21-1498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

HILARION KAPRAL, AKA METROPOLITAN HILARION, NICHOLAS OLKHOVSKIY, VICTOR POTAPOV, SERGE LUKIANOV, DAVID STRAUT, ALEXANDRE ANTCHOUTINE, GEORGE TEMIDIS, SERAFIM GAN, BORIS DMITRIEFF, EASTERN AMERICAN DIOCESE OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, MARK MANCUSO,

Defendants-Appellants.

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

DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Father Alexander Belya's response brief confirms that his lawsuit strikes at the heart of church-state separation. He does not dispute that he is a priest suing over his former Church's disciplinary communication about whether to elevate him to a bishopric. Rather than appeal the allegations in that communication within the Church, Father Alexander left the Church, joined the Greek Orthodox Church, and brought this lawsuit against the Church—all in the midst of an ongoing schism between the Russian and Greek Orthodox Churches.[1] Allowing Father Alexander to use the federal courts to continue a dispute over his place in the Church's hierarchy will necessarily lead to unconstitutional conflict between church and state.

Father Alexander attempts to avoid this inevitability by attacking this Court's jurisdiction over this appeal. But his arguments cannot overcome a straightforward analysis of the *Cohen* factors and clear precedent showing how proceeding with this case would lead to irreparable harm to both First Amendment rights and structural First Amendment limitations on judicial power. Allowing this case to proceed will entangle federal courts in second-guessing a Church disciplinary proceeding, probing internal Synod deliberations, and deposing the senior-most hierarchs of the Church outside Russia. And accepting Father

[1] *See* Statement of the Holy Synod of the Russian Orthodox Church (Oct. 17, 2019), https://perma.cc/TFY3-2DC7.

Alexander's arguments would conflict with this Circuit's precedent, split with two circuits and four state high courts regarding interlocutory appeal, depart from universally approved discovery procedure in church autonomy cases, and reject longstanding doctrine on the merits of church autonomy defenses. This Court should decline the invitation to plunge the federal courts into a religious thicket.

ARGUMENT

I. Father Alexander's claims are barred by the church autonomy doctrine.

The church autonomy doctrine bars defamation claims that would require the government to "interfere[]" in "the right of churches … to decide matters 'of faith and doctrine.'" Br.13-14 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)). Father Alexander doesn't dispute the foundations of this defense, namely, that he is a priest suing his former church over church deliberations regarding his failed appointment to higher clerical office.

Instead, Father Alexander attempts to distinguish his claims as relating to "secular actions." Resp.48. But he offers this Court no way to avoid entanglement in "church discipline [and] ecclesiastical government," matters "at the core of ecclesiastical concern." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-15 (1976). The judicial interference required by this case is clear from the complaint and will worsen if—as the court ordered below—the case proceeds to plenary

merits discovery. No resort to neutral principles will avoid that entanglement.

A. Father Alexander's claims require judicial interference in matters at the core of ecclesiastical concern.

Even accepting all of his factual allegations, Father Alexander's claims require the courts' interference in "strictly ecclesiastical matters" that are inherently beyond "judicial []competence." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017). Those matters include church discipline, church polity, doctrinal questions, and clergy appointment and election. Br.21-29; *see also* Amicus Br. of Roman Catholic Archdiocese of N.Y., et al., at 7-16.

Father Alexander does not dispute that the district court would be required to wade into these matters if it adjudicated his claims. He never disputes, for example, that the Clergy Letter is part of a church disciplinary proceeding, Br.21-24, or that his claim for damages cannot be reviewed by a civil court, Br.28-29. The closest he comes is to concede, as he must, that he is not seeking reinstatement as a ROCOR priest, and to simply assert that his complaint does not implicate "doctrinal discussions." Resp.52; *see Hosanna-Tabor v. EEOC*, 565 U.S. 171, 194 (2012) (claims were barred because damages "would operate as a penalty on the Church for terminating an unwanted minister"). But he ignores that resolution of his claims on their face would require evaluation of both his alleged election as Bishop and the Church's religious reasons for

initiating the Clergy Letter and an internal investigation in the first place. Br.25-27.

Instead, he remarkably claims that—as a priest suing a church for its deliberations over not making him a bishop—it is the *Church* that has "inject[ed] religious matters into" the case. Resp.47 n.15. Not so. First, the religious issues are on the face of his complaint, which describes the religious context and reasoning for the Clergy Letter. *See* JA.88-94.[2] The complaint quotes the portions of the Clergy Letter questioning an "episcopal election," the religious reasons to suspect that Church documents "were drawn up in an irregular manner," the "many serious complaints" against Father Alexander, and the request for an internal investigation and suspension of Father Alexander's "clerical functions." JA.95-96. The Church did not somehow "inject" religion where it was otherwise missing.

