85 (emphasis omitted) (quoting 22 Annals of Cong. 982–83 (1811)).

These principles were confirmed in practice. When the Vatican sent a proposal to Congress in 1783, seeking the approval of a Bishop-Apostolic for America, Benjamin Franklin, who received the proposal as ambassador to France, replied that "'it would be absolutely useless to send it to the congress, which . . . can not . . . intervene in the ecclesiastical affairs of any sect.'" Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011) (citation omitted). Congress, in turn, responded that "it had '"no authority to permit or refuse"' the appointment, and the Pope could appoint whomever he wished because '"the subject . . . being purely spiritual . . . is without the jurisdiction and powers of Congress."'" *Id.* (citation omitted). As President, Madison similarly vetoed an act incorporating an Episcopal church in the District of Columbia, explaining to Congress that "the statute would violate the Establishment Clause insofar as it 'establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same.'"

ACLU v. Capitol Square Rev. & Advisory Bd., 243 F.3d 289, 294 (6th Cir. 2001) (en banc) (quoting 11 Annals of Cong. 982–83 (1811)); *see also* Garnett & Robinson, *supra*, at 312.

2. *Common Law and History*—The church-autonomy doctrine also has deep roots in the common law and history. The first Supreme Court case to apply the church-autonomy doctrine did not rely on the Religion Clauses. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), involved a dispute between two factions of a Presbyterian church that had split into "distinct bodies" over the issue of slavery, each claiming to be the real "church," *id.* at 681. The highest governing body of the Presbyterian church determined that the anti-slavery faction was the authorized church. The Supreme Court refused to disturb that ruling, explaining that "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" is "a matter over which the civil courts exercise no jurisdiction." *Id.* at 733. By "inquir[ing] into" such matters, the "civil courts" "would deprive [religious] bodies of the right of construing their own church laws." *Id.* Thus, based on "a broad and sound view of the relations of church and state under our system of

laws," the Court held "that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

3. ***Practical Concerns***—The church-autonomy doctrine also reflects practical concerns similar to those presented by other immunity doctrines. "[T]he judicial process is singularly ill equipped to resolve" issues of religious doctrine, which are "not within the judicial function and judicial competence." *Thomas v. Rev. Bd.*, 450 U.S. 707, 715–16 (1981). That is not to say that courts and juries lack "technical or intellectual capacity." Berg et al., *supra*, at 176. Rather, the issue is the costs of imposing liability for religious decisions and the very high risk of error in judicial (or jury) evaluation of those decisions. "[M]atters of faith" may not be strictly "rational or measurable by objective criteria" of the sort that courts and juries are used to applying. *Milivojevich*, 426 U.S. at 714–15. And "[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical

disputes." *Id.* at 714 n.8; *see also Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation.").

This is especially true in the context of a church's employment decisions. To pass judgment on a religious institution's selection of its leadership and membership would require a "civil factfinder [to] si[t] in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). For example, church leadership decisions may be made by reference to criteria that civil tribunals are "ill-equipped" to second-guess—consider, for example, the Biblical accounts of "a stammering Moses [being] chosen to lead the people, and a scrawny David to slay a giant" due to their faith. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017); *accord Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (observing that disputes concerning ministers present "issue[s] that [courts] cannot resolve intelligently"); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 850 (2012) (judges and juries "cannot know what makes a good minister in each of the enormously diverse array of religions in the United States"). As this Court recognized in response to

a church organist's Title VII claims, "[d]iscerning doctrine from discrimination is no task for a judge or jury." *Demkovich*, 3 F.4th at 981. "These questions and others like them cannot be answered without infringing upon a religious organization's rights." *Id.*

The same principles also apply to decisions concerning membership in a religious organization. As the Supreme Court has explained in an analogous context, "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)—a principle that applies "with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals," *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring); *see also Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 882(1990) (noting that "Free Exercise Clause concerns" may "reinforc[e]" the constitutional right to freedom of association). As this Court has recognized, it is difficult for a religious organization "to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that

conduct." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006).

