UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

-vs-

HILARION KAPRAL, et al.,

Defendants-Appellants.

CAP Dkt. No. 21-1498

SDNY Dkt. No.: 20-cv-6597

PLAINTIFF-APPELLEE'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO DISMISS THE APPEAL

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Plaintiff-appellee, Alexander Belya ("Belya"), by his counsel, The Rivkin Law Group pllc, submits this reply brief in further support of his motion to dismiss this interlocutory appeal for lack of appellate jurisdiction.

I. DEFENDANTS MISSTATE THE BASIS FOR BELYA'S CLAIM

In an effort to bring this action within the ambit of the ecclesiastical abstention doctrine, Defendants-appellants (hereinafter, "Defendants"), as they had done in their multiple motions to the district court,[1] mischaracterize the nature of Belya's defamation claim. The Defendants' entire argument flows from this mischaracterization. Defendants couch Belya defamation claim as a "repackaging" of a challenge of his election (or non-election) as bishop: *"[i]f [Belya] cannot sue the Church and its leaders for not making him a bishop, he will sue them for saying he is not a bishop*." [Def. Opp. p. 1]. This is most certainly *not* what Belya's defamation claim is about. Rather, the defamation claim is based on a

[1] Defendants have now filed motions to dismiss, for reargument, for interlocutory review certification, for a stay, and for bifurcation of discovery, all of which have been denied by the district court.

false charge, publicly and widely disseminated by the Defendants, that Belya was a forger and a swindler, who had fabricated two letters as having been written by Defendant Hilarion, forged Hilarion's signature on these letters, fabricated and forged Hilarion's official seal on these letters, and then delivered these forgeries to Patriarch Kirill, the head of the Church in Moscow, and, by doing so, duped the latter, as well as the Synod in Moscow, into confirming Belya as the Archbishop of Miami.[2] Having disseminated their charge of falsification and forgery to parishes, churches, monasteries and other institutions within the Church, the Defendants proceeded to circulate it publicly online. Defendant Gan, the Chancellor of the ROCOR Synod, and one of the drafters of the letter which charged Belya with falsification and forgery, himself posted on his own church's social media site, as follows:

> Alleged ROCOR episcopal nominee Fr. Alexander Belya, already confirmed by the ROC [i.e., Moscow] Synod, had not been elected by the ROCOR Synod and a letter informing about his nomination sent to Moscow was a forgery. The priest in question [i.e., Belya] was suspended, internal investigation was started.

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[2] Defendants also charged Belya with falsifying and forging a third letter, from Archbishop Gavriil of Montreal and Canada. [SDNY Dkt. No. 48, ¶ 46].

[SDNY Dkt. No. 48, ¶ 53]. As was intended by the Defendants, this post was picked up by other online media outlets, including verbatim by *Orthodox News*, a major aggregator of news in Eastern Orthodox Christianity:

> Alleged #ROCOR episcopal nominee Fr. Alexander Belya, already confirmed by the #ROC # Synod, had not been elected by the ROCOR Synod and a letter informing about his nomination sent to #Moscow was a forgery. The #priest in question was suspended, internal investigation was started.

[SDNY Dkt. No. 48, ¶ 54]. Likewise, *Helleniscope*, another major Orthodox Christian publication, wrote on its website:

> This past summer, Alexander also forged a letter from His Eminence Metropolitan Hilarion (Kapral), the First Hierarch of ROCOR, attempting to get himself confirmed by the Holy Synod of the Moscow Patriarchate as a bishop-elect for ROCOR in America.

[SDNY Dkt. No. 48, ¶ 55]. Numerous Internet posts and articles followed, many quoting unnamed "sources" at ROCOR, all charging Belya with forgery. Soon the charge that Belya was a forger – and a forger of the signature and seal of the head of ROCOR himself, no less – spread widely on the Internet. Every Orthodox Christian publication reported it. These spilled into social media platforms, such as Facebook and Twitter, of

churches, religious organizations and parishioners. [SDNY Dkt. No. 48, ¶ 56].

Defendants' claim that Belya is simply "repackaging" an otherwise impermissible challenge to a decision not to make him a bishop as a defamation claim is thus manifestly wrong. The defamation claim is not based on the Defendants' decision to make (or unmake) Belya a bishop. He does not challenge the authority of the Defendants to appoint him to the position, or to rescind that appointment, or to even publicly say that he was not a bishop. Belya is challenging nothing more than the Defendants' explicit and deliberate public labeling of him as a forger and swindler of the most egregious kind.

Stripped of the fallacy that this case is about something it is not, the Defendants' argument collapses of its own weight.

II. DISCOVERY WILL NOT IMPLICATE ANY ECCLESIASTICAL ISSUES

Having misstated the nature of Belya's defamation claim, Defendants proceed to misstate the scope of the upcoming discovery, asserting, as they do, that discovery would involve an examination of the process of Belya's election as bishop. [Def. Opp. p. 17]. This, despite the

district court expressly having said that this is *not* an issue in the case, and that it *would not permit any such discovery*.