Second, the Church did not cite matters "outside" the complaint not relied upon by Father Alexander. Resp.46. It cited only to the Clergy Letter, which—as he himself has said—is the "heart" of his claims and

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[2] Father Alexander argues that the motion to dismiss only encompassed the original complaint. Resp.25 & n.7. That's not what he said before. *See* Mot. to Dismiss, ECF 22-2 at 2 & n.1 (relying on amended complaint); Opp. to Mot. for Stay, ECF 66 at 2 (same). It is also false. The district court considered the Church's arguments against both the amended and original complaints, JA.35-37, 65, 73, 82-83. It rejected them and ordered the Church to answer the amended complaint. JA.84. The amended complaint is squarely before this Court.

thus was incorporated by reference in the complaint. Br.26. "Where a document is referenced in a complaint, 'the documents control and this Court need not accept as true the allegations in the amended complaint.'" *Tongue v. Sanofi*, 816 F.3d 199, 206 n.6 (2d Cir. 2016). The omitted portions of the Clergy Letter do not remotely change the nature of this dispute; they simply illuminate the "many serious complaints" against Father Alexander and their relationship to Church doctrine and governance. JA.20.

B. The discovery process will itself violate church autonomy.

Resolution of Father Alexander's claims would require impermissible discovery into internal church matters. Br.30-32. Father Alexander's only response is that specific production has not *yet* been ordered. Resp.58. But the district court *did* order plenary merits discovery, rejecting the Church's request to limit discovery to resolution of the church autonomy defenses. JA.147-48, Dkt. 62 at 2 (requesting discovery be limited to documents "demonstrating Fr. Alexander's ministerial status and [those] described in the complaint"); *see* Br.30; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871) ("It belongs not to the civil power to enter into or review the proceedings of a spiritual court."). Father Alexander does not explain how the district court could adjudicate the merits of his claims without deposing church leadership on internal religious disputes or delving into internal church documents. Br.32. Nor does he address the extensive caselaw warning against the irreparable

harm of merits discovery before resolution of church autonomy defenses, broadly dismissing it as "cases with different facts and legal claims." Resp.58. But as this Court explained in *Fratello*, it is "appropriate[]" to "order[] discovery limited to" First Amendment defenses. 863 F.3d at 198. *See also infra* Part IV.

C. The neutral principles doctrine does not apply here.

The court cannot apply neutral principles of secular law to resolve Father Alexander's dispute over the Clergy Letter without interfering in internal Church discipline and other ecclesiastical matters. Br.33-35; *see also* Amicus Br. of Fourteen States at 8-12 (explaining why neutral principles do not apply here).

1. There are no "neutral principles" to resolve disputes of church discipline, policy, and leadership selection.

Father Alexander claims that the district court could "plausibly" decide the case by ruling on the church's "secular actions." Resp.48. But as explained above, Part I.A., courts cannot do so without judging the religious statements regarding Father Alexander's fitness for ministry and prying into internal religious communications.

Nor does Father Alexander offer any precedent supporting his claims. None of his cited cases involve, as here, investigating or overturning a church's disciplinary evaluation of its own senior hierarchy. In *Moon v. Moon*, for example, the law the Court applied was the statute of limitations. 833 F. App'x 876, 880 (2d Cir. 2020). The application of that

law *prevented* the Court from evaluating potentially defamatory statements.[3] Father Alexander points to a hypothetical in *Rweyemamu v. Cote* suggesting clergy could potentially allege fraud against church employers. Resp.49 (citing 520 F.3d 198, 208 (2d Cir. 2008)). Perhaps—but not, as *Rweyemamu* notes, where the claim, as here, requires a court to second-guess "the circumstances of [a priest's] discharge," which "[would] plunge[] an inquisitor into a maelstrom of Church policy, administration, and governance." 520 F.3d at 209 (quoting *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989)).

Though Father Alexander claims that dismissing the complaint would result in a circuit split, none of the cases he cites allow a court to evaluate the kind of statements made in the Clergy Letter about church discipline, polity, and procedure.[4] Indeed, a ruling in his favor would conflict with

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[3] *See also DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (employment dispute between math teacher and parochial high school).

[4] *See McRaney v. N. Am. Mission Bd.*, 966 F.3d 346, 350 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2852 (2021) (claim challenged "false statements that were not religious in nature"); *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) ("Personnel decisions are protected from civil court interference where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical law."), *abrogated by Hosanna-Tabor*, 565 U.S. at 194 (church personnel decision regarding minister not just protected "only when it is made for a religious reason"); *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605, 608 (S.C. 2013) (statements were reviewable because they were "independent of religious doctrine or governance");

cases he cites, not to mention those cited in the Church's opening brief that he fails to distinguish.[5] To be sure, some of his cases were controversial in their own right. *See McRaney*, 980 F.3d 1066 (5th Cir. 2020) (eight judges joining two opinions dissenting from denial of rehearing *en banc*). But none come close to this case, where the Church's religious reasons for its actions are evident on the face of the complaint, as is the necessary interference with church elections, selection of ministers, and governance.