Moreover, even a brief inquiry into church governance or doctrine can chill the free exercise of religion. "If civil courts undertake to resolve such controversies . . . , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). The Supreme Court has recognized the "significant burden" that religious organizations face if made to "predict which of [their] activities a secular court will consider religious." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). Beyond any actual penalties imposed by the courts, "[f]ear of potential liability" has a profound chilling effect on "the way an organization carrie[s] out . . . its religious mission." *Id.*; *see also Demkovich*, 3 F.4th at 981 (noting that judicial interference with religious employment "raises the concern of chilling religious-based speech in the religious workplace"). That fear is compounded by the possibility that a religious institution could incur hundreds of thousands of dollars in attorneys' fees without any possibility of reimbursement even if

successful on the merits, while potentially facing the threat of paying the plaintiff's attorneys' fees if it loses. *See* Garnett & Robinson, *supra*, at 329 (noting the financial burden and organizational "distraction" of enduring "extensive and costly litigation"). That chilling effect is one of the "dangers that the First Amendment was designed to guard against," making it essential to protect "religious organizations['] autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring).

III. Application Of The Church-Autonomy Doctrine Should Be Determined Early, And Denial Of The Defense Should Be Immediately Appealable.

Denials of motions to dismiss or for summary judgment based on the church-autonomy doctrine are fit for interlocutory appeal under the collateral order doctrine for the same reasons courts have recognized for denials of official immunities. As noted above, an immunity is more "than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Rather, "[t]he entitlement is an *immunity from suit*." *Id.* The purpose of these immunities is to prevent litigation of the claims that the immunities cover. The Supreme Court thus "'repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in

litigation.'" *Pearson*, 555 U.S. at 232 (citation omitted). Federal courts must be "'alert'" to prevent harassing lawsuits, including by "'quickly terminat[ing]'" lawsuits at either the motion-to-dismiss or summary-judgment stage when presented with a valid claim of immunity. *Harlow*, 457 U.S. at 808 (citation omitted).

The same is true *a fortiori* in cases implicating the church-autonomy doctrine. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1191 (2014) (ministerial exception is a "right not to face litigation over the choice of one's clergy," not just a "defense to liability"). As explained, the very purpose of the church-autonomy doctrine is to prevent excessive judicial entanglement with religion and to preserve the independence of religious institutions protected by the First Amendment's Religion Clauses. *See Hosanna-Tabor*, 565 U.S. at 188–89; *supra* at 5–9.

Absent early enforcement of the church-autonomy doctrine, including through appellate review when necessary, a religious institution suffers the very harm the doctrine aims to prevent—intrusive and burdensome secular scrutiny of its internal governance—by the time the case goes to trial and final judgment. At that point, the court of appeals

cannot put the cat back in the bag; "the district court's decision is effectively unreviewable," *Mitchell*, 472 U.S. at 527, because it has already denied the religious institution core aspects of the protections intended to be afforded by the church-autonomy doctrine. As with recognized official immunities, the church-autonomy doctrine is "effectively lost if a case is erroneously permitted to go to trial," *id.* at 526, because the costs, burdens, and intrusions of the civil litigation process will already have deprived the religious institution of its right to be free from government-compelled interference with its ecclesiastical autonomy and will have produced the very chilling of religious activity and excessive entanglement that the church-autonomy doctrine is intended to prevent. And as with official immunities, the only way to give full effect to the church-autonomy doctrine is to determine its application "at the earliest possible stage in litigation" through a district-court ruling that is subject to interlocutory appellate review. *Hunter*, 502 U.S. at 227–28 ("Immunity ordinarily should be decided by the court long before trial.").

One factor the Supreme Court has cited in holding that decisions denying official immunity are immediately appealable is that "substantial social costs" like "harassing litigation" may "unduly inhibit officials

in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The same is true for the church-autonomy doctrine: Litigation and the burdens of suit risk violating the First Amendment's bar on judicial meddling in the church's "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Indeed, "[f]orcing the parties through years of expensive litigation, where churches may weary of the diversion of resources away from mission, is precisely the kind of equitable consideration, coupled with the importance of the threshold constitutional question, that warrants an immediate appeal." Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) (footnote omitted).

If anything, there are even stronger reasons to permit immediate appellate review in church-autonomy-doctrine cases: Not only will the right at issue "have been lost, probably irreparably," by the time of final judgment, *Cohen*, 337 U.S. at 546, but "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.