The district court in its decision on the motion to dismiss, stated that "Belya does not ask this Court to determine whether his election was proper or whether he should be reinstated to his role as Bishop of Miami, and the Court would not consider such a request under the doctrine of ecclesiastical abstention." [Dkt. No. 62, p. 2]. The district court proceeded to identify the issues to be decided: (a) whether Defendants made the alleged statements, (b) the truth of the alleged statements, (c) Defendants' knowledge of the alleged statements' falsity at the time they were made, (d) whether the alleged statements are subject to defamation laws, (e) if any harm was caused by the alleged defamation, and (f) whether any privilege applies. [SDNY Dkt. No. 46, p. 11]. The district court concluded that these "raise secular inquiries that the ultimate finder of fact may make without weighing matters of ecclesiastical concern." [*Id.*].

Further, in denying the Defendants' motion which sought bifurcation of discovery into two phases, dealing first with ecclesiastical

issues and, second, with the issues identified by the district court, [SDNY Dkt. No. 62, p. 2], the district court stated:

> This Court notes that this matter is limited to an inquiry into whether the relevant statements made concerning Belya were defamatory statements. This is a fact-based inquiry as to what occurred, and *the Court will not pass judgment on the internal policies of the Russian Orthodox Church Outside Russia, nor would it be able to under the doctrine of ecclesiastical abstention*.

[SDNY Dkt. No. 66, p. 2] (emphasis added).

The Defendants do not contend that the issues identified by the district court cannot be resolved by neutral principles. Because quite obviously they can be so decided. Rather, the Defendants argue (as they did on the motion to bifurcate) that *other* issues – namely, Belya's election – would necessarily be part of discovery and would lead the district court into impermissible ecclesiastical areas. Specifically, Defendants claim, as they did on the motions to the district court, that discovery "would have to examine the validity of the process of his election as bishop in compliance with ROCOR's internal policies" [Def. Opp. p. 17]. But the district court has already and correctly determined that these issues are not part of the case, and has moreover expressly stated that it would not permit any inquiry into these or any other ecclesiastical matters.

The only discovery that Belya intends to pursue from the Defendants goes to three factual issues: (1) whether Defendant Hilarion's signature on the letters in question is genuine; (2) whether the Defendants knew that the signature was genuine at the time when they accused Belya of forging it; and (3) the extent of the dissemination and publication of the defamatory statements. The remaining issues identified by the district court (applicability of any privilege; whether the statements are subject to defamation laws; and harm to Plaintiff), are ones on which discovery from the Defendants is not needed at all. None of these areas for discovery deal with any issues of religious dogma or practice. Indeed, even the issue of the genuineness of Defendant Hilarion's signature, inasmuch as it has already been denied by the Defendants in their Answer, is at this point a subject for forensic expert discovery. There is no conceivable First Amendment harm to the Defendants in having to respond to discovery on these matters. Belya has no intention of seeking any discovery concerning the Defendant's decisions to elect him, for the obvious reason that he is not challenging these decisions in this action.

Defendants do not go so far as to suggest that people of the cloth are immune from discovery in every and any litigation. Such an assertion would be absurd. Rather, they seek to inject "red-herring" issues which have nothing to do with the case – and which the district court has expressly stated it will not consider – and put these forth are evidence that the case will necessarily touch upon religious matters. It will not. Belya's claims will stand or fall solely on the issues identified by the district court in its decision on the motion to dismiss. These, as the district court recognized, can all be resolved solely by application of neutral principles of law. This is all discovery will address.

III. MINISTERIAL EXCEPTION HAS NO APPLICATION TO THIS CASE

Defendants evade the inapplicability of the ministerial exception to this case. First, Belya does not argue that the Defendants had "waived" their ministerial exception argument. [Def. Opp. p. 12, n. 4].[3] Rather, Belya's argument, which is ignored entirely by the Defendants, is that the ministerial exception has no application to this case.

[3] Belya merely points out that the Defendants had raised the ministerial exception argument for the first time on their motion for reconsideration. [Mot. p. 9].

The ministerial exception, enunciated in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 207 L. Ed.2d 870 (2020), is a narrow rule that provides religious institutions with immunity against employment discrimination claims. As explained in *United States v. Thompson,* 896 F.3d 155, 166 (2d Cir. 2017), "[i]n *Hosanna-Tabor*, the Supreme Court held only that the 'ministerial exception' doctrine 'protects religious employers from employment discrimination lawsuits brought by their ministers'." *See also Fratello v. Archdiocese of New York*, 863 F.3d 190, 298 (2d Cir. 2017) (The ministerial exception bars employment-discrimination claims brought by ministers against the religious groups that employ or formerly employed them); *Hyung Jin Moon v. Hak Ja Han Moon*, 431 F.Supp.3d 394, n. 13 (S.D.N.Y. 2019) (*Hosanna-Tabor* was not a case about ecclesiastical abstention, it addressed the related – but distinct – ministerial exception, which protects employers from employment discrimination lawsuits brought by ministers") (citations, quotations omitted); *Brandenburg v. Greek Orthodox Archdiocese of North America*, 2021 WL 2206486, at * 4 (S.D.N.Y., June 1, 2021) (the ministerial exception only bars "claims

arising from, or relating to, tangible employment actions – such as hiring, firing, promoting, compensation, job assignments, and the like").