Nor does it make a difference that church officials allegedly made some of the statements from the letter public in communications to their church communities. Resp.52. The First Amendment protects the

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Marshall v. Munro, 845 P.2d 424, 427 (Alaska 1993) ("where issues of ecclesiastical doctrine, faith, creed or internal discipline of an organized church are concerned, the secular courts should abstain").

[5] *Compare Ogle v. Hocker*, 279 F. App'x 391, 396 (6th Cir. 2008) (reviewing defamation claim involving "comments outside of the religious practice context" and which "were not related to employment or polity issues"); *with Ogle v. Church of God*, 153 F. App'x 371, 376 (6th Cir. 2005) (holding defamation claim involving same allegations centering on "church disciplinary proceedings" fell "squarely" within First Amendment protection); *Paul v. Watchtower Bible & Tract Soc'y of N.Y.*, 819 F.2d 875, 883, 878 & n.1 (9th Cir. 1987) (challenge to church practice of shunning barred by Free Exercise Clause because "[c]hurches are afforded great latitude when they impose discipline on members"; ecclesiastical abstention further bars claims contesting "some decision relating to government of the religious polity," such as that plaintiff was "wrongfully" excluded as a matter of church law or policy); Br.18-19 (additional cases).

communication between a church and its flock. Br.2, 26-27. In a church with an international scope like ROCOR's, that can include media outlets serving the Church community. JA.97-98 (church social media and Russian Orthodox outlets); *see In re Diocese of Lubbock*, 624 S.W.3d 506, 509 (Tex. 2021) (press release); Archdiocese of N.Y. Br.11-14 (listing examples); Amicus Br. of Jewish Coalition for Religious Liberty at 5-9.

Father Alexander also threatens it will eviscerate neutral principles doctrine to find that "communication about the status and character of a church's ministers" is protected. It would do no such thing. Neutral principles "apply to church-property disputes after a church split, when the two sides both assert rightful ecclesiastical authority"; the doctrine has no application in "defamation actions brought by a minister … against the church" where "there is no doubt about what entity exercises ecclesiastical authority." Amicus Br. of Professors McConnell & Laycock at 36; *see also Merkos L'Inyonei Chinuch v. Otsar Sifrei Lubavitch*, 312 F.3d 94, 100 (2d Cir. 2002) (using secular indicators of corporate entity to determine copyright ownership). Ruling for the Church here would leave the doctrine as it currently stands: neutral principles in certain ownership disputes, church autonomy in questions of church discipline, leadership, and policy.

2. The specific claims at issue here involve determinations of church policy and procedure.

Father Alexander argues that he can disprove the Church's alleged accusations by invoking "civil- and criminal-law definitions" of those accusations without regard to religion. Resp.53. But that law requires determinations of church authorization and authority. *See* Br.27 n.6. Assuming New York law applies, for example, the crime of forgery includes passing as "genuine" a "written instrument fully drawn with respect to every essential feature thereof," when the "ostensible maker" did not "authorize the making or drawing thereof." N.Y. Penal Law §§ 170.00, 170.05. Whether "every essential feature" of the Church documents is "genuine" and whether they were "authorized" by Church authority involves answering religious questions for determination by those Church authorities, not civil courts. Br.27; *see Watson*, 80 U.S. at 727 ("the legal tribunals must accept such [ecclesiastical] decisions as final"). It is for this reason that Father Alexander's attempt to distinguish *Diocese of Lubbock* fails. Br.18, 34-35; Resp.53. There, the church's statements about the plaintiff were based on the church's interpretation of its own law. 624 S.W.3d at 514. The court could not override that determination, and the same is true here. The church autonomy doctrine exists to allow courts to remove themselves from internal church disputes like this one.

II. Father Alexander's claims are barred by the ministerial exception.

The ministerial exception bars Father Alexander's claims because he is a minister, the defendants are undisputedly a church and its senior hierarchy, and he is suing over the Church's disciplinary communications. Br.35.

Father Alexander devotes just a few pages to the merits of the ministerial exception, mostly to re-argue that it is premature and more factual development is needed. His arguments are unsupported by precedent and would turn every ministerial dispute into a pleading game. So he asks this Court to simply avoid ruling on the ministerial exception entirely, but his jurisdictional arguments fare no better.

A. This Court should reach the ministerial exception.

Father Alexander's primary argument is procedural: he claims the ministerial exception wasn't properly raised below and thus cannot be reached on appeal. But that's wrong for three reasons.

First, the Church asserted church autonomy defenses. The ministerial exception is just one "component" of "the general principle of church autonomy," and it is built on the same "constitutional foundation" as other church autonomy cases. *Our Lady*, 140 S. Ct. at 2060-61. The same core rule animates all the doctrine's applications: "independence in matters of faith and doctrine and in closely linked matters of internal government." *Id.* Thus, the same "general principle" that prevents courts

from adjudicating a church's religious beliefs *also* prevents adjudicating "who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188; *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (explaining that the ministerial exception is part of "the broader church autonomy doctrine"); *Bryce v. Episcopal Church*, 289 F.3d 648, 658 n.2 (10th Cir. 2002) (same).