Ct. 63, 67 (2020) (per curiam) (citation omitted). *See Belya v. Kapral*, 59 F.4th 570, 578–79 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc) ("Denial of a church autonomy defense should be an appealable collateral order in light of its strong resemblance to qualified immunity."). Certainly there is no basis for treating a First Amendment right as "fundamental" as the "right to religious liberty" less favorably than official immunities. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1901 (2021) (Alito, J., concurring in the judgment).

Contrary to these principles and this Court's precedent, two other courts of appeals recently issued decisions rejecting interlocutory appeals from denials of the ministerial-exception defense. *See Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1047 (10th Cir. 2022); *Belya v. Kapral*, 45 F.4th 621, 628 (2d Cir. 2022). Both courts rested their conclusion on the erroneous premise that, even where applicable, the ministerial exception "provides religious associations neither an immunity from discovery nor an immunity from trial," *Belya*, 45 F.4th at 633; *accord Tucker*, 36 F.4th at 1038–39 (declining to find that the ministerial exception, like official immunities, provides an "'immunity from suit'" (citation omitted)). That premise is incompatible with this Court's repeated

recognition that "where it applies, the church-autonomy principle operates as a complete immunity, or very nearly so," *Korte*, 735 F.3d at 678, and that, just as government officials are immune "from the travails of a trial and not just from an adverse judgment," religious institutions must be protected from "governmental intrusion into religious affairs," *McCarthy*, 714 F.3d at 975–76. Moreover, those decisions ignore the inevitable result of intrusive discovery and trial by a civil court—the "interfer[ence] with the internal governance of [a] church" that the Religion Clauses forbid, *Hosanna-Tabor*, 565 U.S. at 188.

Practically speaking, the church-autonomy doctrine's nature as a protection against standing trial means that it should be enforced as soon as a court can determine that the immunity applies as a matter of law based on the allegations in the complaint. This is fully consistent with *Hosanna-Tabor*'s statement that, as a procedural matter, the church-autonomy doctrine's ministerial exception "operates as an affirmative defense" rather than "a jurisdictional bar." 565 U.S. at 195 n.4. The same is true of most official immunities, which typically are not jurisdictional, but still must be applied "'at the earliest possible stage in litigation.'" *Pearson*, 555 U.S. at 231–32 (citation omitted); *see Tucker v. Faith Bible*

Chapel Int'l, 53 F.4th 620, 626 (10th Cir. 2022) (Bacharach, J., dissenting from denial of rehearing en banc) ("[E]ven when affirmative defenses aren't jurisdictional in district court, they may trigger the collateral-order doctrine.").

In cases where the church-autonomy doctrine's applicability cannot be resolved at the pleading stage, discovery should initially be limited only to the facts necessary to resolving that question so that the exception's applicability can be determined as promptly as possible through a motion for summary judgment focused on that issue. The Supreme Court has blessed this approach already in the context of qualified-immunity defenses that hinge on factual questions, instructing district courts to exercise their discovery discretion "in a way that protects the substance of the qualified immunity defense." *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998). And the consequences of adopting a more liberal approach to the church-autonomy doctrine are no less grave: "civil intrusion upon, and excessive entanglement with, the religious realm." *Demkovich*, 3 F.4th at 985; *see also id.* at 983 ("the depositions of fellow ministers" would be "onerous").

Treating the denial of a church-autonomy-doctrine defense as an immediately reviewable collateral order would comport with this Court's precedent in *McCarthy*, where the Court permitted an interlocutory appeal to resolve a challenge to a "secular" court's authority under the First Amendment to "reexamine" a church's judgment about its membership. 714 F.3d at 974. And as Defendant-Appellant explains in its Jurisdictional Memorandum, many other courts recognize that interlocutory appeals are appropriate for denials of the church-autonomy doctrine. *See* Jurisdictional Mem., App. Dkt. 5 at 12–13 n.10 (collecting cases). There is no basis for treating church-autonomy cases any less favorably than other immunity-based cases.

CONCLUSION

For the foregoing reasons, the Court has jurisdiction over this interlocutory appeal.

Dated: August 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29 because it contains 6,997 words, as determined by the word count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2023, an electronic copy of the foregoing Brief of *Amici Curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's CM/ECF system.

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