Indisputably Belya was not an employee of the Defendants, and the Defendants were not his employers. An employee-employer relationship, which is the *sine qua non* of the ministerial exception doctrine, does not exist here. Belya does not complain of any "tangible employment actions" by the Defendants, *Brandenburg, supra,* or asserts any employment-related claim at all. His claims have nothing to do with "hiring, firing, promoting, compensation [or] job assignments." *Id.* Further, *Hosanna-Tabor* makes clear that the ministerial exception does not bar "actions by employees alleging … tortious conduct by their religious employers." 565 U.S. at 196. Thus, even in the context of an employment claim, the ministerial exception does not grant religious institutions immunity from defamation claims, or any other tortious conduct, provided these can be proven by neutral principles.

Defendants evade the issue of the inapplicability of the ministerial exception by claiming that it is "tangential to the jurisdictional question and better addressed in briefing on the merits of this appeal." [Def. Opp. p. 12, n. 4]. This is too clever by half. Collateral order jurisdiction

depends on the satisfaction of three criteria: the order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). Defendants bear the burden of establishing all three. Defendants contend that the district court improperly refused to dismiss the complaint on, *inter alia*, ministerial exception grounds. The applicability of the ministerial exception is thus anything but "tangential" to this motion. It goes directly to each of the three prongs which much be satisfied for this Court to assert jurisdiction. For one thing, if the ministerial exception is inapplicable here – as it squarely is – it cannot be deemed "an important issue separate from the merits of the action." It is, rather, a non-issue manufactured by the Defendants. Defendants cannot, on the one hand, claim that the district court erred in not dismissing the complaint based on the ministerial exception, and, on the other, *refuse here to even explain* how the doctrine is applicable to the case.[4]

[4] Notably, the Defendants' motion for reargument [SDNY Dkt. No. 51]; for certification for interlocutory appeal [SDNY Dkt. No. 54], for bifurcation of discovery [SDNY Dkt. No. 62], and for a stay pending

IV. COLLATERAL ORDER STANDARD IS NOT MET

The district court's order does not meet any of the three *Cohen* prongs.

Defendants cannot meet the "conclusive determination" requirement that the appealed order be a "complete, formal and, in the trial court, final rejection" of the issue. *Abney v. United States*, 431 U.S. 651, 659 (1977). The district court has not completely or finally rejected anything. The only thing that the district court concluded is that, reading the complaint in the light most favorable to the plaintiff, it cannot rule as a matter of law that the claims could not be adjudicated by appealing solely to neutral principles of law. The district court also ruled that it would not consider, or permit discovery into, any ecclesiastical matters. Defendants are free to develop a record in discovery to show that consideration of ecclesiastical matters would be necessary to adjudicate the claims and renew their argument on a motion to summary judgment or at trial. No doubt they will seek to do just that. There is thus nothing

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appeal [SDNY Dkt. No. 62], *all* relied heavily on the ministerial exception. Indeed, on the motion for bifurcation, Defendants expressly claimed that first-phase discovery was required to determine whether Belya was a minister under *Hosanna-Tabor's* four-prong test. [SDNY Dkt. No. 62].

final or conclusive in the district court's ruling. It is "'inherently tentative' … because it is not made with the expectation that it will be the final word on the subject addressed." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988).

The second prong, requiring that the order resolve issues completely separate from the merits, likewise is not met here. The requirement stems from the final-judgment rule, because only when the issues on interlocutory appeal are truly distinct from the merits is there little risk that this Court will have to take them up again later in a subsequent appeal. *Johnson v. Jones*, 515 U.S. 304, 311 (2005). Were this Court to accept jurisdiction and affirm the district court's decision, it would almost certainly need to address the question of the applicability of the ecclesiastical abstention doctrine again in subsequent appeal or appeals, following the district court's decision on summary judgment motion or after trial.

With respect to the third *Cohen* prong, Defendants' claim that being required to participate in discovery or "stand trial" would cause them an "irretrievable loss of right" is untenable. Couching a right to avoid the burdens of discovery and trial as effectively unreviewable on

appeal after a final judgment "is too easy to be sound." *Will v. Hallock*, 546 U.S. 345, 350-51 (2006). This is particularly true where, as here, the district court has expressly stated that it would not permit any inquiry into ecclesiastical matters either in discovery or at trial.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of appellate jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: August 2, 2021

/s/ Oleg Rivkin
Oleg Rivkin

CERTIFICATE OF SERVICE

I certify that on August 2, 2021, I electronically filed the foregoing reply with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in this appeal who are registered CM/ECF users will be served by the CM/ECF system.

Dated: August 2, 2021

/s/ Oleg Rivkin
Oleg Rivkin