As applicable here, in the nine pages of briefing it was permitted to argue *all* its defenses, the Church undisputedly raised the church autonomy doctrine's protection against judicial involvement in religious leadership disputes. The Church argued that "dismissal is warranted" under the First Amendment because "Plaintiff's claims … involve an ecclesiastical dispute" over disciplinary proceedings about "Plaintiff's nomination, election, and confirmation to Bishop," a "high ranking position in the ROCOR's Clergy." JA.16-17; JA.36 (same). And the Church cited to caselaw for the proposition that a minister's defamation claim against his religious employer was barred "because inquiring into religious reasoning behind dismissal of [a] spiritual leader is not proper for a civil court." JA.17 (citing *Goodman v. Temple Shir Ami*, 712 So.2d 775 (Fla. Ct. App. 1998), which relied on ministerial exception rulings from the Seventh and D.C. Circuits).

While the Church didn't use the magic words "ministerial exception" in its initial motion to dismiss, it didn't have to. *Our Lady*, 140 S. Ct. at 2060 (noting the term is just a "label"). The district court was fairly

apprised of the Church's position that "[h]ow Defendants elect a Bishop candidate is not for this Court," JA.29, and even cited *Hosanna-Tabor*. JA.76. Further, when the Church had more space to explicate its defenses in a Rule 59(e) motion for reconsideration, the district court acknowledged that "the controlling legal doctrines at issue" were "the ministerial exception and the doctrine of ecclesiastical abstention," but said they were both "meritless." JA.115, 117.

Thus, the "substance" of the constitutional protection against judicial interference in religious leadership disputes was sufficiently raised and passed upon to be preserved for review. *Rweyemamu*, 520 F.3d at 203; *see also Russell v. Bd. of Plumbing Exam'rs*, 1 F. App'x 38, 41 (2d Cir. 2001) (even where an issue "was clearly not pressed below," a district court's engagement with it in a footnote, "while scanty," preserved the issue for appeal).

Second, the district court should have, and this Court must, resolve whether the ministerial exception applies to Father Alexander's claims. As the Third, Sixth, and Seventh Circuits have explained, courts have an independent interest in determining whether the ministerial exception applies. That is because "[t]his constitutional protection is not only a personal one; it is 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); *accord Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d

113, 118 n.4 (3d Cir. 2018) (the ministerial exception sets "constitutional limits on judicial authority"). And because "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses," and not merely a personal right, it "can never be waived" by a private party. *Conlon*, 777 F.3d at 836; *accord Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) ("[T]he ministerial exception … is not subject to waiver."). Indeed, a "federal court will not allow itself to get dragged into a religious controversy even if a religious organization *wants* it dragged in." *Id.* (emphasis added); States' Br.3 (government has a "strong interest" in avoiding "excessively entangl[ing] courts in religious leadership disputes").

For this reason, the Sixth Circuit in *EEOC v. Harris Funeral Homes* resolved a ministerial exception defense that was only raised by amici and that the defendant-employer had both forfeited and expressly waived. 884 F.3d 560, 581 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). And the Third Circuit has twice affirmed district court decisions that raised the exception *sua sponte*. *Sixth Mount Zion*, 903 F.3d at 118 n.4; *Bethea v. Nation of Islam*, 248 F. App'x 331, 333 (3d Cir. 2007). This Court likewise has an "interest independent of party preference" to determine whether the ministerial exception applies to Father Alexander's claims—and if it does, to refrain from being dragged into the dispute at all. *Tomic*, 442 F.3d at 1042.

Father Alexander's response is to argue that waiver is different from forfeiture. That misses the point: regardless of how a private party may raise or address a personal right, the structural limitation on judicial power means that courts are "bound to stay out" of such religious leadership disputes. *Our Lady*, 140 S. Ct. at 2060. In any event, the standard for considering a waived issue is *higher* than considering a forfeited one, *Doe v. Trump Corp.*, 6 F.4th 400, 410 (2d Cir. 2021), so the distinction only cuts against Father Alexander.

Third, this Court's "forfeiture rule is prudential" and leaves "broad discretion to consider issues not raised initially in the District Court." *John Wiley & Sons v. DRK Photo*, 882 F.3d 411 n.12 (2d Cir. 2018) (cleaned up). This Court is "most likely" to exercise that discretion either to "avoid manifest injustice" *or* "where the issue is purely legal and there is no need for additional fact-finding." *Davis v. Shah*, 821 F.3d 231, 246 (2d Cir. 2016). Here, both are true. Allowing the case to proceed to merits discovery before resolution of the ministerial exception would cause a "substantial miscarriage of justice." *Presbyterian Church v. Edwards*, 566 S.W.3d 175, 178 (Ky. 2018). And application of the ministerial exception here is "a pure question of law." *Conlon*, 777 F.3d at 833. While some ministerial exception cases can require factual development into whether the plaintiff is a "minister," *Fratello*, or the religious defendant a "ministry," *Penn*, both are undisputed here. The only question that remains is purely legal: whether Father Alexander's defamation claims

are barred. *See also* Amicus Br. of Constitutional Law Scholars at 28 (explaining that ministerial exception issues are both purely legal and straightforward).

Further, the "assertion of a claim earlier in the proceedings, as well as a lack of prejudice to the opposing party, may also weigh in favor of considering new claims," *Davis*, 821 F.3d at 246, especially where the claim "involves the First Amendment," *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90-91 (2d Cir. 2004). The Church repeatedly raised the ministerial exception below and Father Alexander repeatedly responded. Dkt. 51-1 at 7-12 (reconsideration motion); Dkt. 53 at 6-10 (opposition); Dkt. 54 at 1-2 (motion to certify appeal), Dkt. 55 at 2-3 (opposition); Dkt. 62 (motion for stay); Dkt. 63 at 2-4 (opposition); *see also* JA.137 (Church's Answer); *Davis*, 821 F.3d at 246 (considering issue raised in answer and motion). This Court thus has sufficient basis to exercise its discretion and decide the issue.[6]

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[6] Father Alexander argues that the Church's Rule 59(e) motion was actually an untimely reconsideration motion. Resp.38-39. Not so. By its own text, the local 14-day deadline doesn't apply when "otherwise provided by … rule (such as Fed. R. Civ. P. … 59)." S.D.N.Y. R. 6.3. Here, Rule 59 *does* provide: "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). And "judgment" includes "any order from which an appeal lies." Fed. R. Civ. P. 54(a). Thus, this Court has repeatedly held that motions to reconsider appealable interlocutory orders are properly brought under Rule 59(e). *See, e.g.*, *Lichtenberg v. Besicorp Grp.*, 204 F.3d 397, 400-01 (2d Cir. 2000).

Thus, and as elaborated below, the district court plainly erred in treating the Church's ministerial exception defense as "meritless," and merits proceedings will cause substantial First Amendment harm.

B. The ministerial exception bars Father Alexander's claims.

Father Alexander's claim is squarely foreclosed by the ministerial exception: he undisputedly qualifies as a minister, he is suing his former Church and its senior hierarchy over their internal ministerial decision, and his claim entangles courts in the Church's ability to make those decisions. Br.35-48. Rather than dispute these points, Father Alexander offers two red herrings: first, that the ministerial exception only bars employment discrimination claims or torts that are pled "in concert with an employment claim," and second, that the ministerial exception can only be raised as a defense by an employer. Resp.55-56. These arguments are as novel as they are unfounded.

Father Alexander cites zero cases holding that defamation claims are categorically outside the reach of the ministerial exception. Those he does cite are cases in which the ministerial exception *did* bar defamation claims. *See* Resp.56-57. And his claim that the ministerial exception is narrowly cabined to employment claims flies in the face of the Supreme Court's broad formulation of that exception. As the Court said, a "church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister *without interference by secular authorities*." *Our Lady*, 140 S. Ct. at 2060

(emphasis added). Nothing in that statement is limited to employment. Nor is the broader church autonomy caselaw upon which it is built. *Id.* at 2061 (citing *Milivojevich*, *Watson,* and *Kedroff*); *accord* Br.46-48. It is thus no surprise that courts have frequently applied the ministerial exception to bar defamation claims. *See* Br.39-41; *accord* McConnell & Laycock Br.30-36.

Nor does this Court need to find that the ministerial exception bars *all* defamation claims. Resp.57. Instead, the question is whether the ministerial exception bars *Father Alexander's claims*. It does.

Next, Father Alexander asserts that he can simply dodge the First Amendment by suing individual church leaders in place of the church itself. But if, in lieu of suing a Catholic school, a minister could simply sue the Pope, that "would vitiate both the purpose and the effect of the ministerial exception." *Conlon*, 777 F.3d at 837. Hence this Court's ruling in *Rweyemamu*, which applied the ministerial exception to bar a case in which plaintiff sued both his Bishop and diocese for "misappl[ying] canon law in denying him a requested promotion." 520 F.3d at 199. So too here. The clergy defendants are all sued for the same essential offense as the Church defendants: statements made during a church disciplinary process. All are sued for their effect on ministerial employment: Father Alexander's lost religious status and authority. And all are sued due to their hierarchical roles as agents of the Church. Courts have had no difficulty finding they cannot hold individuals liable for "the very

employment decision for which the organization cannot be held liable." *Conlon*, 777 F.3d at 837; *accord Skrzypczak*, 611 F.3d at 1241 (upholding dismissal of claims against diocese and bishop).

Finally, Father Alexander frets that applying the ministerial exception to a priest's lawsuit over whether he should have been made a bishop will open "floodgates" of litigation in the Court of Appeals. Resp.45. He gets things exactly backwards. Ministerial exception cases in this Circuit are uncommon. The doctrine has been applied by this Court just a handful of times in over 50 years. *See*, *e.g.*, *Fratello*, 863 F.3d at 200 (tracing doctrine's history); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018); *Rweyemamu*, 520 F.3d at 200.[7]

But allowing Father Alexander's claim to proceed *would* open floodgates. If disgruntled priests can avoid the ministerial exception by labeling their religious dispute as sounding in "defamation," then nothing will stop them from rushing into federal court to depose cardinals and coerce production of internal religious disciplinary communications. Br.42.

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[7] Nor will recognizing appellate jurisdiction "clog this Court's docket," as Father Alexander claims. Resp.36-37. As this Court's docket shows, church autonomy cases are relatively rare, and denials that require interlocutory appeals rarer still. For example, in more than 30 years since the D.C. Court of Appeals allowed interlocutory appeals of church autonomy defenses in *United Methodist Church v. White*, Br.53, the court has heard only five such cases. Nor have the Fifth and Seventh Circuits been inundated since *McCarthy* and *Whole Woman's Health*.

III. This Court has jurisdiction under the collateral order doctrine.

This Court has jurisdiction over this appeal under *Cohen v. Beneficial Industry Loan Corporation* because the district court's orders below (1) conclusively foreclosed the Church's immunity under the church autonomy doctrine, (2) resolved an important issue that is separate from the merits of Father Alexander's claims, and (3) are effectively unreviewable on appeal from a final judgment. 337 U.S. 541, 546 (1949); Br.49-57; ECF 41 at 9.

Father Alexander concedes, as he must, that the *Cohen* factors control this Court's appellate jurisdiction analysis. He fails to distinguish or even address Supreme Court cases recognizing that First Amendment rights can be eligible for interlocutory appeal, including those protecting church autonomy. ECF 41 at 9; Br.49-50. He concedes that the Fifth and Seventh Circuits have both expressly found that church autonomy defenses meet the *Cohen* test. Resp.20-21. And he offers virtually no response at all to the caselaw, scholars, and amici establishing the irreparable church-state harm of allowing a priest to use federal courts to fight with his former church and its hierarchy over whether he should be a bishop.

One global error of Father Alexander's jurisdictional analysis is to try to break it up into whether it sounds in church autonomy, the ministerial exception, or discovery proceedings. Resp.19-24. But, as explained above, his doctrinal dichotomy between church autonomy and the ministerial

exception is wrong. And his attempt to hive off discovery misses the point of an immunity. Hence the Supreme Court's recognition that an order that even "implicit[ly]" denies an immunity of "such pretrial matters as discovery" is immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299, 303, 308 (1996).

Another global error Father Alexander makes is to argue, on the strength of a one-justice concurrence, that "courts should altogether cease relying on *Cohen* and the collateral-order doctrine." Resp.18. In his view, after the Supreme Court's decision in *Mohawk Industries v. Carpenter*, no collateral order appeal is permissible unless the Supreme Court has already allowed it. Resp.14-15. But *Mohawk* said no such thing, and in fact expressly declined to address rights with a "structural constitutional grounding." 558 U.S. 100, 113 n.4 (2009). And that is just the kind of right at issue here: a "structural limitation imposed on the government by the Religion Clauses" which forbids it from "interfer[ing] with the internal governance of the church." *Conlon*, 777 F.3d at 836 (cleaned up); *accord Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018) (similar).

Moreover, Father Alexander's argument has been repeatedly, and recently, rejected by this Court. "[T]hat the Supreme Court has not *yet* held that a [particular type of order] falls within the collateral order doctrine does not necessarily foreclose that outcome." *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 344 (2d Cir. 2021). Rather,

because the collateral order doctrine isn't "a series of watertight exceptions on a list," it applies to all "cases that satisfy the doctrine's three requirements." *United States v. Bescond*, 7 F.4th 127, 136 n.4 (2d Cir. 2021) (cleaned up). Even in the criminal context—where the doctrine applies "with the utmost strictness"—this Court found it applies where the rights at stake are "no less important than" those in other interlocutory appeals. *Id.* at 134, 136.

A. The Church's defenses will be effectively unreviewable after a final judgment.

Church autonomy provides an immunity against government interference in church discipline and policy decisions. Br.50-54 (collecting cases). Father Alexander does not dispute that multiple federal appeals courts and state supreme courts have recognized this immunity and, where applicable, permitted interlocutory appeals.

Instead, he claims that those cases are irrelevant because "this Court has already concluded that ecclesiastical-abstention concerns do not satisfy *Cohen*." Resp.27-28 (citing *In re Roman Catholic Diocese of Albany,* 745 F.3d 30 (2d Cir. 2014)). He asserts that *Diocese of Albany* determined mandamus, not interlocutory appeal, "is the proper vehicle to challenge orders similar to those here" and therefore "forecloses this appeal." Resp.24, 27.

But *Diocese of Albany* is not a church autonomy case. The opinion does not mention "ecclesiastical abstention," "church autonomy," *any* church

autonomy cases, or even the words "First Amendment." The Diocese's briefing is similarly bereft. This is because the appeal in *Diocese of Albany* was entirely about personal jurisdiction, 745 F.3d at 35.

But while *Diocese of Albany* does not foreclose the Church's appeal, it does foreclose Father Alexander's assertion that the Church must seek mandamus instead of interlocutory appeal. As this Court explained, mandamus is available if it is "the *only means* for the [Church] to obtain the relief it seeks." 745 F.3d at 35 (emphasis added). But numerous courts have held that church autonomy defenses provide an immunity appealable under *Cohen*, and there are no cases to the contrary. Thus, the Church cannot seek mandamus at this time and must instead pursue interlocutory appeal.

Father Alexander next seizes on the Seventh Circuit's decision *Herx v. Diocese of Fort Wayne-South Bend*, 772 F.3d 1085, 1091 (7th Cir. 2014). But the "primary argument" *Herx* considered in favor of collateral order jurisdiction arose under Title VII, not the First Amendment; the court expressly noted that the defendant did "not seek collateral-order review of the district court's ruling regarding the ministerial exception." 772 F.3d at 1090-91 & n.1. And *Herx* emphasized it "h[e]ld only that the Diocese has not made a persuasive case for expanding the scope of the collateral-order doctrine to cover the interlocutory decision rendered here"—reflecting that the entirety of the defendant's briefing on "the

criteria for collateral-order review" consisted of "only a few sentences." *Id.* at 1090-91.

What is relevant here is that *Herx* affirmed the Seventh Circuit's prior decision in *McCarthy v. Fuller* that church autonomy defenses are eligible for interlocutory appeal because they are "closely akin" to "official immunity," and thus provide immunity against "the travails of a trial and not just from an adverse judgment." 714 F.3d 971, 975 (7th Cir. 2013); *Herx*, 772 F.3d at 1091.

Father Alexander likewise does not dispute that *McCarthy* was correctly decided. And it is on point. There, Fuller claimed to be a religious sister in the Catholic Church and sued for defamation after being called a "fake nun." 714 F.3d at 974. Despite a determination by the Catholic Church that Fuller "was neither a nun nor a sister in the Catholic Church," Fuller insisted that a secular court could hear her defamation claim and decide whether the documents evidencing her expulsion were "forged." *Id.* at 978. The district court agreed and was prepared to allow a jury to reject the Catholic Church's religious judgment. *Id.* at 976. But the Seventh Circuit reversed in a collateral order appeal because "[t]he harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of case[s] in which the collateral order doctrine allows interlocutory appeals." *Id.* at 976.

So too here. Father Alexander's defamation claims necessarily ask secular courts and juries to adjudicate the Clergy Letter's statements and to award him damages for the "decrease of the membership in his church." JA.49, 105-06. But the Church has been clear that Father Alexander was not elected the Bishop of Miami, and thus "removed that issue from the litigation." *McCarthy*, 714 F.3d at 979. And assessing damages for decreased church membership requires resolving "religious questions" that "federal courts are not empowered to decide." *Id.* at 980; Br.28-29. Thus, the district court's orders requiring the development of evidence solely to contest such religious matters threatens irreparable harm that justifies a collateral order appeal. *McCarthy*, 714 F.3d at 978-79.[8]

It is no answer that a district court judge might be "aware" of a duty "*not* to weigh or evaluate the Church's doctrine." Resp.28. Ordering discovery that goes beyond making a "threshold inquiry" into the applicability of church autonomy defenses itself "'impinge[s] on rights guaranteed by the Religion Clauses.'" *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc) (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)). "It is not only the

[8] It makes no difference that *McCarthy* dismissed a portion of the appeal related to certain church-property claims, which are generally distinct from church leadership and discipline claims. Br.33-34; *supra* Part I.C.1.

conclusions" that may abridge rights, "but also the very process of inquiry leading to findings and conclusions." *Catholic Bishop*, 440 U.S. at 502. Indeed, that is part and parcel to the "immunity" that the Religion Clauses can provide from "the travails of a trial." *McCarthy*, 714 F.3d at 975.

That point raises, and largely addresses, three of Father Alexander's other arguments. First, he says the Church unfairly cited qualified immunity decisions. Resp.32. But the Church relied on cases like *McCarthy*, *Bryce*, and *Skrzypczak* which say that that church autonomy *is* "similar to" qualified immunity. Br.51 (quoting *Bryce*, 289 F.3d at 654); *accord* McConnell & Laycock Br.13-20. Second, he claims that only a couple of groups of immunities can support interlocutory appeal, and church autonomy isn't in those groups. Resp.30-31. But cases like *McCarthy*, *Herx*, *Whole Woman's Health*, and several state high-court decisions say otherwise.[9] Moreover, he provides no reason to think that

[9] Rather than engage the reasoning of the state-court cases, Father Alexander dismisses them as irrelevant because they are not bound by *Cohen*. Resp.22 n.6. But each of these state high courts interpreted a "final judgment" requirement like Section 1291 and applied *Cohen* or something materially identical. *See Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002) (applying *Cohen* and the collateral order doctrine to hear interlocutory appeal of denial of ministerial exception defense); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014) (exception is akin to qualified immunity and "is appropriate for interlocutory appeal" as a "substantial claim of right which would be

fundamental church-state interests protected by both Religion Clauses are "less important than the interests implicated in other kinds of cases in which interlocutory review is available." *Bescond*, 7 F.4th at 136; *see also 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). Third, he claims that such church-state interests are only of recent provenance and lack the historical pedigree of qualified immunity. But, as Professors McConnell and Laycock show (at 10-17), the principles undergirding the Church's appeal here arise from the time of the Founding and from common-law roots at least as deep as the other immunities Father Alexander acknowledges are eligible for interlocutory appeal.

In sum, the Church's defenses are not just defenses to liability, but against merits adjudication at all. Br.49-52. Absent collateral appeal, the Church cannot fully vindicate its Free Exercise right to appoint and discipline its own clergy, and the judiciary cannot avoid getting "embroil[ed] … in line-drawing and second-guessing regarding [religious] matters about which it has neither competence nor legitimacy." *Colo.*

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rendered moot by litigation and thus is not subject to meaningful review in the ordinary course following a final judgment" (cleaned up)); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1199-1200 (Conn. 2011) (similar); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) (similar).

Christian Univ. v. Weaver, 534 F.3d 1245, 1265 (10th Cir. 2008); ECF 41 at 15-19; Br.52-55; McConnell & Laycock Br.26-30.[10]

B. The district court's orders conclusively determined the Church's church autonomy rights.

Similarly, the district court's orders conclusively determined the Church's rights by denying the motion to dismiss and bifurcation of discovery. Br.55-56. This does not mean, as Father Alexander claims, that every order denying a motion to dismiss a case involving church autonomy issues would necessarily be appealable. Resp.34. Courts can and normally do "appropriately" manage discovery and pretrial procedures in church autonomy cases. *Fratello*, 863 F.3d at 198. But where they don't, the immunity the First Amendment provides is conclusively foreclosed. Br.30-33, 54-55.

C. The Church's immunity is collateral to the merits.

Finally, the Church's immunity against merits discovery is collateral to the merits. Br.56-57. Father Alexander claims that the Church's

[10] Father Alexander briefly highlights *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). But *Dayton* is a *Younger* abstention case and has nothing to do with the ministerial exception or the collateral order doctrine. *See id.* at 626. *Dayton* was based in comity, emphasizing that "constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* at 627, 629. Comity is not at issue here, and accepting Father Alexander's absolute rule against interlocutory appeals would mean that the Church could *not* "receive an adequate opportunity to raise its constitutional claims" later, as in *Dayton*, *id.* at 628.

arguments amount to a factual defense about the truth or falsity of his claims. But that is wrong. The Church's immunity is based on the fact that—regardless of the truth or falsity of Fr. Alexander's stated facts—the court does not have the ability to determine *whether* the facts he alleges are true without interfering in ecclesiastical matters. *E.g.*, Br.35, 42-43, 48.

IV. The district court erred by failing to limit merits discovery.

The district court erred in denying bifurcation for the same reasons that compel dismissal of this case—even "the beginnings of discovery" into the merits of a minister's claims can have "prejudicial effects" on "rights guaranteed by the Religion Clauses." *Demkovich*, 3 F.4th at 982-83; *see* Br.57-59. Church autonomy "exists to avoid judicial entanglement in the internal organization of the religious institutions, and bifurcating discovery serves that end." *Fitzgerald v. Roncalli High Sch., Inc.*, No. 1:19-cv-4291, 2021 WL 4539199, at *1 (S.D. Ind. Sept. 30, 2021). Father Alexander simply ignores this caselaw.

But, as he admits, a district court abuses its discretion when it "bases its decision on an error of law." Resp.57-58 (quoting *Klipsch Grp. v. ePRO E-Com. Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018)). Here, the district court's sole reason for denying bifurcation was its erroneous view that Father Alexander's "claims raised purely secular issues that could be resolved by appeal to neutral principles of law" without "pass[ing] judgment on the internal policies and or determinations" of the Church. JA.147. But

as the Church has shown, *supra* Parts I-III, these claims draw civil courts into the heart of a religious dispute. In such a case, the "very process of inquiry" violates the Religion Clauses. *Catholic Bishop*, 440 U.S. at 502.

CONCLUSION

The district court's decisions below should be reversed and Father Alexander's claims dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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January 12, 2022

/s/ Diana Verm Thomson
Diana Verm Thomson

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 January 12, 2022.

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January 12, 2022

/s/ Diana Verm Thomson
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